NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges viii

Attorney General xii

District Attorneys xiii

Table of Cases Reported xiv

Cases Reported Without Published Opinion xix

General Statutes Cited and Construed xxii

Rules of Civil Procedure Cited and Construed xxiv

Constitution of United States Cited and Construed xxv

Disposition of Petitions for Discretionary Review xxvi

Disposition of Appeals of Right to Supreme Court xxviii

Opinions of the Court of Appeals 1-743

Amendment to Rules of Appellate Procedure 747

Operating Procedures—Mimeographing Department 748

Analytical Index 753

Word and Phrase Index 789

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

NAOMI E. MORRIS[1]

Judges

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EDWARD B. CLARK
GERALD ARNOLD
BURLEY B. MITCHELL, JR.
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RICHARD C. ERWIN
HARRY C. MARTIN
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RAYMOND B. MALLARD

Retired Judge

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

1. Appointed Chief Judge 1 December 1978 by Chief Justice Susie Sharp to replace Judge Walter E. Brock who resigned as Chief Judge.
2. Appointed 2 January 1979 to fill the unexpired term of Judge Walter E. Brock who took office as Associate Justice of the Supreme Court 2 January 1979.
3. Appointed 1 January 1979 to succeed Franklin Freeman, Jr. who took office as District Attorney of the 17th District 3 January 1979.

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	JOHN C. MARTIN	Durham
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	CLIFTON E. JOHNSON	Charlotte
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	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

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DAVID I. SMITH	Burlington
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1. Elected 7 November 1978 and took office 1 January 1979 to succeed Joshua S. James who retired 31 December 1978.
2. Elected 7 November 1978 and took office 1 January 1979 to succeed Walter E. Crissman who retired 31 December 1978.
3. Elected 7 November 1978 and took office 1 January 1979 to succeed Fred H. Hasty who retired 31 December 1978.

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1. Elected 7 November 1978 and took office 1 January 1979 to succeed N. B. Barefoot who took office on Superior Court 1 January 1979.
2. Appointed 10 January 1979 to succeed S. Pretlow Winborne who retired 31 December 1978.
3. Elected 7 November 1978 and took office 4 January 1979 to succeed Woodrow Hill who retired 31 December 1978.
4. Elected 7 November 1978 and took office 4 December 1978 to succeed Samuel F. Gantt whose term expired 3 December 1978.
5. Appointed 15 December 1978 to succeed Frank Freeman who retired 30 November 1978.
6. Appointed Chief Judge 1 January 1979.
7. Elected 7 November 1978 and took office 1 January 1979 to succeed Edward K. Washington who took office on Superior Court 1 January 1979.
8. District 19 divided into 19A and 19B effective 1 January 1979.
9. Appointed Chief Judge 1 January 1979.
10. Appointed 1 January 1979.
11. Appointed 2 March 1979 to succeed Edward E. Crutchfield who retired 31 December 1978.
12. Elected 7 November 1978 and took office 4 December 1978 to succeed Joseph P. Edens, Jr. whose term expired 3 December 1978.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

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Administrative Deputy Attorney General

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CASES REPORTED

	PAGE
Agaliotis v. Agaliotis,	42
Air Conditioning Co., Rutherford v.	630
Alexander, Teague v.	332
Alford, S. v.	236
Alston, S. v.	219
American Radiator & Standard Sanitary Corp., Smith v.	457
Amusements of America, Inc., Martin v.	130
Ashley, Harris v.	494
A-S-P Associates v. City of Raleigh	271
Bache Halsey Staurt, Inc. v. Hunsucker	414
Ballenger v. Crowell	50
Bank v. Burnette	120
Bank v. Dixon	430
Bank v. Harwell	190
Bank v. Holshouser	165
Bartow, Town of Hillsborough v.	623
Bass Air Conditioning Co., Rutherford v.	630
Beal v. Dellinger	732
Belk Brothers, Inc., Wearring v.	375
Blackmon, S. v.	620
Blake v. Insurance Co.	555
Board of Transportation v. Gragg	740
Board of Transportation v. Jones	337
Board of Transportation v. Pelletier	533
Board of Transportation v. Recreation Comm.	708
Boyles, In re	389
Brad Ragan, Inc., Shellhorn v.	310
Brooks, S. v.	48
Brooks, S. v.	445
Brown v. Brown	607
Brown, S. v.	22
Buchanan v. Mitchell County	596
Burnette, Bank v.	120
Byerly v. Byerly	551
Caison v. Cliff	613
Cannon, S. v.	322
Carson, S. v.	209
Catawba Valley Machinery Co., City of Hickory v.	387
Cavendish v. Cavendish	577
Charlotte Park and Recreation Comm., Board of Transportation v.	708
City of Hickory v. Machinery Co.	387
City of Raleigh, A-S-P Associates v.	271
City of Raleigh Housing Authority, Telegraph Co. v.	172
City of Thomasville v. Lease-Martin Afex, Inc.	737
Clay, Johnson v.	542
Cliff, Caison v.	613
Clinard, McClendon v.	353
Clodfelter v. Furniture Co.	45
Coble, Sec. of Revenue, Equipment Co. v.	483
Cole, Parrish v.	691
Collins, S. v.	617
Comr. of Motor Vehicles, Oldham v.	178
Correll, S. v.	451
County of Henderson v. Osteen	199
County of Mitchell, Buchanan v.	596
Covington v. Rhodes	61
Crowell, Ballenger v.	50
Currituck Grain Inc. v. Powell	7
Daniels, S. v.	382
Davis, S. v.	672
DeBerry, S. v.	538
Dellinger, Beal v.	732
Dial, S. v.	529
Dixon, Bank v.	430
Donayre v. Jones	12
Doty, In re	233
Drilling Co. v. Nello L. Teer Co.	472
Earley, S. v.	361
Earls v. Link, Inc.	204
Ellis v. Ellis	81
Equipment Co. v. Coble, Sec. of Revenue	483
Ervin, S. v.	261

	PAGE
Family Medical Center, Harris v.	716
Fate, S. v.	68
Faulkner, In re	222
Faulkner v. N. C. State Hearing Aid Dealers and Fitters Board	222
Fewell, S. v.	592
First-Citizens Bank and Trust Co., Pritchard v.	489
First National Bank of Shelby v. Dixon	430
Forman & Zuckerman v. Schupak	17
Forney, S. v.	703
Forsyth County Hospital Authority, Inc., Stoltz v.	103
Furniture Co., Clodfelter v.	45
G. D. Reddick, Inc., West v.	370
Georgia-Pacific Corp., Wadsworth v.	1
Godwin v. Tew	686
Gosnell, S. v.	679
Grady, S. v.	152
Gragg, Board of Transportation v.	740
Graham, S. v.	86
Gregory Poole Equipment Co. v. Coble, Sec. of Revenue	483
Griffith v. Griffith	25
Gunther, S. v.	279
Halsey Co. v. Knitting Mills	569
Hammonds, S. v.	385
Hardin, S. v.	558
Harmon v. Pugh	438
Harrington v. Harrington	610
Harrington Manufacturing Co. v. Manufacturing Co.	393
Harris v. Ashley	494
Harris v. Medical Center	716
Harwell, Bank v.	190
Hatterasman Motel Corp., Maurice v.	488
Haulk, S. v.	357
Hearing Aid Dealers and Fitters Board, Faulkner v.	222
Henderson County v. Osteen	199
Hewett v. Hewett	37
Hickory v. Machinery Co.	387
Hill v. Smith	625
Hill, S. v.	75
Hillsborough v. Bartow	623
Hipps, S. v.	679
Hogan v. Motor Lines	288
Hoglen v. James	728
Holbrook v. Holbrook	303
Holbrook v. Holbrook	308
Holshouser, Bank v.	165
Hospital Authority, Inc., Stoltz v.	103
Hospital, Joyner v.	720
Housing Authority of the City of Raleigh, Telegraph Co. v.	172
Howard Schultz and Associates of the Southeast v. Ingram	422
Huffman, S. v.	584
Hunsucker, Bache Halsey Stuart, Inc. v.	414
Ingram, Schultz and Assoc. v.	422
In re Boyles	389
In re Doty	233
In re Faulkner	222
In re Jacobs	573
In re Kirkman	515
In re Maynor	724
In re Stroud	373
In re Underwood	344
In re Watts	90
In re Weston	564
Insurance Co., Blake v.	555
Jackson v. Stanwood Corp.	479
Jacobs, In re	573
James, Hoglen v.	728
Johnson v. Clay	542
Johnson Motor Lines, Hogan v.	288
Johnson, Philpott v.	380
Johnson, S. v.	111
Johnson v. Wall	406
Jones, Board of Transportation v.	337
Jones, Donayre v.	12
Joyner v. Hospital	720
Keaveny, Marshall v.	644
Kirkman, In re	515
Knitting Mills, Halsey Co. v.	569

PAGE

Lawrence Knitting Mills, Halsey Co. v. ... 569
Lease-Martin Afex, Inc., City of Thomasville v. ... 737
Leatherman v. Leatherman ... 696
Lewis, S. v. ... 108
Liles v. Myers ... 525
Link, Inc., Earls v. ... 204

McClendon v. Clinard ... 353
McCombs, S. v. ... 214
McDougald, S. v. ... 244
McGill, S. v. ... 29
McKinney Drilling Co. v. Nello L. Teer Co. ... 472
McLean v. Sale ... 520

Machinery Co., City of Hickory ... 387
Mahaffey v. Sodero ... 349
Manufacturing Co. v. Manufacturing Co. ... 393
Marshall v. Keaveny ... 644
Martin v. Amusements of America, Inc. ... 130
Martin, S. v. ... 115
Maurice v. Motel Corp. ... 588
Mayberry, S. v. ... 509
Maynor, In re ... 724
Medical Center, Harris v. ... 716
Miller v. Miller ... 95
Miller, Oldham v. ... 178
Mitchell County, Buchanan v. ... 596
Moore v. Moore ... 700
Moore, S. v. ... 239
Motel Corp., Maurice v. ... 588
Motor Co., Shapiro v. ... 658
Motor Lines, Hogan v. ... 288
Mountain High, Inc., Russo v. ... 159
Mullis, S. v. ... 40
Myers, Liles v. ... 525

Nello L. Teer Co., Drilling Co. v. ... 472
N. C. National Bank v. Burnette ... 120
N. C. National Bank v. Harwell ... 190
N. C. National Bank v. Holshouser ... 165
N. C. Secretary of Revenue, Equipment Co. v. ... 483

PAGE

N. C. State Board of Transportation v. Gragg ... 740
N. C. State Board of Transportation v. Jones ... 337
N. C. State Board of Transportation v. Pelletier ... 533
N. C. State Board of Transportation v. Recreation Comm. ... 708
N. C. State Comr. of Motor Vehicles, Oldham v. ... 178
N. C. State Hearing Aid Dealers and Fitters Board, Faulkner v. ... 222

Oakes, S. v. ... 113
Oldham v. Miller, Comr. of Motor Vehicles ... 178
Osteen, Henderson County v. ... 199

Parker, S. v. ... 316
Parrish v. Cole ... 691
Peacock & Assoc., Wallpaper Co. v. ... 144
Peacock & Assoc., Wallpaper Co. v. ... 149
Pearsall, S. v. ... 600
Pelletier, Board of Transportation v. ... 533
Perry, S. v. ... 735
Phillips, S. v. ... 377
Philpott v. Johnson ... 380
Piland, S. v. ... 367
Pope v. Pope ... 328
Powell, Currituck Grain Inc. v. ... 7
Powell Manufacturing Co., Manufacturing Co. v. ... 393
Price, S. v. ... 261
Pritchard v. Trust Co. ... 489
Pugh, Harmon v. ... 438

Raintree Corp. v. Rowe ... 664
Raleigh, A-S-P Associates v. ... 271
Raleigh Housing Authority, Telegraph Co. v. ... 172
Raleigh Paint and Wallpaper Co. v. Peacock & Assoc. ... 144
Raleigh Paint and Wallpaper Co. v. Peacock & Assoc. ... 149

	PAGE
Recreation Comm., Board of Transportation v.	708
Reddick, Inc., West v.	370
Reid, S. v.	547
Rhodes, Covington v.	61
Rigby v. Stroud	373
Roberts v. Roberts	295
Rowe, Raintree Corp. v.	664
Russo v. Mountain High, Inc.	159
Rutherford v. Air Conditioning Co.	630
St. Paul Fire and Marine Insurance Co., Blake v.	555
Sale, McLean v.	520
Sanitary Corp., Smith v.	457
Scarboro, S. v.	105
Schultz and Assoc. v. Ingram	422
Schupak, Forman & Zuckerman v.	17
Secretary of Revenue, Equipment Co. v.	483
Shapiro v. Motor Co.	658
Shellhorn v. Brad Ragan, Inc.	310
Sheppard v. Sheppard	712
Shook, S. v.	465
Slate, S. v.	209
Smith, Hill v.	625
Smith v. Sanitary Corp.	457
Sneed, S. v.	230
Sodero, Mahaffey v.	349
Southern Bell Telephone and Telegraph Co. v. Housing Authority	172
Stanwood Corp., Jackson v.	479
S. v. Alford	236
S. v. Alston	219
S. v. Blackmon	620
S. v. Brooks	48
S. v. Brooks	445
S. v. Brown	22
S. v. Cannon	322
S. v. Carson	209
S. v. Collins	617
S. v. Correll	415
S. v. Daniels	382
S. v. Davis	672
S. v. DeBerry	538
S. v. Dial	529
S. v. Earley	361
S. v. Ervin	261
S. v. Fate	68
S. v. Fewell	592
S. v. Forney	703
S. v. Gosnell	679
S. v. Grady	152
S. v. Graham	86
S. v. Gunther	279
S. v. Hammonds	385
S. v. Hardin	558
S. v. Haulk	357
S. v. Hill	75
S. v. Hipps	679
S. v. Huffman	584
S. v. Johnson	111
S. v. Lewis	108
S. v. McCombs	214
S. v. McDougald	244
S. v. McGill	29
S. v. Martin	115
S. v. Mayberry	509
S. v. Moore	239
S. v. Mullis	40
S. v. Oakes	113
S. v. Parker	316
S. v. Pearsall	600
S. v. Perry	735
S. v. Phillips	377
S. v. Piland	367
S. v. Price	261
S. v. Reid	547
S. v. Scarboro	105
S. v. Shook	465
S. v. Slate	209
S. v. Sneed	230
S. v. Tew	33
S. v. Vietto	99
S. v. Watts	561
S. v. Whitted	603
S. v. Williams	138
S. v. Williams	183
S. v. Wolfe	672
S. v. Piland	367
S. v. Price	261
State Board of Transportation v. Gragg	740
State Board of Transportation v. Jones	337

	PAGE
State Board of Transportation v. Pelletier	533
State Board of Transportation v. Recreation Comm.	708
State Comr. of Motor Vehicles, Oldham v.	178
State Hearing Aid Dealers and Fitters Board, Faulkner v.	222
State Secretary of Revenue, Equipment Co. v.	483
Stoltz v. Hospital Authority, Inc.	103
Stroud, In re	373
Stroud, Rigby v.	373
Tart v. Walker	500
Teague v. Alexander	332
Teer Co., Drilling Co. v.	472
Telegraph Co. v. Housing Authority	172
Tew, Godwin v.	686
Tew, S. v.	33
Thomasville v. Lease-Martin Afex, Inc.	737
Town of Hillsborough v. Bartow	623
Toyota Motor Co., Shapiro v.	658
Triplett v. Triplett	364
Trust Co., Pritchard v.	489
Turner Halsey Co. v. Knitting Mills	569
Tuttle v. Tuttle	651
Underwood, In re	344
United Furniture Co., Clodfeter v.	45
Vietto, S. v.	99
Vincent v. Vincent	580
Wachacha v. Wachacha	504
Wadsworth v. Georgia-Pacific Corp.	1
Walker, Tart v.	500
Walker v. Walker	226
Wall, Johnson v.	406
Wallpaper Co. v. Peacock & Assoc.	144
Wallpaper Co. v. Peacock & Assoc.	149
Watts, In re	90
Watts, S. v.	561
Wearring v. Belk Brothers, Inc.	375
West v. Reddick, Inc.	370
Weston, In re	564
Whitted, S. v.	603
Williams, S. v.	138
Williams, S. v.	183
Wilson Memorial Hospital, Joyner v.	720
Wolfe, S. v.	672

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
Abernathy, S. v.	391
Armstrong, S. v.	118
Ashford, S. v.	118
Austin v. Royall	118
Avent, S. v.	118
Bennett, S. v.	627
Black, S. v.	391
Boyd, S. v.	743
Bridgers, S. v.	743
Burch, S. v.	242
Burke, S. v.	627
Buyers Corp. v. Underwriters, Inc.	391
Cagle, S. v.	391
Cash, S. v.	627
Church, S. v.	118
Clark, S. v.	627
Clodfelter, In re	242
Cole, Supply Co. v.	391
Cox, S. v.	743
Culbreth, Town of Kill Devil Hills v.	743
Davis, In re	627
Dept. of Social Services v. Malone	242
Devard, S. v.	242
Distributors, Inc., Sheet Metal, Inc. v.	391
Dobbins, S. v.	242
Dorsey, S. v.	242
Edmisten, Utilities Comm. v.	629
Elliott v. Potts	743
Elliott, S. v.	627
Fiddler, S. v.	242
Fitch v. Miller	391
Fluid, S. v.	242
Fowler, S. v.	627
Fox v. Miller	391
Freedle, S. v.	242
Furniture Fair, Inc. v. Steel Corp.	118
Giles, S. v.	118
Gornto v. Morris	743
Graham, S. v.	242
Gray v. Gray	391
Green, S. v.	627
Gyoker, S. v.	118
Hall, S. v.	391
Harris, S. v.	627
Henderson, In re	242
Henderson, S. v.	627
Hilgart v. Volkswagen	627
Howell, S. v.	242
Hubbard v. Hubbard	242
Hyman v. Hyman	627
Ingram, S. v.	242
In re Clodfelter	242
In re Davis	627
In re Henderson	242
In re Jones	391
In re Pollock	627
In re Purvis	627
In re Richardson	627
In re Scarlett	627
In re Surf & Ski Shops	118
Ivester v. Ivester	118
Jackson, S. v.	628
Jones, In re	391
Jones, S. v.	391
Jones, S. v.	628
Latimer, S. v.	628
Leazer, S. v.	628
Locklear, S. v.	242
McCoy, S. v.	118
McIntosh, S. v.	118
McNair v. Stevens & Co.	391
Mackey, S. v.	628
Malone, Dept. of Social Services v.	242
May v. Town of Conover	242
Miller, Fitch v.	391
Miller, Fox v.	391
Mincey, S. v.	119
Misher, S. v.	242
Moore, S. v.	391
Morris, Gornto v.	743
Murphy, S. v.	118

	PAGE
Nichols, S. v.	628
Pennell, S. v.	743
Peters, Woodell v.	629
Pollock, In re	627
Porter, S. v.	628
Potts, Elliott v.	743
Puckett, S. v.	243
Purvis, In re	627
Reynolds v. Reynolds	118
Richardson, In re	627
Robertson, S. v.	243
Robertson, S. v.	628
Robinette, S. v.	628
Royall, Austin v.	118
Rush, S. v.	119
Samuels, S. v.	243
Scarlett, In re	627
Seymour, S. v.	243
Sheet Metal, Inc. v. Distributors, Inc.	391
Shehan, S. v.	628
Simpson, S. v.	628
Smart, S. v.	243
Smith, S. v.	118
Spicer, S. v.	243
Stancill, S. v.	628
Stanfield, S. v.	118
S. v. Abernathy	391
S. v. Armstrong	118
S. v. Ashford	118
S. v. Avent	118
S v. Bennett	627
S. v. Black	391
S. v. Boyd	743
S. v. Bridgers	743
S. v. Burch	242
S. v. Burke	627
S. v. Cagle	391
S. v. Cash	627
S. v. Church	118
S. v. Clark	627
S. v. Cox	743
S. v. Devard	242
S. v. Dobbins	242
S. v. Dorsey	242

	PAGE
S. v. Elliott	627
S. v. Fiddler	242
S. v. Fluid	242
S. v. Fowler	627
S. v. Freedle	242
S. v. Giles	118
S. v. Graham	242
S. v. Green	627
S. v. Gyoker	118
S. v. Hall	391
S. v. Harris	627
S. v. Henderson	627
S. v. Howell	242
S. v. Ingram	242
S. v. Jackson	628
S. v. Jones	391
S. v. Jones	628
S. v. Latimer	628
S. v. Leazer	628
S. v. Locklear	242
S. v. McCoy	118
S. v. McIntosh	118
S. v. Mackey	628
S. v. Mincey	119
S. v. Misher	242
S. v. Moore	391
S. v. Murphy	118
S. v. Nichols	628
S. v. Pennell	743
S. v. Porter	628
S. v. Puckett	243
S. v. Robertson	243
S. v. Robertson	628
S. v. Robinette	628
S. v. Rush	119
S. v. Samuels	243
S. v. Seymour	243
S. v. Shehan	628
S. v. Simpson	628
S. v. Smart	243
S. v. Smith	118
S. v. Spicer	243
S. v. Stancill	628
S. v. Stanfield	118
S. v. Steptoe	243
S. v. Toms	392
S. v. Tripp	628
S. v. Turner	743

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
S. v. Way	628
S. v. Webb	628
S. v. Wells	243
S. v. Williams	243
S. v. Williams	628
S. v. Wilson	628
S. v. Wooten	392
Steel Corp., Furniture Fair, Inc. v.	118
Steptoe, S. v.	243
Stevens & Co., McNair v.	391
Supply Co. v. Cole	391
Surf & Ski Shops, In re	118
Toms, S. v.	392
Town of Conover, May v.	242
Town of Kill Devil Hills v. Culbreth	743
Tripp, S. v.	628
Turner, S. v.	743
Tyson v. Tyson	628
Underwriters, Inc., Buyers Corp. v.	391
Utilities Comm. v. Edmisten	629
Vick v. Vick	629
Volkswagen, Hilgarth v.	627
Way, S. v.	628
Webb, S. v.	628
Wells, S. v.	243
Wiliams, S. v.	243
Wiliams, S. v.	628
Wilson, S. v.	628
Woodell v. Peters	629
Wooten, S. v.	392

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15(b)	Ballenger v. Crowell, 50
	Earls v. Link, Inc., 204
	Rutherford v. Air Conditioning Co., 630
1-15(c)	Ballenger v. Crowell, 50
1-47(2)	Bank v. Holshouser, 165
1-50(5)	Smith v. Sanitary Corp., 457
1-52	Rutherford v. Air Conditioning Co., 630
1-52(5)	Earls v. Link, Inc., 204
	Smith v. Sanitary Corp., 457
1-75.4(5)(c)	Pope v. Pope, 328
1-75.10	Philpott v. Johnson, 380
1-82	Miller v. Miller, 95
1-180	State v. Alston, 219
	State v. Hardin, 558
1A-1	See Rules of Civil Procedure infra
7A-450(b)	State v. Shook, 465
8-51	Godwin v. Tew, 686
14-29	State v. Haulk, 357
14-39(b)	State v. Gunther, 279
14-56	State v. Sneed, 230
14-118.1	State v. Watts, 561
15A-534(f)	State v. Brooks, 445
15A-761, Art. III(a)	State v. Fate, 68
15A-904(a)	State v. McDougald, 244
15A-910	State v. McDougald, 244
15A-926(b)(2)b.3	State v. Ervin, 261
15A-927(c)(2)	State v. Ervin, 261
15A-943(b)	State v. Davis, 672
15A-977(a)	State v. Martin, 115
15A-1002(b)(3)	State v. Williams, 183
15A-1448(a)(1), (5)	State v. Ervin, 261
16-3	Bache Halsey Stuart, Inc. v. Hunsucker, 414
20-7	State v. Cannon, 322

G.S.	
20-16.2(a), (c)	Oldham v. Miller, 178
20-28	State v. Cannon, 322
20-139.1(b)	State v. Mullis, 40
20-154(a)	Brown v. Brown, 607
25-2-104(1)	Currituck Grain Inc. v. Powell, 7
25-2-725	Bank v. Holshouser, 165
25-3-104	Liles v. Myers, 525
25-3-203	Agaliotis v. Agaliotis, 42
25-4-105, 106	Bank v. Harwell, 190
25-4-212	Bank v. Harwell, 190
25-4-301	Bank v. Harwell, 190
25-9-603	Bank v. Burnette, 120
30-2(a)	In re Kirkman, 515
30-31	Pritchard v. Trust Co., 489
31-18.1(c)	In re Weston, 564
Ch. 38	Wadsworth v. Georgia-Pacific, Corp., 1
38-3	Beal v. Dellinger, 742
Ch. 40	Town of Hillsborough v. Bartow, 623
44A-8, 10	Wallpaper Co. v. Peacock & Assoc., 144
	Wallpaper Co. v. Peacock & Assoc., 149
45-21.16(d)	In re Watts, 90
46-19	Hewett v. Hewett, 37
Ch. 48	Sheppard v. Sheppard, 712
48-26	Sheppard v. Sheppard, 712
50-3	Miller v. Miller, 95
50-10	Miller v. Miller, 95
50-13.4(c)	Walker v. Walker, 226
50-13.5(f)	Holbrook v. Holbrook, 303
50-16.5(b)	Cavendish v. Cavendish, 577
55-113(b)	Jackson v. Stanwood Corp., 479
55-113(d), (e)	Jackson v. Stanwood Corp., 479
75-1.1	Manufacturing Co. v. Manufacturing Co., 393
	Bache Halsey Stuart, Inc. v. Hunsucker, 414

G.S.	
84-4.1	State v. Scarboro, 105
93D-13(a)(2)	In re Faulkner, 222
97-10.2(f)(2)	Hogan v. Motor Lines, 288
105-13	Bank v. Dixon, 430
105-164.4(1)	Equipment Co. v. Coble, Sec. of Revenue, 483
105-164.13	Equipment Co. v. Coble, Sec. of Revenue, 483
105-176.13(16)	Equipment Co. v. Coble, Sec. of Revenue, 483
105-375	Henderson County v. Osteen, 199
105-392	Henderson County v. Osteen, 199
105-467(1)	Equipment Co. v. Coble, Sec. of Revenue, 483
115-166	State v. Vietto, 99
122-58.1	In re Doty, 233
122-58.4	McLean v. Sale, 520
122-58.7	In re Doty, 233
122-58.7(a)	In re Underwood, 344
	In re Jacobs, 573
122-58.7(i)	In re Underwood, 344
	In re Jacobs, 573
122-58.8(b)	In re Doty, 233
122-58.11(e)	In re Boyles, 389
136-112(1)	Board of Transportation v. Jones, 337
150A-51	In re Faulkner, 222
160A-512(4), (6), (11)	Telegraph Co. v. Housing Authority, 172
160A-515	Telegraph Co. v. Housing Authority, 172

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(j)(9)b	Smith v. Sanitary Corp., 457
4(j)(9)c	Philpott v. Johnson, 380
5(b)	Griffith v. Griffith, 25
6(a)	In re Underwood, 344
12(a)(1)a	Miller v. Miller, 95

Rule No.	
12(b)	Miller v. Miller, 95
12(b)(6)	Raintree Corp. v. Rowe, 664
12(c)	Harris v. Medical Center, 716
12(h)(3)	Bache Halsey Stuart, Inc. v. Hunsucker, 414
15(a)	Halsey Co. v. Knitting Mills, 569
	Harris v. Medical Center, 716
24(a)(2)	Ellis v. Ellis, 81
24(b)(2)	Ellis v. Ellis, 81
24(c)	Parrish v. Cole, 691
36	Rutherford v. Air Conditioning Co., 630
38(b)	Miller v. Miller, 95
40	Forman & Zuckerman v. Schupak, 17
41(a)(2)	West v. Reddick, Inc., 370
50(a)	Byerly v. Byerly, 551
52(b)	Parrish v. Cole, 691
56(c)	Raintree Corp. v. Rowe, 664
56(e)	Schultz and Assoc. v. Ingram, 422
58	Harrington v. Harrington, 610
60(a)	Schultz and Assoc. v. Ingram, 422
60(b)	Hoglen v. James, 728
60(b)(2)	Harris v. Medical Center, 716

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Rule No.	
V Amendment	State v. Pearsall, 600

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

Case	*Reported*	*Disposition in Supreme Court*
A-S-P Associates v. City of Raleigh	38 N.C. App. 271	Allowed, 296 N.C. 410
Austin v. Royall	38 N.C. App. 118	Denied, 295 N.C. 733
Bache Halsey Stuart, Inc. v. Hunsucker	38 N.C. App. 414	Denied, 296 N.C. 583
Bank v. Burnette	38 N.C. App. 120	Allowed, 296 N.C. 410 Appeal Dismissed
Bank v. Harwell	38 N.C. App. 190	Denied, 296 N.C. 410
Board of Transportation v. Recreation Comm.	38 N.C. App. 708	Denied, 296 N.C. 583 Appeal Dismissed
Buchanan v. Mitchell County	38 N.C. App. 596	Denied, 296 N.C. 583
Buyers Corp. v. Underwriters, Inc.	38 N.C. App. 391	Denied, 296 N.C. 410
Cavendish v. Cavendish	38 N.C. App. 577	Denied, 296 N.C. 583
Covington v. Rhodes	38 N.C. App. 61	Denied, 296 N.C. 410
Dept. of Social Services v. Malone	38 N.C. App. 242	Denied, 296 N.C. 583
Elliott v. Potts	38 N.C. App. 743	Denied, 296 N.C. 584
Fox v. Miller	38 N.C. App. 391	Denied, 296 N.C. 584
Griffith v. Griffith	38 N.C. App. 25	Denied, 296 N.C. 106
Harmon v. Pugh	38 N.C. App. 438	Denied, 296 N.C. 584
Hewett v. Hewett	38 N.C. App. 37	Denied, 295 N.C. 733
Hogan v. Motor Lines	38 N.C. App. 288	Denied, 296 N.C. 411
Holbrook v. Holbrook	38 N.C. App. 303 38 N.C. App. 308	Denied, 296 N.C. 411 Denied, 296 N.C. 411
In re Boyles	38 N.C. App. 389	Denied, 296 N.C. 411 Appeal Dismissed
In re Kirkman	38 N.C. App. 515	Denied, 296 N.C. 584 Appeal Dismissed
McLean v. Sale	38 N.C. App. 520	Denied, 296 N.C. 585
Manufacturing Co. v. Manufacturing Co.	38 N.C. App. 393	Denied, 296 N.C. 411
Martin v. Amusements of America, Inc.	38 N.C. App. 130	Denied, 296 N.C. 106
Rutherford v. Air Conditioning Co.	38 N.C. App. 630	Denied, 296 N.C. 586
Sheet Metal, Inc. v. Distributors, Inc.	38 N.C. App. 391	Denied, 296 N.C. 586
Shellhorn v. Brad Ragan, Inc.	38 N.C. App. 310	Denied, 295 N.C. 735
Sheppard v. Sheppard	38 N.C. App. 712	Denied, 296 N.C. 586

Case	*Reported*	*Disposition in Supreme Court*
Sipe v. Blankenship	37 N.C. App. 499	Denied, 296 N.C. 411
Smith v. Sanitary Corp.	38 N.C. App. 457	Denied, 296 N.C. 586
State v. Alford	38 N.C. App. 236	Denied, 295 N.C. 649 Appeal Dismissed
State v. Alston	38 N.C. App. 219	Denied, 296 N.C. 586
State v. Ashford	38 N.C. App. 118	Denied, 296 N.C. 587
State v. Blackmon	38 N.C. App. 620	Denied, 296 N.C. 412
State v. Brooks	38 N.C. App. 48	Denied, 295 N.C. 735 Appeal Dismissed
State v. Cagle	38 N.C. App. 391	Denied, 296 N.C. 107
State v. Clemmons	34 N.C. App. 101	Denied, 296 N.C. 412
State v. Correll	38 N.C. App. 451	Denied, 296 N.C. 107
State v. Cox	38 N.C. App. 743	Denied, 296 N.C. 412 Appeal Dismissed
State v. Dorsey	38 N.C. App. 242	Denied, 296 N.C. 412
State v. Gosnell	38 N.C. App. 679	Denied, 296 N.C. 587 Appeal Dismissed
State v. Grace	37 N.C. App. 723	Denied, 296 N.C. 412
State v. Grady	38 N.C. App. 152	Denied, 296 N.C. 107 Appeal Dismissed
State v. Hooker	37 N.C. App. 457	Denied, 296 N.C. 413
State v. Jackson	38 N.C. App. 628	Denied, 296 N.C. 413
State v. McCombs	38 N.C. App. 214	Allowed, 296 N.C. 413
State v. McDougald	38 N.C. App. 244	Denied, 296 N.C. 413 Appeal Dismissed
State v. McGill	38 N.C. App. 29	Allowed, 295 N.C. 651
State v. Mackey	38 N.C. App. 628	Denied, 296 N.C 587
State v. Moore	38 N.C. App. 239	Denied, 295 N.C. 736
State v. Oakes	38 N.C. App. 113	Denied, 296 N.C. 107
State v. Parker	38 N.C. App. 316	Denied, 296 N.C. 108
State v. Piland	38 N.C. App. 367	Denied, 296 N.C. 413 Appeal Dismissed
State v. Reid	38 N.C. App. 547	Denied, 296 N.C. 588
State v. Scarboro	38 N.C. App. 105	Denied, 295 N.C. 652
State v. Smart	38 N.C. App. 243	Denied, 296 N.C. 108
State v. Steptoe	38 N.C. App. 243	Appeal Dismissal Denied, 295 N.C. 737
State v. Tripp	38 N.C. App. 628	Denied, 296 N.C. 588
State v. Vietto	38 N.C. App. 99	Allowed, 296 N.C. 108
State v. Watts	38 N.C. App. 561	Denied, 296 N.C. 414
State v. Way	38 N.C. App. 628	Allowed, 296 N.C. 588

Case	*Reported*	*Disposition in Supreme Court*
State v. Webb	38 N.C. App. 628	Denied, 296 N.C. 414
State v. Williams	38 N.C. App. 138	Denied, 296 N.C. 108
Teague v. Alexander	38 N.C. App. 332	Denied, 296 N.C. 414
Telegraph Co. v. Housing Authority	38 N.C. App. 172	Denied, 296 N.C. 414
Town of Hillsborough v. Bartow	38 N.C. App. 623	Appeal Dismissed 296 N.C. 414
Town of Kill Devil Hills v. Culbreth	38 N.C. App. 743	Denied, 296 N.C. 589 Appeal Dismissed
Tuttle v. Tuttle	38 N.C. App. 651	Denied, 296 N.C. 589
Vick v. Vick	38 N.C. App. 629	Allowed, 296 N.C. 415
Wallpaper Co. v. Peacock & Assoc.	38 N.C. App. 144	Denied, 296 N.C. 415
Wallpaper Co. v. Peacock & Assoc.	38 N.C. App. 149	Denied, 296 N.C. 415
Woodell v. Peters	38 N.C. App. 629	Denied, 296 N.C. 589

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Arnold v. Sharpe	37 N.C. App. 506	296 N.C. 533
Beasley v. Beasley	37 N.C. App. 255	296 N.C. 580
Equipment Co. v. Coble, Sec. of Revenue	38 N.C. App. 483	Pending
Henderson County v. Osteen	38 N.C. App. 199	Pending
Herff Jones Co. v. Allegood	35 N.C. App. 475	Withdrawn
Housing, Inc. v. Weaver	37 N.C. App. 284	296 N.C. 581
Moore v. Fieldcrest Mills	36 N.C. App. 350	296 N.C. 467
Moore v. Moore	38 N.C. App. 700	Pending
Murray v. Murray	37 N.C. App. 406	296 N.C. 405
Rappaport v. Days Inn	36 N.C. App. 488	296 N.C. 382
Smith v. State	36 N.C. App. 307	Pending
State v. Gunther	38 N.C. App. 279	296 N.C. 578
Townsend v. Railway Co.	35 N.C. App. 482	296 N.C. 246
Wadsworth v. Georgia-Pacific Corp.	38 N.C. App. 1	Pending
White v. White	37 N.C. App. 471	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

J. B. WADSWORTH, JR., J. B. WADSWORTH III, JEAN L. WADSWORTH, GUARDIAN FOR HENRY WADSWORTH AND FRANCES WADSWORTH, MINORS v. GEORGIA-PACIFIC CORPORATION

No. 776SC822

(Filed 5 September 1978)

1. Boundaries § 8.1— boundary dispute—consent to trial before superior court judge

Although boundary disputes are usually tried by special proceedings brought before the clerk of superior court under Chapter 38 of the General Statutes, this statute is not jurisdictional and by consent a boundary dispute may be originally tried before a superior court judge.

2. Boundaries § 10.1— boundary dispute—conditional agreement

The parties had not made a binding agreement as to a boundary line where the agreement was conditioned upon the settlement of a claim by plaintiffs for timber cut by defendant, and no settlement had been made.

3. Boundaries § 10.1— boundary disputes—acts and statements of landowners

When a dividing line between two tracts can be located by the calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line, but where the line in dispute is unfixed and uncertain, the acts and admissions of the adjoining landowners recognizing a certain line as the proper boundary line are evidence competent to be submitted to the trier of facts.

4. Boundaries § 15.1— boundary dispute—sufficiency of evidence to support judgment

The evidence in an action to determine a boundary line between two tracts was sufficient to support the trial court's determination that the line was as contended for by defendant where defendant introduced evidence that

defendant and its predecessors in title since 1946 had considered such line as the boundary line between the tracts; defendant had cut timber up to this line and plaintiffs' predecessor in title had cut timber up to this line on his side of it; and defendant had planted timber up to such line.

Judge MORRIS concurring in result.

Judge HEDRICK dissenting.

APPEAL by plaintiffs from *James, Judge*. Judgment entered 23 February 1977 in Superior Court, BERTIE County. Heard in the Court of Appeals 28 June 1978.

The plaintiff J. B. Wadsworth, Jr. began this action by filing a complaint in which he alleged the defendant had trespassed on his land, cutting timber owned by him and planting pine trees on a part of his cultivated land. The defendant filed an answer and counterclaim in which it alleged the parties owned contiguous tracts, with J. B. Wadsworth, Jr.'s interest being a life estate. Defendant asked for damages from J. B. Wadsworth, Jr. for timber he had cut on its land. The complaint was then amended to allege the other plaintiffs had an interest in the land, and the additional plaintiffs adopted the pleadings of J. B. Wadsworth, Jr.

A jury trial was waived, and it was stipulated that neither side disputed the other side's title and that the only question was the location of the boundary line between the two tracts which question would be tried on the defendant's counterclaim. Neither side offered into evidence a deed so that the boundary line could not be established by reference to a deed. Plaintiffs and defendant offered evidence which each contended established the boundary according to their respective contentions.

The plaintiffs contended that an agreement had been reached as to the boundary which was binding on the parties. A writing designated "line agreement" was received in evidence. This consisted of a plat with a line drawn upon it by L. T. Liverman, Jr., a surveyor. It was signed by J. B. Wadsworth, Jr. and George L. Pace, a representative of Georgia-Pacific Corporation, who certified he had examined the line as shown on the map and agreed that it was correct. The agreement had been recorded in the Bertie County Register of Deed's Office. The plaintiffs also offered evidence by several witnesses, including J. B. Wadsworth, Jr., that J. B. Wadsworth, Jr. had farmed the land up to the line claimed by plaintiffs for 35 years without objection from anyone.

The defendant offered evidence through several witnesses. As to the plaintiffs' contention that the parties had agreed upon a line, the defendant's evidence was that George Pace did not have the authority to bind Georgia-Pacific and that the line agreement was not a final agreement, but was contingent on J. B. Wadsworth, Jr.'s settling of certain claims he had against Georgia-Pacific, which he refused to settle, for timber which Georgia-Pacific had cut. As to the correct location of the line, the defendant offered evidence that there had never been a line placed on the ground at the position for which plaintiffs contended, but there had been a line placed on the ground at the position for which defendant contended. There was a fence, a ditch and surveyor's chops along the line which the defendant contended had been there since at least 1946. There had never been a dispute with J. B. Wadsworth, Sr. in regard to the location of the line and when J. B. Wadsworth, Sr. cut timber on his property in the 1950's, he cut up to the line for which the defendant contended, but had not cut across it. Georgia-Pacific had in the past cut timber up to the line for which it contended. Georgia-Pacific in 1969 had planted trees up to the line for which it contended and J. B. Wadsworth, Sr. had made the statement in the presence of his son, J. B. Wadsworth, Jr., that he had built a fence along the line of the edge of the trees which Georgia-Pacific had planted.

The court entered a judgment in which it found that the line between the parties' lands is as contended for by the defendant. To support this finding, the court found that this line was well-established on the ground by old chops in trees, a fence for a part of the way and a drain or ditch for part of the way and that it corresponds with a line surveyed by Charles Hale in 1953 and J. B. Parker in 1930; that Georgia-Pacific and its predecessors in title have claimed this as the dividing line since 1930 which claim was known to the plaintiffs; that the defendant has cut and removed timber lying immediately north of the line; that J. B. Wadsworth, Sr. sold the timber on his tract in the 1950's and at that time he recognized the line claimed by the defendant and did not cut across it. As to the plaintiffs' contention that the parties had agreed upon a line, the court found that J. B. Wadsworth, Jr. could not agree upon a line because he had only a life estate in the property; that George Pace was without authority to agree on the line for Georgia-Pacific; and that there were other considera-

tions involved in the proposed settlement and an agreement was never reached.

Satisky and Silverstein, by Howard P. Satisky, for plaintiff appellants.

Pritchett, Cooke and Burch, by Stephen R. Burch, and Roswald B. Daly, Jr., for defendant appellee.

WEBB, Judge.

We affirm the judgment of the superior court.

[1] This action was converted from an action for wrongful cutting of timber and trespass to one to determine a boundary line. Boundary disputes are usually tried by special proceedings brought before the Clerk of Superior Court under Chapter 38 of the General Statutes. This statute is not jurisdictional, however, and by consent a boundary dispute may be originally tried before a superior court judge. *Andrews v. Andrews*, 252 N.C. 97, 113 S.E. 2d 47 (1960).

[2] The appellants' first contention is that the court committed error by not holding that the parties had made a binding agreement as to the boundary line. If the agreement between the parties as to the boundary line was conditioned upon something else before becoming effective—in this case the settlement of a claim by the plaintiffs for timber cut by the defendant—it was not an agreement until that settlement was made. *Lerner Shops v. Rosenthal*, 225 N.C. 316, 34 S.E. 2d 206 (1945). The Court found as a fact based on competent evidence that there was such a condition upon the agreement, and we are bound by that finding. The court made other findings in regard to the effectiveness of the line agreement which appellant contends were not proper. We do not discuss them. The finding by the court was sufficient to support the portion of the judgment which held that the agreement as to the location of the line was not final and it cannot be disturbed because there is another finding which may not be proper. 1 Strong, N.C. Index 3d, Appeal and Error, § 57.2, p. 342.

[3, 4] The court found that the boundary line was located according to the contention of the defendant. The plaintiffs contend this was error. Since the case was tried by stipulation on the defendant's counterclaim as to the location of the boundary line, the

burden of proof was on the defendant to establish the boundary line. The question before this Court is whether the defendant offered sufficient, competent evidence to support this finding by the superior court. Neither side offered a deed in evidence, so the court could not have found the boundary on the basis of a deed. When a dividing line between two tracts can be located by the calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line, but where the line is in dispute and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper boundary line are evidenhe competent to be submitted to the trier of the facts. *Kirkpatrick v. McCracken*, 161 N.C. 198, 76 S.E. 821 (1912); *Wiggins v. Rogers*, 175 N.C. 67, 94 S.E. 685 (1917), and *Taylor v. Meadows*, 175 N.C. 373, 95 S.E. 662 (1918). The defendant introduced evidence that Georgia-Pacific and its predecessors in title since at least 1946 had considered the line for which Georgia-Pacific contended as the boundary between the tracts. Georgia-Pacific had cut timber up to this line and the plaintiffs' predecessor in title had cut timber up to this line on his side of it. Georgia-Pacific had planted timber up to it. We hold that this was sufficient, competent evidence for the court to hold that the boundary line was as contended for by Georgia-Pacific. There was evidence from which the court could have found otherwise, but we are bound by the findings of fact of the superior court.

Some of the findings of fact to support the court's conclusion as to the location of the boundary line are not supported by the evidence. Nevertheless, the court found sufficient facts supported by competent evidence to support this conclusion and it will not be disturbed.

The judgment is affirmed.

Judge MORRIS concurs in result.

Judge HEDRICK dissents.

Judge MORRIS concurring.

I concur in the result reached. It is true that neither party introduced into evidence a deed. Under ordinary circumstances,

absent evidence that the boundary line cannot be accurately determined from the deed, the statements and acts of the landowners would not be competent evidence in locating the boundary between them. Here, however, neither party offered any objection to the evidence upon which the court based its findings as to the location of the line. Neither should now be heard to complain.

Judge HEDRICK dissenting.

As pointed out in the majority opinion neither party offered into evidence the deeds to their respective tracts. The court, therefore, necessarily based its finding that the boundary line was as contended for by the defendants on the evidence of the surveyor, Liverman, that he surveyed a line dividing the two tracts from survey chops on trees, a fence for a part of the way and a drain or ditch for part of the way. With respect to the line Liverman surveyed, which the trial court accepted as the dividing line, Liverman testified: "I did not use any other documents other than what I found on the ground to locate that line."

In my opinion the best evidence as to the location of the dividing line between the two tracts, since the respective titles were not in dispute, would be the deeds to the two tracts. In my opinion before the boundary line can be established by evidence *aliunde* the record, the party with the burden to establish the line must first prove that the dividing line cannot be located on the ground from the calls in the deeds. Thus, in the present case, it is my opinion that the trial court's finding the line to be as contended for by defendant is not supported by competent evidence. While the parties stipulated that the title to the two tracts of land was not in dispute, the plaintiff did not agree that the court could locate the line without regard to the deeds. Indeed, the record discloses that the plaintiff objected throughout the trial to the surveyor's testimony upon which the trial judge relied to locate the line. I tremble to think of the far-reaching consequences of settling boundary line disputes without regard to the record title. I vote to vacate the judgment and remand for a new trial.

CURRITUCK GRAIN INCORPORATED, A NORTH CAROLINA CORPORATION v. STALEY POWELL

No. 771DC880

(Filed 5 September 1978)

1. **Uniform Commercial Code § 4— farmer of corn and soybeans—merchant as defined in U.C.C.**

Evidence that defendant was a farmer raising corn and soybeans was sufficient to support a jury's finding that defendant by his occupation held himself out as having knowledge or skill peculiar to corn and soybeans, thus putting defendant within the statutory definition of "merchant." G.S. 25-2-104(1)

2. **Evidence § 41— question before jury—opinion evidence inadmissible**

In an action for breach of contract to deliver corn and soybeans where defendant contended that he was not a merchant within the meaning of the Uniform Commercial Code at the time the contract was made, the trial court erred in permitting plaintiff to ask its only witness questions on direct examination with respect to defendant's knowledgeability, since that was the question before the jury, and the witness's opinion on that question was inadmissible.

3. **Trial § 11.2— jury argument—evidence of witness's credibility—no instruction to disregard—error**

In an action for breach of contract the trial court erred in failing to instruct the jury to disregard the jury argument of plaintiff's counsel that "I have known [the witness] for a long time and he is not a person who is able to [commit perjury]", since such argument in effect amounted to testimony by the attorney as to the credibility of the witness.

APPEAL by defendant from *Beaman, Judge.* Judgment entered 11 July 1977 in District Court, CURRITUCK County. Heard in the Court of Appeals 17 August 1978.

This is an action in which the plaintiff has alleged that the defendant has refused to deliver corn and soybeans to the plaintiff as the defendant contracted to do. The defendant contends the plaintiff is barred from recovery by the statute of frauds as set forth in G.S. 25-2-201. This case has previously been in this Court. *See Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E. 2d 1 (1976). On the previous appeal, we reversed on the ground that the affidavit filed by defendant did not establish as a matter of law that he was not a merchant within the meaning of G.S. 25-2-104(1).

At the trial of the case, evidence was received which taken most favorably to the plaintiff shows that the defendant had been in the trucking business for forty years prior to 1970. In 1970, he began farming with his father. He admitted on cross-examination that he had filed an affidavit in which he said he had leased approximately 140 or 150 acres of land in 1970, but denied the affidavit was correct as to the date. He testified he rented the land in 1971 and purchased a farm from a Mr. Warren in 1973. The defendant discussed with Mr. Warren the best way to market his crops and Mr. Warren told him it would be best to contract for the sale of them. The defendant then called Mr. Williams, the agent of plaintiff and agreed to sell the corn and soybeans to plaintiff. Written confirmation of the sales was mailed by plaintiff to the defendant and no reply was received by the plaintiff from defendant. The defendant sold the corn and soybeans to another merchant for a higher price. The defendant testified he had not previously sold corn or soybeans. From a verdict in favor of the plaintiff, the defendant appeals.

White, Hall, Mullen and Brumsey, by William Brumsey III, for plaintiff appellee.

Twiford, Trimpi and Thompson, by John G. Trimpi, for defendant appellant.

WEBB, Judge.

The defendant's first assignment of error is that the district court erred in not granting his motion for a directed verdict and for a judgment n.o.v. The defendant contends that the evidence met the test as laid down by this Court in its previous opinion so that as a matter of law he was not a merchant at the time the alleged contract was made. He contends that the evidence shows he had never negotiated a grain contract prior to 1974, that he had never sold any grain or soybeans prior to that time and that he had no knowledge of the customs and practices of the marketing of grain prior to that time. The opinion in the previous case does state that the affidavit of the defendant does not establish these facts, but the opinion does not hold as to what constitutes a merchant within the meaning of the statute. In determining whether all the evidence shows the defendant was not a merchant we must look at the statute. G.S. 25-2-201 provides:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

* * *

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

G.S. 25-2-104 provides:

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . .

* * *

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

The statutory definition of a merchant is in the disjunctive. As applied to this case a merchant is (1) one who deals in corn and soybeans, or (2) one who by his occupation holds himself out as having knowledge or skill peculiar to the practice of dealing in corn and soybeans, or (3) one who by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction which are corn and soybeans. The Official Comment to G.S. 25-2-104 states it as follows: "The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions."

[1] We hold that the evidence in this case that the defendant was a farmer raising corn and soybeans was sufficient to support a jury's finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to corn and soybeans. This would put him within the statutory definition of merchant. We also hold that there was sufficient evidence to support a jury's finding that the defendant by his occupation held himself out as having knowledge or skill peculiar to the practice of dealing in corn and soybeans which would also put him within the statutory definition of merchant.

There have been cases from other jurisdictions passing on this question. *See Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E. 2d 559 (1975); *Cook Grains v. Fallis*, 239 Ark. 962, 395 S.W. 2d 555 (1965); *Continental Grain Co. v. Martin*, 536 F. 2d 592 (5th Cir. 1976), *cert. denied*, 429 U.S. 1024 (1976); *Decatur Cooperative Association v. Urban*, 219 Kan. 171, 547 P. 2d 323 (1976); *Lish v. Compton*, 547 P. 2d 223 (Utah 1976); *Loeb and Co., Inc. v. Schreiner*, 294 Ala. 722, 321 So. 2d 199 (1975); *Sand Seed Service, Inc. v. Poeckes*, 249 N.W. 2d 663 (Iowa 1977). The majority of these hold that being a farmer does not make a person a merchant. None of the cases construe the statute as we do, but we believe the plain words of the statute govern.

[2] Under his second assignment of error, the defendant has brought forward exceptions to questions propounded by the plaintiff on direct examination of its only witness. These questions were:

> "Q. And did he hold himself out as having knowledge by his occupation as a farmer that he knew what he was talking about when he was negotiating the sale with you?
>
> MR. TRIMPI: OBJECTION.
>
> THE COURT: OVERRULED.
>
> WITNESS: I certainly felt like he knew what he was talking about.
>
> BY MR. BRUMSEY:
>
> Q. Was his conversation with you in your opinion knowledgeable?

MR. TRIMPI: OBJECTION.

THE COURT: OVERRULED.

WITNESS: Yes."

We believe this assignment of error has merit. Each of the questions is a leading question. The first question asks the witness to answer the very legal question which will determine this case, a question which is now before this Court for the second time. We do not believe the witness could properly answer it. The second question asks the witness his opinion as to the knowledgeability of the defendant. We presume the propounder of the question meant knowledgeable as to dealing in corn and soybeans. It asked the witness his opinion as to the question before the jury. There is some debate among textbook writers as to whether this type of evidence should be excluded. *See* 1 Stansbury's N.C. Evidence, § 126 (Brandis Rev. 1973) pp. 400-402, and footnote 63. We believe the court should not have allowed either of these questions.

[3] The defendant's third assignment of error pertains to the argument of plaintiff's counsel to the jury. The defendant takes exception to the following argument:

"I contend to you, ladies and gentlemen, that Mr. Williams is a man to be believed. He is a man who is known throughout this county for his honesty and integrity. He has been elected for several terms on the Currituck County School Board—

MR. TRIMPI: OBJECTION.

THE COURT: Well, SUSTAINED.

MR. BRUMSEY: (Continuing his argument:)

He is a man of honesty and integrity and he is not going to come before you ladies and gentlemen and commit perjury from the witness stand under oath. I have known him for a long time and I know he is not a person who is able to do that.

MR. TRIMPI: OBJECTION.

THE COURT: OVERRULED.

* * *

Mr. Williams has also been under attack, his memory has been under attack to some extent about the number of conversations, type of conversations he had with Mr. Powell. Ladies and gentlemen there is a reason for Mr. Williams to be able to remember Mr. Powell's conversation over and above any other person he had conversations with. And you know the reason for that? Because the other people by and large have all complied with the contract—

MR. TRIMPI: OBJECTION.

THE COURT: OVERRULED."

The plaintiff's counsel's statement about the witness "I have known him for a long time and he is not a person who is able to do that" is in effect testimony by the attorney as to the credibility of the witness. It was error for the court not to sustain the defendant's objection and instruct the jury to disregard this argument. We hold that the failure of the court to instruct the jury to disregard this argument, combined with the admission of improper evidence as shown above, was prejudicial enough to require a new trial.

The defendant has also assigned as error the court's charge in defining the word "merchant." The court used the statutory definition of merchant as found at G.S. 25-2-104(1). Without passing on this assignment of error, the court at a new trial can use this opinion for a more detailed definition.

New trial.

Chief Judge BROCK and Judge HEDRICK concur.

LUIS E. DONAYRE v. ROBERT T. JONES

No. 7717SC849

(Filed 5 September 1978)

Brokers and Factors § 4— broker's liability for losses incurred—limited obligation

In an action for breach of contract arising from the sale of certain commodities options, the trial court properly entered summary judgment for

defendant where plaintiff alleged and the parties agreed that defendant obligated himself to accept "liability for all losses incurred in [the plaintiff's] purchase of December 26, 1972 six pack beyond the initial $3000.00 you invest"; by his affidavit filed in support of his summary judgment motion, defendant contended that the above wording of defendant's letter to plaintiff was properly construed as imposing liability upon him only in the event of a margin call resulting in the plaintiff's being required to make an additional cash outlay of all or part of the $2000 carried on margin account, and the letter should not be construed as an agreement holding defendant liable for fluctuations in the value of commodity options detrimental to plaintiff; and plaintiff in no way contested the facts set forth in defendant's affidavit.

APPEAL by plaintiff from *Crissman, Judge*. Judgment entered 5 August 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 14 August 1978.

The plaintiff, Luis E. Donayre, initiated this action on 22 March 1976 against the defendant, Robert T. Jones, alleging a breach of contract by the defendant arising from the sale of certain commodities options. By his complaint, the plaintiff alleged that the defendant was employed as a sales representative for Goldstein, Samuelson, Inc., at all times pertinent to this action. During December of 1972, the defendant attempted to persuade the plaintiff to invest in a "six-pack" of commodities consisting of six-month commodity options for the purchase of six individual investments itemized as sugar, silver, plywood, cocoa, copper, and platinum. By letter dated 19 December 1972, the defendant informed the plaintiff that: "This will confirm that I accepted liability for all losses incurred in your purchase of December 26, 1972 six pack beyond the intitial $3000.00 you invest."

The plaintiff further alleged that he invested in such commodities options with Goldstein, Samuelson, Inc., on 26 December 1972. This investment was made in the form of the plaintiff's check of 3 January 1973 in the amount of $3,080.

The plaintiff also alleged that Goldstein, Samuelson, Inc., filed for bankruptcy on 27 February 1973 and has since been placed in receivership and adjudicated to be a bankrupt. The plaintiff alleged that at the time of the filing for bankruptcy the commodities options in question were of a value of $10,154.50. The plaintiff made demand of the defendant for $7,074.50 which he alleged the defendant owed him as a result of the agreement contained in the defendant's letter of 19 December 1972. The defendant refused the demand.

The defendant filed an answer in which he admitted most of the plaintiff's allegations but denied any loss by the plaintiff in excess of the $3,000 originally invested or any liability arising from the letter of 19 December 1972. The defendant also filed a motion for summary judgment in his favor and a supporting affidavit. In his affidavit the defendant stated that, during December of 1972, the plaintiff wished to invest $5,000 in six-month commodity options. The plaintiff elected to finance the $5,000 purchase by giving the defendant a check for $3,080 and placing $2,000 on a margin account. The $80 figure represented interest on the $2,000 placed upon margin account for six months at 8 percent interest. The plaintiff wished assurance that there would be no margin call requiring him to produce the $2,000 placed on margin account. As a result of the plaintiff's desire in this regard, the defendant wrote him the letter of 19 December 1972 referred to in the complaint. The defendant stated in his affidavit that the plaintiff has never been called upon to produce any part of the $2,000 on margin account and has suffered no loss other than his initial cash outlay of $3,000 on the $5,000 investment.

The plaintiff filed an affidavit in which he essentially restated portions of his complaint. That affidavit did not tend to contradict the statements of fact set forth in the defendant's affidavit. The trial court allowed the defendant's motion and granted summary judgment in his favor from which the plaintiff appealed.

Franklin Smith for plaintiff appellant.

George C. Mountcastle for defendant appellee.

MITCHELL, Judge.

The plaintiff assigns as error the entry of summary judgment in favor of the defendant by the trial court. In support of this assignment, the plaintiff contends that a genuine issue of material fact exists as to the amount of his losses and, thus, the resulting liability of the defendant. We do not agree.

The parties agree that the defendant obligated himself to accept "liability for all losses incurred in [the plaintiff's] purchase of December 26, 1972 six pack beyond the initial $3,000.00 you in-

vest." By his affidavit, the defendant provided additional facts surrounding the sale of the commodities options to the plaintiff which gave rise to the defendant's letter accepting liability. Neither the plaintiff's complaint nor his affidavit filed in response to the defendant's motion for summary judgment in any way contests these additional facts as set forth in the defendant's affidavit. Instead, the plaintiff's affidavit merely restates certain allegations of the complaint without referring to the additional facts set forth by the defendant. By his affidavit, the defendant made a convincing showing that genuine issues of fact are lacking. Therefore, the plaintiff was required to demonstrate by affidavit or other receivable facts that a real, not a formal, controversy existed. He could not and did not demonstrate the existence of such a controversy by his affidavit, which merely restated certain allegations of the complaint and held back any evidence in his possession relating to the events surrounding the defendant's agreement to accept liability. *Patrick v. Hurdle*, 16 N.C. App. 28, 190 S.E. 2d 871, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 195 (1972). As the plaintiff did not introduce any materials pointing to specific areas of impeachment or contradiction and did not contest the additional facts set forth in the defendant's affidavit, only latent doubts as to the credibility of the statements set forth in the defendant's affidavit were raised. Therefore, the affidavit was sufficient to support a motion for summary judgment. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

The issue of the defendant's liability *vel non* rests upon the intention of the parties at the time he wrote the letter of 19 December 1972 accepting liability for losses. The intention of the parties at that time must be determined "from the expressions used, the subject matter, the end in view, the purpose sought and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948). The plaintiff contends that, when viewed in this context, the defendant's letter constituted an acceptance of liability for any fluctuation in the value of the commodities options which were detrimental to the plaintiff. The defendant contends, however, that the wording of the letter was properly construed as imposing liability upon him only in the event of a margin call resulting in the plaintiff's being required to make an additional cash outlay of all or part of the $2,000 carried on margin account.

The word "loss" is a generic and relative term and not a word of limited, hard and fast meaning. Black's Law Dictionary, 1094 (Revised 4th ed. 1968). A mere reduction in the value of property may constitute a "loss" in one case, while in others that word may be used so as to include only a total and complete separation from a thing of value. *Compare Boney v. Insurance Co.*, 213 N.C. 470, 196 S.E. 837 (1938), *with Logan v. Johnson*, 218 N.C. 200, 10 S.E. 2d 653 (1940). Such words, capable of more than one meaning, must be given that meaning which it is apparent the parties intended. 3 Strong, N.C. Index 3d, Contracts, § 12, p. 390. Here, the language employed by the defendant in his letter of 19 December 1972 must be given such construction as he should have supposed the plaintiff would give it or as would have been fairly justified on the plaintiff's part. *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970); 17 Am. Jur. 2d, Contracts, § 248, p. 641. We hold that the application of these rules to the writing in question commands the conclusion that the defendant could only suppose that the plaintiff would construe the letter as an acceptance of liability by the defendant for any additional cash outlays required of the plaintiff by virtue of a margin call, and that the plaintiff was not fairly justified in giving the terms of the letter any other construction.

It is true, of course, that the letter of 19 June 1972 did not express in specific terms this limitation of the defendant's liability to possible additional cash outlays which might be required of the plaintiff. However, our courts will imply such limitations where, as here, from the language of the contract and the circumstances under which it is entered, it may be inferred that the parties must have intended the stipulation in question. The policy of the law is to supply in contracts that presumed to have been deemed obvious by the parties. *Lane v. Scarborough*, 284 N.C. 407, 410-11, 200 S.E. 2d 622, 624 (1973). To construe the defendant's letter of 19 December 1972 as an agreement to be held liable for fluctuations in the value of commodity options detrimental to the plaintiff would make him liable for all such detrimental variations resulting from the daily fluctuations in the value of the commodities options in question during the entire period they were held by the plaintiff. We think it may be presumed to have been deemed obvious by the parties that the defendant did not accept liability for so-called "paper losses"

resulting from fluctuations in the value of commodities options. Instead, we find it must have been so obvious to the parties as not to require expression that the defendant accepted liability only for additional cash outlays if required of the plaintiff. *See* 17 Am. Jur. 2d, Contracts, § 255, p. 651.

We base our holding upon the defendant's letter of 19 December 1972 taken within the context of a transaction in commodity options as alleged in the plaintiff's complaint. We note that those portions of the defendant's affidavit in support of his motion for summary judgment, which are uncontested by the plaintiff, tend to support our interpretation. We have found it unnecessary to rely upon the affidavits of either party but have considered them for the purpose of determining whether they raise material issues of fact. We have determined they do not.

The trial court properly concluded that there was no genuine issue as to any material fact, and that the defendant was entitled to summary judgment as a matter of law. The judgment of the trial court must be and is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

FORMAN & ZUCKERMAN, P. A. v. DONALD SCHUPAK, ERIC D. ROSENFELD, AND PETER D. FISCHBEIN, INDIVIDUALLY AND PARTNERS TRADING AS SHUPAK, ROSENFELD & FISCHBEIN

No. 7718SC850

(Filed 5 September 1978)

1. Judgments § 13.2— notice of hearing of default judgment motion—due process

Notice given to defendants of a hearing on plaintiff's motion for judgment by default provided defendants with sufficient time in which to prepare and present their contentions so as to comply with due process where defendants received actual notice that the action had been filed against them; a year and a half later defendants were given thirteen days' notice of the hearing on plaintiff's motion; and the record shows that defendants received actual notice of the hearing since they responded by letter to the clerk raising what they perceived to be violations of the local rules of court.

2. Trial § 1; Judgments § 13.2— local court rules—calendaring of motion where request filed a day late

A local rule of court, promulgated by the senior resident superior court judge pursuant to G.S. 1A-1, Rule 40, which provided that "Requests for pretrial hearings on motions will be considered by the Calendar Committee if filed by 5:00 p.m. on Monday two (2) weeks prior to the beginning of the session requested" meant only that the calendar committee was not required to consider a belated request that a motion be calendared at a certain session and did not prohibit the calendaring of a motion for default judgment where the request was a day late if the calendar committee or the court so chose.

APPEAL by defendants from *Walker (Hal H.), Judge*. Judgment entered 18 May 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 August 1977.

This is an action in which the plaintiff sought to recover unpaid fees for legal services provided to the defendants. The plaintiff commenced this action by the filing of summons and a complaint on 6 October 1975 with service upon the defendants by mail. The defendants moved to dismiss for lack of in personam jurisdiction. On 6 October 1976 we affirmed the trial court's denial of the motion. *Forman & Zuckerman, P. A. v. Schupak*, 31 N.C. App. 62, 228 S.E. 2d 503 (1976). The Supreme Court of North Carolina denied the defendants' petition for discretionary review, *Forman & Zuckerman, P. A. v. Schupak*, 292 N.C. 264, 233 S.E. 2d 391 (1977), and the appellate judgment was certified to the Clerk of Superior Court of Guilford County. The clerk received and filed that certification on 16 March 1977.

On 27 April 1977 the defendants' default was entered by the clerk. The plaintiff filed a motion for judgment by default on 3 May 1977 together with a request that the motion be calendared for hearing on 16 May 1977. The defendants responded by letter to the local calendaring clerk on 10 May 1977 indicating that the calendar request was one day late under the local court rules and could not be considered. The plaintiff then wrote a letter to the calendaring clerk indicating that the matter had been placed upon the court's calendar for 16 May 1977, and that the plaintiff did not waive any right to have the motion heard at that time. The plaintiff requested that, in deference to the defendants' objection by their letter, the matter also be placed upon the court's calendar for 30 May 1977. A copy of this letter was forwarded to the defendants. The matter was brought on for hearing before the trial

court, as originally calendared, during the 16 May 1977 session. The trial court entered judgment by default against the defendants on 18 May 1977. From the entry of this judgment, the defendants appealed.

William Zuckerman for plaintiff appellee.

Peter D. Fischbein, pro se and for defendant appellants.

MITCHELL, Judge.

The defendants' sole assignment of error is directed to the failure of the trial court to remove the plaintiff's motion for judgment by default from the 16 May 1977 calendar. The defendants contend that they were thereby denied due process and rights provided by local court rules.

Due process, of course, requires adequate notice and opportunity to be heard. As the Supreme Court of the United States has specifically stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 94 L.Ed. 865, 873, 70 S.Ct. 652, 657 (1950) (citations omitted).

[1] The defendants were originally given notice of the pendency of this action on 6 October 1975. They obviously received this notice as they came into court to contest jurisdiction. A year and a half later, the defendants were given thirteen days' notice of the hearing on the plaintiff's motion for judgment by default. The record on appeal clearly reflects that the defendants had actual notice, as they responded by letter to the clerk raising what they

perceived to be violations of the local rules of court. Given these facts, we hold that the notice given the defendants provided them with a reasonable period of time in which to prepare and present their contentions with regard to the plaintiff's motion.

We do not find the defendants' absence from the hearing to have been excused by their purported reliance on their letter to the clerk raising issues concerning the local rules or by their receipt of the plaintiff's later letter to the clerk by way of response. The defendants assumed the dual position of attorneys and clients and were required to give both their personal and professional attention to their business on the docket. They, like other parties to actions before the courts, were required to remain alert in protecting their rights and interests and could not sleep on those rights. *School v. Peirce*, 163 N.C. 424, 79 S.E. 687 (1913). By failing to appear or to make reasonable inquiry of the court as to whether the matter would be heard on 16 May 1977, the defendants failed to exercise the care and attentiveness required of parties and attorneys in an action before the courts. We hold that the defendants were not denied due process, and this assignment is without merit.

[2] The defendants additionally contend that the trial court committed reversible error by calendaring the plaintiff's motion in violation of local court rules. We find this contention also without merit.

It is true that a judicially evolved rule of administrative law requires executive agencies of government to follow certain procedures they have promulgated, even though the procedures did not originally arise from any constitutional requirement. *See Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012, 79 S.Ct. 968 (1959), *and Securities & Exch. Com. v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626, 63 S.Ct. 454 (1942). This rule, however, constitutes a recognition of the fact that the "procedural" rules of such agencies generally take on certain aspects of both procedural and substantive law. The rule does not, therefore, apply with equal vigor to local rules of court which are adopted to promote the effective administration of justice and do not substantially determine the parties' procedural or substantive rights previously provided by our General Statutes or other applicable law.

The rules in question were promulgated by the Senior Resident Superior Court Judge of Guilford County pursuant to his authority under G.S. 1A-1, Rule 40, to "provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district." These rules provide, in part, that "Requests for pretrial hearings on motions will be considered by the Calendar Committee if filed by 5:00 p.m. on Monday two (2) weeks prior to the beginning of the session requested." As the plaintiff's request that its motion be calendared for the 16 March 1977 session was filed a day late, the calendar committee was not required to consider the request. The rule did not, however, prohibit the calendaring of the motion at the requested session if the calendar committee or the trial court so chose. We do not think these facts present a situation in which the defendants' failure to pursue the matter further constituted excusable neglect induced by justifiable reliance upon their letter to the clerk referring to the local rules or induced by the response of the plaintiff. Local rules adopted pursuant to G.S. 1A-1, Rule 40, are rules of court which are adopted to promote the effective administration of justice by insuring efficient calendaring procedures are employed. Wide discretion should be afforded in their application so long as a proper regard is given to their purpose. *See Wagner v. Edington Coal Co.*, 100 W. Va. 117, 130 S.E. 94 (1925).

The defendants failed to show that the granting of the calendaring request, which was filed a day late under the local rules, in any way harmed them or constituted an abuse of discretion. Therefore, it was not error for the trial court to calendar or hear the motion, and the judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. BOBBY GENE BROWN

No. 785SC314

(Filed 5 September 1978)

1. **Automobiles § 46— opinion testimony as to speed—opportunity for observation**

In this prosecution for involuntary manslaughter and driving under the influence, a witness had an adequate opportunity to observe defendant's automobile in travel so that he was competent to testify that the automobile was "going fast" immediately prior to the accident where the witness testified that he was in an upstairs apartment on a corner of the intersection where the accident occurred; he heard the loud sound of a car coming down the street toward the intersection and immediately went to a window and observed defendant's car coming toward the intersection; and he watched as defendant attempted to turn at the intersection and drove his automobile into a yard where two children were playing. The witness's admission that he had never driven an automobile did not bear on the competency of his testimony but only on its probative force.

2. **Automobiles § 46— opinion that defendant exceeded speed limit—knowledge of speed limit**

There was sufficient evidence that a witness knew the speed limit in the area in question to permit him to testify that defendant's automobile was traveling in excess of the speed limit where an officer had previously testified that the posted speed limit in the area was 35 mph, and the witness testified on cross-examination that he thought the speed limit in the area was 35 mph.

3. **Homicide § 27.2— involuntary manslaughter—exceeding speed limit—sufficient evidence to support instruction**

A witness's testimony that defendant was traveling at an excessive rate of speed was sufficient to support the court's instruction that the jury should find defendant guilty of involuntary manslaughter if, among other things, it found he "intentionally or recklessly violated the law by . . . operating a vehicle in excess of the speed limit."

APPEAL by defendant from *Webb, Judge*. Judgment entered 7 October 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 21 August 1978.

Defendant was charged with involuntary manslaughter and operating a motor vehicle while under the influence of an intoxicating beverage. The defendant pled not guilty to each charge, and the State presented evidence tending to show the following:

At about 6:40 p.m. on 28 May 1977 the defendant was travelling at a fast rate of speed in a southerly direction on 8th Street

in Wilmington, North Carolina. When he reached the intersection at Meares Street the defendant attempted to turn left, hit the southeast curb, continued across Meares Street and jumped the north curb, hitting two children who were playing in the yard. Phillip Devone was injured and Richard Nixon was killed in the accident. Later the defendant submitted to a breathalyzer test and was determined to have a .16 percent blood alcohol content.

The defendant presented evidence tending to show that the accident was the result of faulty brakes.

The jury found the defendant guilty of both offenses. Pursuant to the defendant's motion the trial court arrested judgment in the case in which defendant was found guilty of driving under the influence of an intoxicating beverage. From a judgment imposing a 5 year prison sentence for his conviction of involuntary manslaughter, the defendant appealed.

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

Ernest B. Fullwood for the defendant appellant.

HEDRICK, Judge.

[1] The defendant's two assignments of error focus on the trial court's admission of testimony regarding the speed at which he was driving at the time of the accident, and the court's instruction thereon. The defendant recognizes the general rule that a " 'person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed' of a motor vehicle." 1 Stansbury's N.C. Evidence § 131, at 420 (Brandis rev. 1973) and cases cited thereunder. He argues that the witness, Alphonso Braggs, did not have sufficient opportunity to observe the defendant's moving vehicle and ascertain its speed at the time of the accident.

Braggs first testified that he was in his upstairs apartment at the northeast corner of 8th and Meares Streets when he heard "the loud sound of a car coming down going south on 8th Street"; that he immediately went to his window facing south and observed the defendant's car heading south on 8th Street; that he watched as the defendant turned east on Meares Street, drove onto the sidewalk on the southeast corner of the intersection, and

then crossed Meares Street and came to rest in the yard where the children had been playing. The district attorney then asked the witness what he had noticed about the defendant's automobile when he first observed it, and Braggs replied that "[i]t was going fast." The defendant's objection and motion to strike this testimony was overruled.

In our opinion Braggs had an adequate opportunity to observe the defendant's automobile in travel, and thus, he was competent to testify as to its fast rate of speed immediately prior to the accident. *See Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973); *Honeycutt v. Strube*, 261 N.C. 59, 134 S.E. 2d 110 (1964). The witness' admission that he has never driven an automobile bears not on the competency of the evidence, but on its probative force. *Murchison v. Powell*, 269 N.C. 656, 153 S.E. 2d 352 (1967). Furthermore, we find the cases upon which the defendant relies, *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327 (1955), and *Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821 (1956), distinguishable since in each of these cases the witness, whose testimony as to speed was excluded, had been distracted in his observation or had observed the vehicle only a few feet before impact.

[2] The defendant also excepted to Braggs' testimony that in his opinion the defendant's automobile was travelling in excess of the speed limit. He argues that there was no indication in the record that the witness knew the speed limit in the vicinity in which the accident occurred. Prior to Braggs' testimony Officer Robert Lee Harris, Jr. of the Wilmington Police Department testified that the "posted speed limit in the area of 8th and Mears [sic] on . . . [28 May 1977] was thirty-five miles an hour." Braggs testified on cross-examination that he thought the speed limit in the vicinity was thirty-five miles per hour. We think this evidence provided an adequate foundation upon which Braggs could testify that the defendant was driving in excess of the speed limit.

[3] Our disposition of the foregoing assignment is likewise dispositive of the defendant's assignment regarding the trial court's instruction on the speed at which the defendant was driving his automobile. In the pertinent portion of the charge the trial judge instructed the jury that it should find the defendant guilty of involuntary manslaughter if, among other things, it found that he "intentionally or recklessly violated the law by either

operating a vehicle in excess of the speed limit," or by driving under the influence of an intoxicating beverage. Clearly, Braggs' testimony that the defendant was travelling at an excessive rate of speed was sufficient to support the quoted instruction. The defendant's assignments of error challenging the admission of Braggs' testimony of speed and the instruction thereon are overruled.

We hold that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

ELIZABETH ELAINE GRIFFITH v. BILLY NEAL GRIFFITH

No. 7726DC874

(Filed 5 September 1978)

1. **Divorce and Alimony § 23— child support arrearage—child over 18—jurisdiction of court to order payment of arrearage**

Defendant's contention that the trial court did not have authority to entertain a motion in the cause to reduce to judgment the support payments alleged to be in arrears because the only minor child of the marriage had reached the age of majority is without merit, since the child became 18 on 2 March 1976; plaintiff sought and obtained judgment for only the amount of arrearage in child support which accrued until and including 2 March 1976; and the legal obligation to provide child support and the failure to meet that obligation both arose while the court had jurisdiction.

2. **Divorce and Alimony § 24— child support arrearage—motion in the cause to recover—real party in interest**

In an action to recover past due child support payments, defendant's contention that the child, who had reached the age of 18, was the real party in interest rather than plaintiff mother is without merit since the custodial parent, who provides support which the other parent was legally obligated to provide, is the real party in interest in an action to recover the support so provided.

3. **Notice § 2; Rules of Civil Procedure § 5— notice served on attorney of record—sufficiency**

The attorney who represented defendant in the action concerning child support thereby became the defendant's attorney of record and remained such

by virtue of his failure to withdraw with leave of the court; therefore, notice of a motion in the cause for arrearage in child support could properly be served on defendant's attorney of record, and defendant could not complain of inadequate notice. G.S. 1A-1, Rule 5(b).

APPEAL by defendant from *Brown, Judge*. Order entered 25 July 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 16 August 1978.

This is an action to recover child support payments which are in arrears. In 1962 the plaintiff sued the defendant for divorce and, at the time of the divorce, the trial court ordered the defendant to pay child support. The defendant failed to comply with this order, and in August of 1969 the court found him to be in arrears. The court ordered him to pay the amount in arrears plus $600 to the plaintiff's attorney.

The defendant once again failed to comply with the court's order, and on 21 April 1976 the plaintiff filed a motion seeking judgment against the defendant for unpaid child support payments of $7,438.50 and for attorney's fees. By this time, neither the plaintiff, the defendant nor the child resided in North Carolina. The child became eighteen years of age shortly before this motion was filed.

In order to give notice to the defendant of the pending motion, the plaintiff's attorney mailed a letter of notice to the defendant at a Houston, Texas, address and to his attorney of record on the date the motion was filed. The letter addressed to the defendant was returned undelivered, but on 11 May 1976 the defendant's attorney of record responded to the notice by indicating that he was unable to contact his "former client," that the defendant was unaware of the pending action and that the attorney did not intend to make a personal appearance at the hearing.

On 13 May 1976, the court conducted a hearing on the motion and issued an order which set forth findings of fact and conclusions of law and rendered judgment against the defendant for the amount in arrears and the plaintiff's attorney's fees.

On 10 February 1977, the defendant filed a motion to dismiss and set aside the order of 13 May 1977 or, in the alternative, for a

new trial. The trial court entered an order denying the motion on 25 July 1977. The defendant appealed.

Thomas R. Cannon for plaintiff appellee.

Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, by T. LaFontine Odom and L. Holmes Eleazer, Jr., for defendant appellant.

MITCHELL, Judge.

[1] Defendant brings forward six assignments of error which are presented in three arguments. Basically, the defendant argues that the judgment of 13 May 1976 should not have been granted.

Defendant first contends that the trial court, in entering the 13 May 1976 judgment, lacked subject matter jurisdiction and that the motion to dismiss should have been granted. The defendant argues that the trial court did not have authority to entertain a motion in the cause to reduce to judgment the support payments alleged to be in arrears, as the only minor child of the marriage had reached the age of majority. We do not agree.

In 1962, the plaintiff and the defendant came before the trial court on the matter of the custody and support of their minor child. Where the parties invoke the jurisdiction of the court in such matters, the minor child becomes a ward of the court. As a result the court has continuing authority to compel the parents to fulfill their legal obligations to the child. *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). Although the legal obligation of a parent to support his child ceases upon the child's emancipation, the court nevertheless continues to have authority to compel a parent to provide that support due before emancipation, so long as the action is not barred by the statute of limitations. *See Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977).

In this case, the minor child became eighteen years of age on 2 March 1976. The plaintiff sought and obtained judgment for only the amount of arrearage in child support which accrued until and including 2 March 1976. The legal obligation to provide child support and the failure to meet that obligation both arose while the court had jurisdiction. The court did not extend its jurisdiction any further than was required to insure that the defendant

complied with its prior order for the support of his minor child. Therefore, the court had jurisdiction over the subject matter of this case.

[2] Defendant next contends that the plaintiff was not the real party in interest. Defendant argues that, since the minor child had become eighteen years of age, the child was the real party in interest rather than the mother. It is true that a minor child by his guardian may institute an action for his support. G.S. 50-13.4(a). However, it is also true that a parent having custody of a minor child may institute an action for the support of such child, and once an order for support has been obtained, the past due payments may be reduced to judgment by motion in the cause. G.S. 50-13.4(a), and 13.4(f)(8). The fact that a child becomes eighteen years of age does not prevent the parent having custody from having the past due payments which accrued while the child was a minor reduced to judgment. *See Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977). If the custodial parent provides support which the other parent was legally obligated to provide, then the custodial parent is a real party in interest in an action to recover the support so provided. Therefore, the trial court correctly determined that the plaintiff was a real party in interest.

[3] The defendant next contends that he was not given proper notice of the motion in the cause to reduce to judgment the support payments alleged to be in arrears. We do not agree.

Although the defendant was not served personally in this case, G.S. 1A-1, Rule 5(b) allows service of notice of written motions by service on the attorney of record. This procedure, as explained in *United States v. Curry*, 47 U.S. 106, 110, 12 L.Ed. 363, 365 (1847):

> Is undoubtedly good and according to established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself.

The attorney upon whom notice was served represented the defendant in the action concerning child support and, thereby,

became the defendant's attorney of record. The relationship between a party and his attorney of record continues so long as the opposing party may enter a motion in the matter or apply to the court for further relief. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E. 2d 71 (1956). Since that attorney did not withdraw from the case with leave of the court and motions might still be properly entered, he continued to be the defendant's attorney of record.

It is clear that notice may be served on the attorney of record and that such notice is notice to the party. G.S. 1A-1, Rule 5(b); *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). Since notice was properly served on the defendant's attorney of record, the defendant cannot now complain of inadequate notice absent a showing of extraordinary circumstances not presented by this case.

For the reasons stated, the order of the trial court is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. RONALD McGILL

No. 7826SC301

(Filed 5 September 1978)

1. **Indictment and Warrant § 8.4— election between offenses—discretionary matter**

It was within the discretion of the trial court to decide whether it would compel the State to elect between the two offenses charged and, if so, at what stage in the trial.

2. **Criminal Law § 137.1— two crimes charged—dismissal of wrong charge—no prejudice**

Where defendant was charged with possession of marijuana and possession of marijuana with intent to sell, and the jury returned a guilty verdict on the charge of possession of marijuana, the trial court's clerical error in dismissing that charge was not prejudicial to defendant, since judgment was entered in the possession with intent to sell case for the exact crime of which the jury found defendant guilty.

3. Criminal Law § 88— cross-examination limited—no error

The trial court did not err in limiting defendant's cross-examination of a witness, since the evidence elicited upon cross-examination was irrelevant and since defendant failed to include in the record what the witness's answer would have been had he been permitted to testify.

4. Criminal Law § 75.9— volunteered statement—ownership of contraband

Evidence was sufficient to support the trial court's conclusion that, after officers searched an apartment and discovered a quantity of marijuana, defendant voluntarily stated that everything in the apartment was his.

APPEAL by defendant from *Walker (Ralph A.), Judge.* Judgment entered 3 November 1977, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 August 1978.

Defendant was indicted for possession of marijuana and for possession of marijuana with intent to sell. At his trial on both offenses, the State presented evidence tending to show that on the evening of 26 November 1976, police officers, acting pursuant to a search warrant, went to a residence at 929 Beal Street in Charlotte. There they discovered the defendant, Lind Criddell, and two children. During a search of the residence, they also discovered a large quantity of marijuana in a bedroom closet and a smaller quantity in a shoe box. Defendant, for whom the search warrant had been issued, was arrested and was read his constitutional rights. The officers questioned Criddell but eventually decided not to arrest him. Officer M. F. Greene testified over objection that, during his questioning of Criddell, the defendant stated that Criddell did not live there, that Criddell knew nothing about anything in the apartment, and that everything in the apartment was his, the defendant's.

Defendant put on evidence tending to show that on the evening in question he was just visiting in the apartment which was rented by Amelia McDaniel. He denied claiming to Officer Greene that everything in the apartment was his.

The jury returned a verdict of guilty of possession of more than one ounce of marijuana. Defendant was sentenced to imprisonment for not less than sixteen months nor more than twenty-four months. He appeals.

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

Laura A. Kratt for defendant appellant.

HEDRICK, Judge.

[1, 2] Prior to the trial of this case, defendant made several motions, one of which was that the State elect between the two charges of possession of marijuana and possession of marijuana with the intent to sell and deliver. The trial court reserved a ruling on this motion until a later time. After the jury returned a guilty verdict on the charge of possession of marijuana, the trial judge sentenced defendant and then ordered, erroneously, the dismissal of case 76CRS69882, which was the indictment charging possession of marijuana. Defendant now argues that the trial court's reservation of a ruling on the motion for the State to elect and its subsequent error in dismissing the case for which defendant had been found guilty constituted prejudicial error. We do not agree.

First of all, our courts have long held that a trial court has broad discretion in deciding whether it will compel an election of offenses and, if so, at what stage in the trial. *See State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931), and cases cited therein. Defendant's argument that the reading of multiple indictments prejudiced him in the eyes of the jury is simply not sufficient for us to find that the trial court abused its discretion in the matter. Furthermore, we do not accept defendant's argument that the trial court's instructions, which explained the counts as alternative offenses, were prejudicial to the defendant.

Secondly, the obvious clerical error by His Honor in dismissing case 76CRS69882, possession of marijuana, had no prejudicial effect on defendant. Judgment was entered against defendant in case 76CRS69883 for the exact crime of which the jury found him guilty, possession of marijuana, a lesser included offense of possession of marijuana with intent to sell. Therefore, there was no resulting harm to defendant.

[3] A second argument brought forward by defendant is that the trial court committed prejudicial error in refusing to allow defendant his full right to cross-examine Officer Greene. The record discloses that a *voir dire* hearing was held to determine whether there was probable cause for the issuance of the search warrant. Defense counsel, in cross-examining Officer Greene concerning the reliability of a confidential informant, elicited the following testimony:

"I received my information from a reliable informant who had given me information leading to the arrest of three other persons. None of them had been convicted at the time this warrant was issued. I am not sure if any of them has been convicted as of this time. I believe Patricia Cureton plead [sic] guilty to the charge. I was not present at the trial and the other two, one of them is scheduled next week.

"The Amelia Wilkins trial is next week and I am not sure of the status of Brunson. I have not been called to Court for it yet. I have a subpoena for Wilkins on my desk, I believe for the 7th. I've been advised that Patricia Cureton plead [sic] guilty. I don't know. I just know what I've been told.

"Q. Well, let me ask you, did you arrest her on October 9, 1976?

"DISTRICT ATTORNEY: OBJECTION.

"COURT: SUSTAINED. I don't care to go into those cases any further.

EXCEPTION NO. 2"

We fail to see the relevance of defendant's questioning at the point at which the prosecutor's objection was sustained. Furthermore, defendant failed to make an offer of proof which would aid us in determining whether there was error in the trial court's ruling. When an objection to a question is sustained, this ordinarily means that the answer the witness would have given should be made a part of the record on appeal. *See* 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1972).

[4] Defendant's final argument on this appeal is that the trial court erred in allowing into evidence the alleged statement by defendant that Criddell knew nothing about the apartment and that everything in the apartment was his, not Criddell's. The record, however, reveals that the trial court conducted a *voir dire* hearing into the admissibility of the statement. At the close of the hearing, the trial court made the following findings of fact:

"3. That a search of the premises was conducted and that a quantity of marijuana was discovered in the said apartment. That the defendant was advised of his constitutional

rights. That the law enforcement officers then questioned one Lind Criddell who was there in the apartment and that the defendant stated to the officers that Criddell did not live there and that everything in the apartment was the defendant's.

"4. That the defendant was 26 years of age and did not appear to be under the influence of any alcohol or controlled substances. That the defendant understood his constitutional rights and that no questions were asked of the defendant after being advised of his rights."

Based on these findings, the trial court concluded that defendant had volunteered the statement in question. Since the court's findings are supported by competent evidence, they are binding on appeal. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Arrington*, 27 N.C. App. 664, 219 S.E. 2d 791 (1975). The findings of fact in turn support the trial court's conclusion of law.

We find, therefore, that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. ELTON TEW

No. 784SC332

(Filed 5 September 1978)

1. Criminal Law § 99.3— judge's comment "Who cares?"—no expression of opinion

In a homicide prosecution, the trial judge's comment "Who cares?" after defense counsel had asked decedent's wife to repeat the number she stated she had called to reach the police immediately after decedent was stabbed did not constitute a prejudicial expression of opinion, particularly since defense counsel was allowed to explain his reason for bringing out the witness's familiarity with the telephone number and defense counsel's examination of the witness proceeded thereafter without incident.

2. Criminal Law § 99.8— court's questioning of witness

Defendant was not prejudiced by four questions which the trial court asked State's witnesses where the tenor of the questions was neutral and they all sought to elicit information that would prove to be helpful to the defendant.

3. Criminal Law § 99.2; Homicide § 20.1— identity of person in photograph— court's response to juror's question—identity of deceased not removed from jury's consideration

In a homicide prosecution in which a juror asked the trial judge how he would know that a photograph was of deceased if he did not know deceased personally, the trial judge's response, "It's not for you to consider. Listen to the evidence," did not remove from the jury's consideration the identity of the person killed but merely told the juror not to consider how he would know the person in the photograph, as the evidence either would or would not satisfy him on that point, and that he should listen to such evidence to make his determination. Furthermore, the trial judge's response was not prejudicial to defendant since defendant admitted that he stabbed the person alleged to have been killed.

APPEAL by defendant from *Smith (David), Judge*. Judgment entered 9 November 1977 in Superior Court, SAMPSON County. Heard in the Court of Appeals 23 August 1978.

Defendant Elton Tew was arrested without a warrant on 7 August 1977 and held on a magistrate's order issued on the same date alleging probable cause to believe that defendant murdered Louis Fulton Gilmore. Preliminary hearing was conducted, probable cause was found and Tew was bound over to superior court for trial on 22 August 1977 on charges of second degree murder.

Trial was begun 7 November 1977 before Judge David Smith. Evidence for the State tended to show that on 7 August 1977 defendant stabbed and killed Louis Gilmore after Gilmore came into defendant's house uninvited and began threatening Gilmore's wife (who was living with the defendant at the time). The defendant took the stand and admitted stabbing Gilmore from behind after Gilmore had threatened Mrs. Gilmore and put his hands in his pocket. The jury found the defendant guilty of voluntary manslaughter and he was sentenced to six years imprisonment. From this judgment defendant appeals, assigning error.

Attorney General Edmisten, by Associate Attorney Leigh Emerson Koman, for the State.

John R. Parker, for the defendant.

MARTIN (Robert M.), Judge.

Defendant's assignments of error pertain to actions and comments of the trial judge which were purportedly prejudicial. We will deal with them seriatim.

I

[1] Defendant contends that it was a prejudicial expression of opinion for the trial judge to interject the remark "who cares?" after a question asked by defendant's counsel in violation of G.S. 1-180. In the cross-examination of Magdeline Gilmore, decedent's spouse, counsel for defendant was inquiring as to what she did immediately after the alleged stabbing. She stated that she called the rescue squad and then she "called 2-4141 and the law answered."

Q. "What is that number?"

Court: "Who cares?"

Counsel for defendant concedes that this is the only comment in the record which might tend to ridicule the defendant or his counsel, but contends that in the context of the entire record, the effect of the trial judge's comment was to express an opinion about the case in violation of G.S. 1-180. We do not agree. Defendant relies on *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977) and *State v. Hewitt*, 19 N.C. App. 666, 199 S.E. 2d 695 (1973) in support of his contention. Our examination finds the instant record devoid of the circumstances cited in the above two cases where there was repeated and sometimes heated exchange between the trial judges and defense counsel, giving rise to the possibility that, on the totality of the trial record, the juries may have inferred that the trial judges were expressing opinions about the merit of the testimony and the defendants before them. Such is not the case here. Counsel for defendant was allowed to explain his reason for bringing out the witness's familiarity with the particular telephone number and the cross-examination proceeded thereafter without incident. While we do not approve the inadvertent remark of the trial judge, we find it harmless error. The defendant's first assignment of error is overruled.

II

[2] Defendant next contends that the trial court erred in his examination of some of the State's witnesses, contending that the examination went beyond what was necessary for proper understanding and clarification of the testimony. We do not agree. Such examination tends to create a prejudicial atmosphere where, by the frequency, or tenor of questions asked, or the persistence of the trial judge in asking them, the jury gets the impression of a "judicial leaning." *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977). In the instant case the trial judge asked only four questions which we are asked to review. They all sought to elicit information that would prove to be helpful to the defendant. The tenor of the questions is neutral and certainly the questioning was not excessive. Any error contained therein would tend to be favorable to the defendant, and accordingly we overrule his second assignment of error.

III

[3] The defendant lastly assigns as error the trial judge's response to the juror's question in the following dialogue:

Juror Number One: "Sir, how would I know that is Gilmore if I don't know him personally?"

Court: "It's not for you to consider. Listen to the evidence."

Defendant contends that by answering the juror's question in that manner, the trial judge removed from the jury's consideration the identity of the subject in the photograph. We do not agree. We think it apparent that the judge was instructing the juror not to consider how he would know the person in the photograph, as the evidence either would or would not satisfy him on the point and he should listen to such evidence to make his determination. In his instructions to the jury, Judge Smith correctly placed the burden upon the State to prove defendant's guilt beyond a reasonable doubt. In the face of defendant's admission that he did stab Louis Gilmore, we perceive that any possible error or confusion here was harmless. Defendant's third assignment of error is overruled.

IV

In conclusion, we find that on the record the defendant had a fair trial free from prejudicial error. Accordingly, the judgment of the trial court is affirmed.

No error.

Judges VAUGHN and MITCHELL concur.

MATTIE W. HEWETT v. JOHNNIE HEWETT, JESSE HEWETT, ANNIE MAE HEWETT, GOLEY HEWETT, ELEANOR HEWETT, JAMES BERNARD HEWETT, WESLEY HEWETT, WOODROW HEWETT, HENRY HEWETT, MAYBELLE HEWETT, INA HEWETT, INA LEE HEWETT, FRANK KELLY HEWETT, LARUTH HEWETT, AND DONALD HEWETT

No. 7713SC935

(Filed 5 September 1978)

Partition § 7.2— exceptions to commissioners' order not timely—no showing of mistake, fraud or collusion

In a partition proceeding where the report of the commissioners was properly confirmed by the clerk, it will not be disturbed on appeal since respondents failed to make timely exceptions, and since they made no showing of fraud, collusion or mistake. G.S. 46-19.

APPEAL by respondents from *McConnell, Judge*. Order entered 15 August 1977 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 23 August 1978.

Petitioner and respondents owned a certain tract of land as tenants in common; petitioner Mattie Hewett owned a 7/18 undivided interest in the land. Petitioner instituted this special proceeding for a partition of the land, and commissioners were appointed. The commissioners found that the land had been divided into small farms and homesteads in such manner that it was difficult to make a division, and they were authorized to employ a surveyor and appraiser for help. The commissioners subsequently recommended that the timber first be sold from the land, that petitioner's interest then be allotted to her individually, and that respondents could then have their interests allotted collectively

or individually as they chose. The clerk approved the recommendations and ordered them carried out. The timber was sold for over $11,000. The commissioners then filed a report allotting three tracts of land to petitioner and providing that the remaining land could be divided among respondents at a later time. The commissioners also noted that some of respondents' heirs or kin were living in two mobile homes on the land allotted to petitioner without petitioner's authorization. They recommended that the mobile homes be removed but that $750 be given to the owners of each mobile home as compensation. It was further recommended that the timber proceeds be used to pay the costs of the land division and that the remainder be divided among the parties. The clerk entered an order approving the recommendations on 10 November 1976. No exceptions were filed by any parties to the order of the clerk at this time or within ten (10) days thereafter. Writs of possession were subsequently entered directing removal of the mobile homes. On 8 June 1977 some of the respondents objected and filed a motion to set aside the orders which had been entered in the proceedings. The clerk denied the motion. On appeal, Judge John McConnell affirmed the clerk's 10 November 1976 order. Respondents have now appealed to this Court from that order, assigning error.

Prevatte, Herring, Prevatte & Owens, by Richard S. Owens III, for the petitioner.

Cherry and Wall, by James J. Wall, for the respondents.

MARTIN (Robert M.), Judge.

Respondents made four assignments of error in this appeal.

1) They contend that it was improper to allow and order sale of the timber located on the subject property.

2) They contend it was error for the clerk to confirm the reports of the commissioners because specific values were not assigned to the severalty shares.

3) They contend it was error for the clerk to allow attorney fees to counsel for petitioner from the funds generated by sale of the timber.

4) They contend that the court had no jurisdiction to put the petitioner in possession of the land allotted to her by the commissioners' report.

Without reference to the merits of the respondents' contentions, we are constrained to hold that the report of the commissioners was properly confirmed by the clerk, and will not now be disturbed. G.S. 46-19 provides that unless exceptions to the report of the commissioners in a partition proceeding are filed within ten (10) days of filing of such report, the report is confirmed and may be set aside only on grounds of fraud, collusion or mistake. Although respondents argue that sufficient mistake existed to form a basis for overturning the confirmed report of the commissioners, their argument is without merit. Mistake has been defined as "some unintentional act, or omission, or error, arising from ignorance, surprise, imposture or misplaced confidence." 54 Am. Jur. 2d, *Mistake*, § 1 (1971), Black's Law Dictionary 1152 (4th ed 1951). Although respondents have alleged in conclusory terms that the clerk's confirmation of the commissioners' report itself was a mistake, they did not, on hearing *de novo* before Judge McConnell, allege or prove those facts which would constitute mistake requiring that the report of the commissioners be vacated. Respondents were represented by counsel, their attorney serving additionally as a commissioner for the sale of the timber in question. Respondents do not show that they were deceived or misled into failing to file exceptions to the commissioners' report, or that they were mistaken as to its contents. They were under no other impediment which would excuse their failure to timely file their exceptions, and therefore these exceptions must be deemed waived and the order confirming the commissioners' report upheld. *Floyd v. Rook*, 128 N.C. 10, 38 S.E. 33 (1901); G.S. 46-19.

Affirmed.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. JAMES P. MULLIS

No. 7827SC289

(Filed 5 September 1978)

Automobiles § 126.3— testimony by breathalyzer operator—insufficient foundation —permit issued by Department of Human Resources

A proper foundation was not laid for the admission of testimony by a breathalyzer operator where the operator testified that he possessed "a valid permit to administer the breathalyzer test in North Carolina" but there was no showing that the permit was issued by the Department of Human Resources as required by G.S. 20-139.1(b).

APPEAL by defendant from *Snepp, Judge*. Judgment entered 7 December 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 16 August 1978.

Defendant was convicted in the District Court of Gaston County of operating a motor vehicle on the highway under the influence of intoxicating liquor. He appealed to the Superior Court. From a jury verdict of guilty and judgment of four months in custody in the Gaston County jail, defendant appealed.

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

Steve Dolley, Jr., for defendant appellant.

ERWIN, Judge.

Defendant contends that the trial court erred in allowing into evidence testimony of the breathalyzer operator when the proper foundation had not been laid by showing what permit he held and who issued it.

G.S. 20-139.1(b) reads:

> "Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the Commission for Health Services and by *an individual possessing a valid permit issued by the Department of Human Resources* for this purpose. The Department of Human Resources is authorized to approve satisfactory techniques or

methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and the Department of Human Resources may issue permits which shall be subject to termination or revocation at the discretion of the Department of Human Resources; provided, that in no case shall the arresting officer or officers administer said test." (Emphasis added.)

The evidence of the State tended to show that on 25 September 1977 at about 12:10 a.m. the defendant was observed operating his Thunderbird at a high rate of speed while traveling north on U.S. 321, leaving the State of South Carolina and entering Gaston County, North Carolina. The defendant was stopped by James Carter of the South Carolina Highway Patrol, who testified that defendant's vehicle was going from the left lane to the right lane in an erratic fashion. A North Carolina highway patrolman was dispatched to the site where the defendant was waiting with the South Carolina patrolman. Defendant was placed under arrest and taken to the Gaston County Courthouse. Sergeant Brison of the North Carolina Highway Patrol administered the breathalyzer test which showed a reading of 0.17%. Sergeant Brison testified, "I possess a valid permit to administer the breathalyzer test in North Carolina and have a permit with me in Court. I have a copy of the permit with me, a duplicate copy. It is State's Exhibit Number Four."

We have carefully examined the record before us, and we cannot find that State's Exhibit No. 4 was introduced into evidence. We do not find any evidence to show who issued the permit to Sergeant Brison to administer the breathalyzer test. In view of this, we must find error and grant defendant a new trial.

The mandate of the statute can be met in one of three ways: (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence and in the event of conviction from which an appeal is taken, by bringing forward the exhibit as a part of the record on appeal; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources. *See State v. Eubanks*, 283 N.C.

556, 196 S.E. 2d 706 (1973), *rehearing denied*, 285 N.C. 597 (1973). In the case before us, none of the three is shown.

The other assignments of error of the defendant have been considered and are overruled.

The defendant is awarded a new trial.

New trial.

Judges PARKER and CLARK concur.

ROBERT L. AGALIOTIS v. LOUIS AGALIOTIS AND FRANCES SCATES

No. 7712DC925

(Filed 5 September 1978)

Uniform Commercial Code § 33— check payable to wrong person—payee's name signed by another—no wrongful conversion

In an action for the wrongful conversion of the proceeds of a check, the trial court erred in granting plaintiff's motion for summary judgment where the uncontradicted evidence tended to show that defendant was entitled to receive the proceeds of an insurance policy in which plaintiff was named as insured and defendant was named as payor; the insurance company intended to deliver the check to defendant and did so; only by administrative error was the check made payable to plaintiff rather than to defendant; and defendant endorsed the check by signing plaintiff's name, as he was permitted to do under G.S. 25-3-203.

APPEAL by defendant Louis Agaliotis from *Brewer, Judge*. Judgment entered 19 August 1977 in District Court, CUMBERLAND County. Heard in the Court of Appeals 22 August 1978.

Plaintiff alleged in his complaint that the defendant Louis Agaliotis, father of plaintiff, wrongfully converted the proceeds of a check in the amount of $1,852. Plaintiff's name, Robert L. Agaliotis, appeared on the check as payee. Defendant Agaliotis answered, denying that he had converted the funds and claiming that the check was intended for him. Both plaintiff and defendant Agaliotis moved for summary judgment, and the trial court granted the plaintiff's motion. Defendant appeals.

Downing, David, Vallery & Maxwell, by Edward J. David, for plaintiff appellee.

Barrington, Jones & Witcover, by Henry W. Witcover, for defendant appellant Louis Agaliotis.

ERWIN, Judge.

Defendant contends that the trial court erred in concluding as a matter of law that he "willfully and wrongfully endorsed the check signing the name: 'Robert L. Agaliotis,' " that plaintiff was entitled to the proceeds thereof, and that defendant had converted such proceeds. We find merit in defendant's arguments and hold that the trial court erred in granting plaintiff's motion for summary judgment.

The trial court made the following findings of fact:

"I. That a contract of insurance was entered into between Louis Agaliotis and Occidental Life Insurance Company of North Carolina set forth in insurance policy No. 260 664 in which the said Louis Agaliotis was named as payor and the plaintiff, Robert L. Agaliotis, was named as the insured. The policy further provides that all transactions affecting the policy prior to the insured's reaching the age of twenty-one (21) shall be between the company and said payor.

II. That pursuant to a paid-up provision in the contract Louis Agaliotis as payor, as provided in said policy of insurance, requested the proceeds of the policy and a check in the amount of $1852.00 was issued by the said Occidental Life Insurance Company of North Carolina and delivered to Louis Agaliotis.

III. Through administrative error by Occidental Life Insurance Company, the check was issued with the name of Robert L. Agaliotis as payee. The intent of the said company being to issue and deliver the check and pay the proceeds of the said insurance policy to Louis Agaliotis as payor.

IV. That the said check was cashed by Louis Agaliotis endorsing on the said instrument the name Robert L. Agaliotis and that the said Louis Agaliotis received the proceeds of the check."

The findings of fact show, and it was not contradicted, that defendant was entitled to receive the proceeds of the insurance policy in question, that the insurance company intended to deliver the check to defendant and did so, and that only by administrative error was the check made payable to "Robert L. Agaliotis."

Thus, it appears to us that plaintiff's position is that defendant should be liable to him merely because of the administrative error and defendant's having indorsed the check "Robert L. Agaliotis." G.S. 25-3-203, "Wrong or misspelled name," provides in pertinent part:

> "Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both . . ."

Plaintiff must show some basis, other than a mere misnomer, to recover of defendant; he has not done so. In fact, the trial court concluded that plaintiff was not entitled to the proceeds of the policy and yet granted summary judgment for plaintiff. In reality, defendant, not plaintiff, was the payee, and defendant did no more than indorse the check in a manner permitted under the Uniform Commercial Code.

Summary judgment under Rule 56 may be entered only where there is no genuine issue as to any material fact, and clearly if findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975). Here, however, we feel that the trial court was merely summarizing the material facts that were not at issue.

Defendant further argues that the trial court erred in failing to grant his motion for summary judgment. We agree. Defendant filed his motion, which was supported by affidavits. Under Rule 56(e) it became incumbent upon plaintiff to show that there is a genuine issue for trial; he may not rely upon the mere allegations of his pleadings. If he does not do so, summary judgment, if appropriate, shall be entered against him. Defendant successfully carried his burden of showing that no genuine issue of material fact existed. Plaintiff failed to counter such showing.

It follows that the trial court erred in granting plaintiff's motion for summary judgment in the amount of $1,852 and in failing to grant defendant's motion for summary judgment as to the claims in plaintiff's complaint. The undisputed facts presented a question of law for the court, and it should have entered summary judgment for defendant. *See Mattox v. State*, 280 N.C. 471, 186 S.E. 2d 378 (1972). The judgment appealed from is reversed, and the case is remanded with instructions that summary judgment be entered in favor of defendant in accordance with this opinion.

Reversed and remanded.

Judges PARKER and CLARK concur.

CHARLES CLODFELTER EMPLOYEE-PLAINTIFF v. UNITED FURNITURE COMPANY EMPLOYER; AMERICAN MUTUAL LIABILITY INS. CO., CARRIER, DEFENDANTS

No. 7710IC954

(Filed 5 September 1978)

Master and Servant § 91 — workmen's compensation — claim not filed in time — absence of estoppel

The Industrial Commission's determination that there was insufficient evidence of estoppel to give the Commission jurisdiction over a workmen's compensation claim filed by plaintiff more than two years after he reached the age of 18 was supported by the evidence where plaintiff testified that he did not file the claim earlier because he had been told by his foreman and the employer's personnel manager that he was not entitled to any benefits, and the foreman and personnel manager testified that they could not recall giving such advice, since the Commission was the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission resolved the conflict in the evidence against plaintiff.

APPEAL by plaintiff from the decision of the North Carolina Industrial Commission filed 12 August 1977. Heard in the Court of Appeals 25 August 1978.

Plaintiff instituted this workmen's compensation proceeding on 11 August 1975 to recover for injuries received on 31 July 1969. Plaintiff's evidence tended to show that he was 16 years old

and working for defendant Furniture Company during the summer of 1969, that his right forearm was injured when two fluorescent lights exploded, that he notified his foreman Jerry Lanier immediately and was taken to a hospital where he stayed for three days, that his doctor and his hospital bills were paid for him, that he asked foreman Lanier and personnel manager Alton Myers about further benefits after he was discharged from the hospital, that both told him that he was not entitled to any benefits since he resigned from the job after the accident and since he had only been summer help, that he did not file a workmen's compensation claim until August 1975 because of what these two men had told him, and that he still suffers scarring and numbness and weakness in his right forearm. The hearing commissioner entered an order in which he found as facts that plaintiff filed for workmen's compensation benefits over two years after he reached the age of 18, that plaintiff alleged that he delayed because he had been informed that he was not entitled to benefits, that the foreman and personnel manager could not recall giving such advice and that "there is insufficient evidence of estoppel in this case to confer jurisdiction on the Commission." The commissioner therefore dismissed the proceeding for lack of jurisdiction. The Full Commission affirmed this order. From this determination, plaintiff appealed.

Gerrans & Spence, by C. E. Gerrans, for the plaintiff.

Teague, Johnson, Patterson, Dilthey & Clay, by George W. Dennis III, for the defendants.

MARTIN (Robert M.), Judge.

The question for decision is whether there was sufficient evidence of estoppel to give the North Carolina Industrial Commission jurisdiction when no claim was filed by the plaintiff within the time allowed by G.S. 97-24(a). We answer the question in the negative. G.S. 97-24(a) provides:

> "The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter."

Plaintiff contends the employer should be estopped from asserting the lateness of a claim if the employer discouraged the filing through misrepresentation, deception or assurances. He argues that his evidence should invoke the doctrine of estoppel for that defendants' employees could not recall what they might have said at the time of the accident.

The general rule in this State is stated in *Hart v. Motors*, 244 N.C. 84, 88, 92 S.E. 2d 673, 676 (1956):

> "The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel. (Citations omitted.)" See *Barham v. Hosiery Co.*, 15 N.C. App. 519, 190 S.E. 2d 306 (1972).

There is a direct contradiction between the testimony presented by the plaintiff and that offered by the defendants. A resolution of this conflict necessarily requires passage on the credibility of the witnesses involved. In finding as a fact and concluding as a matter of law that there is insufficient evidence of estoppel to confer jurisdiction on the Commission, both Deputy Commissioner Delbridge and the Full Commission have resolved this credibility question contrary to the plaintiff. This being so, this finding of fact and conclusion of law is binding on appeal, as the Commission is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. *Anderson v. Motor Company*, 233 N.C. 372, 64 S.E. 2d 265 (1951); *Henry v. Leather Company*, 231 N.C. 477, 57 S.E. 2d 760 (1950).

Inasmuch as the findings of fact are supported by legal evidence, the opinion and award of the Full Commission cannot be disturbed.

For the reasons given, the decision of the Commission is

Affirmed.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. WAYNE HAYWOOD BROOKS

No. 7829SC296

(Filed 5 September 1978)

1. **Criminal Law § 106.5— uncorroborated testimony of accomplice—sufficiency of evidence**

It was not error for the trial court to permit defendant's conviction based solely upon the uncorroborated testimony of an accomplice.

2. **Constitutional Law § 48— effective assistance of counsel not denied**

Defendant's contention that he was denied adequate assistance of counsel in the preparation of his defense and at trial is without merit, since nothing in the record tended in any way to indicate incompetence of counsel or that the trial was a farce or mockery of justice.

APPEAL by defendant from *Ervin, Judge*. Judgment entered 2 November 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 16 August 1978.

The defendant was indicted for felonious breaking or entering and felonious larceny and entered pleas of not guilty. The jury returned verdicts of guilty as charged on both bills. From judgment sentencing him to consecutive terms of imprisonment of ten years and six to ten years respectively, the defendant appealed.

The State offered evidence at trial tending to show that the defendant and an accomplice broke into Medical Arts Pharmacy, Inc., in Forest City, North Carolina, on 31 January 1977. At that time they took and carried away from the pharmacy quantities of various types of prescription drugs and other property. The only evidence offered by the State tending to show the defendant participated in the crimes charged was in the form of testimony by the defendant's alleged accomplice.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

J. H. Burwell, Jr., for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the trial court's denial of his motion to dismiss at the close of the State's evidence. In support

of this assignment, the defendant contends that it was error for the trial court to permit his conviction based solely upon the uncorroborated testimony of an accomplice. We do not agree.

At common law it is well settled that the testimony of an accomplice, although entirely without corroboration, will support a conviction of one accused of a crime. *Caminetti v. United States*, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917); 30 Am. Jur. 2d, Evidence, § 1151, p. 327. In this jurisdiction the common law rule to this effect has been adopted and is to be applied by the trial courts. *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961) (*obiter dictum*); *State v. Shaft*, 166 N.C. 407, 81 S.E. 932 (1914) (same); *State v. Haney*, 19 N.C. 390, 397-99 (1837). This assignment is, therefore, without merit and overruled.

[2] The defendant acting pro se has prepared five assignments of error and supporting arguments which his counsel has included in his brief. Among these, the defendant contends that he was denied adequate assistance of counsel in the preparation of his defense and at trial. Usually this issue arises during post conviction proceedings. It may however be considered on direct appeal, and for purposes of judicial efficiency we consider it here. The alleged incompetency of counsel for a defendant does not constitute a denial of constitutional right unless the defendant's representation by counsel is so lacking as to make the trial a farce and a mockery of justice. *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). Here, the State presented evidence through an accomplice that the defendant committed the acts alleged in the indictments. The defendant testified to the contrary. The jury apparently believed the State's evidence, and nothing in the record tends in any way to indicate incompetence of counsel or that the trial was a farce or mockery of justice. This assignment of error is without merit and is overruled.

We have also reviewed the other assignments of error presented by the defendant pro se and find them to be unsupported by the record on appeal and without merit. The defendant received a fair trial free from prejudicial error and we find

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

RALPH D. BALLENGER v. LESTER A. CROWELL, JR.

No. 7727SC825

(Filed 19 September 1978)

1. **Physicians, Surgeons and Allied Professions § 14— malpractice—necessary proof**

In malpractice cases, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused plaintiff's injury.

2. **Physicians, Surgeons and Allied Professions § 17— malpractice action—continued prescribing of addictive narcotic drugs**

In a malpractice action based on alleged negligence of defendant physician in causing and increasing plaintiff's addiction to narcotic drugs, the materials presented on motion for summary judgment raised genuine issues of material fact as to whether standard medical practice no longer regarded drug addiction as necessary in the treatment of plaintiff's disease and whether defendant knew or should have known that narcotics were not necessary to control plaintiff's pain.

3. **Physicians, Surgeons and Allied Professions § 17— malpractice action—addiction to prescribed drugs—contributory negligence—reliance on physician**

In a malpractice action based on alleged negligence of defendant physician in causing and increasing plaintiff's addiction to narcotic drugs, summary judgment was not properly entered for defendant on the ground that plaintiff was contributorily negligent as a matter of law in knowingly continuing his addiction to the drugs where plaintiff presented evidence that he relied upon defendant's advice that it would be necessary for him to continue taking the drugs for the rest of his life.

4. **Physicians, Surgeons and Allied Professions § 13— malpractice action—continued negligent treatment—statute of limitations**

The statute of limitations for "latent injury" cases, G.S. 1-15(b), did not apply to a malpractice action involving a course of continued negligent treatment. Nor did the statute of limitations for malpractice cases provided by G.S. 1-15(c) apply to such action where the action was pending when the statute was passed.

5. **Physicians, Surgeons and Allied Professions § 13— malpractice action—statute of limitations—continued course of treatment**

The continued course of treatment exception to the common law rule that an action accrues at the time of defendant's negligence applied in a malpractice action based on alleged negligence of defendant physician in continuing to prescribe addictive narcotic drugs for the plaintiff during the years 1962 to 1974. Therefore, plaintiff's cause of action accrued at the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which plaintiff knew or should have known that the narcotic drugs were unnecessary to the treatment of his disease.

6. Physicians, Surgeons and Allied Professions § 13— malpractice—continued prescribing of addictive drugs—accrual of cause of action—knowledge drugs unnecessary

In a malpractice action based on the alleged negligence of defendant physician in continuing to prescribe addictive narcotic drugs for plaintiff for twelve years, the evidence on motion for summary judgment presented a genuine issue of material fact as to when plaintiff knew or should have known that the narcotic drugs were not necessary to the treatment of his disease.

APPEAL by plaintiff from *Thornburg, Judge*. Judgment entered 27 May 1977, in Superior Court, LINCOLN County. Heard in the Court of Appeals 28 June 1978.

Plaintiff instituted a malpractice action in 1976 to recover damages from defendant-doctor alleging that he "negligently, improperly, intentionally, and in complete disregard for plaintiff's mental and physical well-being" caused plaintiff's addiction to narcotic drugs, and that he continued to maintain and increase his addiction for 12 years, from 1962 until 1974. Plaintiff was suffering from a chronic debilitative neurological disorder known as "Charcot-Marie-Tooth disease," and this disease was diagnosed by defendant in 1960. From 1960 until 1962, defendant treated plaintiff's pain with the addictive narcotic pantopon and, thereafter, prescribed or gave to plaintiff morphine sulphate and other addictive drugs. Plaintiff became addicted in 1962. Plaintiff continued under defendant's care and alleged that, by 1974, defendant was prescribing and he was ingesting approximately thirty-five one-half grain morphine sulphate tablets as well as twenty-five other prescription drug tablets and capsules each day to sustain his addiction. Plaintiff entered Appalachian Hall Hospital voluntarily in the fall of 1974 for treatment of his drug addiction and related physical and mental problems, leaving defendant's care before so doing.

Defendant in his answer pled the following defenses: that plaintiff had not stated a cause of action upon which relief could be granted pursuant to G.S. 1A-1, Rule 12(b)(6), that defendant was not negligent, that plaintiff was contributorily negligent, and that plaintiff's cause of action was barred by the statute of limitations. Defendant moved for summary judgment pursuant to G.S. 1A-1, Rule 56, on all the grounds pled in his answer.

At hearing on defendant's motion for summary judgment, depositions were presented which tended to show that plaintiff

knew he had become addicted to his pain medication in 1962, but believed it necessary to alleviate his pain. In 1967 or 1968, he voluntarily entered the Federal Narcotics Addiction Hospital in Lexington, Kentucky. At that time he was told that it would be dangerous to take him off the drugs. The defendant told him not to worry about the drugs and told him that he "would just always have to take them." Later, however, defendant recommended that the plaintiff enter a hospital to help him get off the drugs, but the defendant refused to assist the plaintiff in obtaining hospitalization. The defendant had slipped prescriptions for the drugs to the plaintiff at home and in the hospital. Defendant refused to file with Medicare, and failed to keep accurate records of the prescriptions. Defendant's nurses were not aware that he was prescribing the medication for plaintiff. Plaintiff stated in his deposition that the standard treatment for plaintiff's disease was surgery for a deformed joint, and although defendant had examined his feet regularly in the early years, in the last several years all he did was write prescriptions. In 1974, plaintiff consulted other physicians and entered Appalachian Hall. At that time he learned that he did not need narcotics for pain and successfully withdrew from the medication. Plaintiff, in his deposition, stated: "I have not taken any pain medication since the medication I received in Appalachian Hall [non-narcotic empirin]. I relied upon Dr. Crowell about the medication he prescribed for me—I thought he was the doctor and for a long time I thought he should know more about it than I did."

The deposition of plaintiff's wife tended to show that defendant told her that her husband needed the drugs he was addicted to, and that breaking the addiction was just too risky. A deposition of Dr. Griffin, plaintiff's present doctor, tended to show that plaintiff was heavily addicted when he saw plaintiff in 1974 in Appalachian Hall. The doctor learned either from plaintiff or his wife that plaintiff had been told by the doctor at Lexington that there was no need to withdraw from the drugs because he would have to go back on them for pain. Dr. Griffin testified that he had never heard of anyone breaking such a heavy addiction himself, and that Charcot-Marie-Tooth disease is a rare, progressive, neurological illness which is not always continuously painful and that treatment must be symptomatic. Although the illness itself could not be treated, the pain should be carefully controlled.

Plaintiff, once he withdrew from drugs, suffered only such pain as could easily be controlled by empirin, and treatment with narcotics was not necessary. Dr. Griffin testified that, while morphine in such doses as plaintiff was receiving might be appropriate in terminal cases, the dosage was not normal. He would not say that the dosage was in violation of approved medical standards. He did state that it was standard that, at some point, a doctor should intervene and either switch medication or break the addiction.

Defendant produced material which tended to show that the narcotics were necessarily prescribed to reduce plaintiff's pain and were necessarily increased. He advised breaking the addiction and tried to reduce dosage without success. He denied that he had not been filing for Medicare but admitted that the office records on plaintiff's morphine prescriptions were incomplete. He testified that he recommended that plaintiff institutionalize himself at least 10 to 12 times but that he, as treating physician, never made any effort to contact any institution.

The trial court found that there was no issue as to any material fact necessary to support a judgment and granted defendant's motion for summary judgment. From this order, plaintiff appeals.

Bailey, Brackett & Brackett by Kermit D. McGinnis for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by John G. Golding and C. Bryon Holden for defendant appellee.

CLARK, Judge.

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31 (1977). All evidence before the court must be construed in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied* 279 N.C. 619, 184 S.E. 2d 883 (1971). It is only in the exceptional negligence case that the rule should be invoked. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147, *cert. denied* 279 N.C. 395, 183 S.E. 2d 243 (1971).

In the case *sub judice*, the court did not specify the grounds upon which the defendant's motion for summary judgment was granted. Therefore, every possible basis for the court's ruling must be examined in order to determine whether the motion was properly granted. We find that there are three potential grounds upon which the court's ruling could be supported, any one of which would entitle the defendant to summary judgment. First, that there was no issue of fact as to the negligence of the defendant; second, that there was no issue of fact as to the contributory negligence of the plaintiff; and third, that the statute of limitations barred plaintiff's action as a matter of law. We will consider these grounds in that order.

[1, 2] The court's grant of summary judgment could be upheld if it were clear as a matter of law that defendant was not negligent in continuing and increasing plaintiff's addiction. Negligence is, as noted earlier, rarely an issue appropriate for disposition by summary judgment. Where diverse inferences can be drawn the question of negligence is for the trier of fact. *Olan Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735 (1968). In malpractice cases, plaintiff's burden of proof at trial is heavy. He must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury. See 10 Strong's N.C. Index 3d, Physicians and Surgeons, § 15, *et seq.* In the case *sub judice*, Dr. Griffin did not state that defendant's treatment violated standard medical practice. But he did state that it was not normal and was not recommended. There was some evidence presented which tended to show that standard medical practice no longer considered addiction necessary and that defendant should have known more care was required than the mere writing of ever-increasing prescriptions. Although not a drug addiction case, *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E. 2d 108 (1967), stated that a doctor could be held negligent for prescribing a dangerous drug as a remedy for ailments for which it was neither necessary nor suited if he violated accepted standards and knew actually or constructively that he was violating them. There was sufficient evidence presented at the hearing to raise the material issues of fact of whether standard practice no longer regarded addiction as necessary in the treatment of plaintiff's

disease, and whether defendant knew or should have known that narcotics were not necessary to control plaintiff's pain to overcome a motion for summary judgment on the grounds of no negligence as a matter of law.

[3] Like negligence, contributory negligence is rarely appropriate for summary judgment. There are no malpractice cases in North Carolina dealing with the issue of whether drug addiction is actionable when it is shown to be unnecessary even though the addiction was accepted by the patient. But several cases outside our jurisdiction have made it quite clear that a patient is to be permitted to rely on his doctor without becoming a culpable partner of what turns out to be his doctor's negligence. The fact that the patient becomes addicted, continues in the doctor's care and knowingly continues his addiction will not make him contributorily negligent unless he himself is doing something wrong or unless he knows his doctor is negligent. In the case *sub judice*, plaintiff believed that he had to be addicted for the rest of his life because defendant had told him so. That, once he became an addict, he began to behave like one, and wheedled prescriptions, is not surprising and does not make him contributorily negligent. In a Massachusetts case, *King v. Solomon*, 323 Mass. 326, 81 N.E. 2d 838 (1948), a physician addicted his patient to morphine in the absence of a diagnosis that her painful condition could not be cured. Plaintiff-patient actively sought the drug. The court ruled that the fact that plaintiff knew she was addicted and actively sought the narcotic did not make her contributorily negligent. In a New Mexico case, *Los Alamos Medical Center, Inc. v. Coe*, 58 N.M. 686, 275 P. 2d 175 (1954), the plaintiff became addicted to drugs as a result of her doctor's negligence. The plaintiff had continuing confidence in her doctor, and was assured by her doctor that there was no cause for alarm. Plaintiff, in that case, often begged for the drugs. The court found that she had the right to rely on her doctor and was not contributorily negligent. Defendant's attempts to distinguish these cases from the case *sub judice* are unsuccessful and point clearly to disputed issues of fact, such as whether plaintiff refused to go to the hospital when requested by defendant, and whether defendant's threats of refusing drugs were effectual and sufficient to render plaintiff contributorily negligent in continuing his addiction. Again we must reiterate that summary judgment must never be granted when there are

any disputed issues of material fact. Plaintiff could not possibly be found guilty of contributory negligence as a matter of law.

The court's grant of summary judgment could also be upheld if plaintiff's action was barred by the three-year statute of limitations governing medical malpractice actions. G.S. 1-52. Plaintiff contends that the action accrued at the termination of the physician-patient relationship in 1974. Defendant contends that the plaintiff's cause of action accrued at the time the plaintiff first became addicted to drugs.

The time at which an action for malpractice accrues is currently governed by G.S. 1-15(b)-(c). Subsection (b) governs those malpractice cases in which the "injury, defect or damage [is] not readily apparent to the claimant at the time of its origin. . . ." This subsection, which governs "latent injury" type cases, provides that the action accrues at the time the injury is discovered, provided that, the action must be brought within 10 years of the last act of the defendant. This amendment to G.S. 1-15 was effective 22 July 1971.

Subsection (c), effective 1 January 1977, provides that:

> "[A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever . . . the injury, loss, defect or damage [is] not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made. . . ."

[4] These amendments do not apply retroactively to revive actions already barred at common law, nor do they affect pending litigation. They do, however, apply to those cases which have not yet accrued, or accrued within three years immediately preceding the effective date of the amendments. *Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co.*, 18 N.C. App. 689, 198 S.E. 2d 88 (1973). *See Shuler v. Dyeing Machine Co.*, 30 N.C. App. 577, 227 S.E. 2d

634, *cert. denied* 291 N.C. 177, 229 S.E. 2d 690 (1976). In the case *sub judice*, the prescription of narcotic drugs spanned the years from 1960 to 1974. The case, however, was pending at the time subsection (c) was enacted and so that section cannot apply. *See Nationwide Mut. Ins. Co., supra.* Nor does subsection (b) apply, since that section is applicable to the "latent injury" type case, and not those cases such as the one now before us which involves a course of continued negligent treatment. Therefore, the determination of this case will be controlled by case law.

The landmark North Carolina case, decided prior to the adoption of G.S. 1-15 which determines when the statute of limitations for a malpractice action commences, is *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). In *Shearin*, the plaintiff's appendix was removed by the defendant on 20 July 1951. After the operation, plaintiff returned to the defendant's care for a six- and twelve-month checkup. On 15 November 1952, the plaintiff complained to the defendant of severe abdominal pain. At defendant's request, X rays were taken. On 18 November 1952, the defendant notified the plaintiff that a lap-pack had been left in plaintiff's abdomen during the operation in 1951. The next day, the defendant operated on the plaintiff and removed the lap-pack. Plaintiff filed an action for malpractice on 14 November 1955. The defendant pled the statute of limitations as a bar. Plaintiff contended that the action accrued on 15 November 1952 when the plaintiff discovered the existence of the lap-pack. The court in *Shearin* specifically rejected the time of plaintiff's discovery of the injury as the time at which the action accrued, and held that the action was barred. The court discussed the "continued course of treatment" rule adopted in many states, but stated that there was no allegation in the complaint that the defendant was negligent in failing to discover the lap-pack. The court also noted that the treatment for the appendicitis ended at the twelve-month checkup, which was more than three years before suit was filed. Therefore, even under the continued course of treatment rule, the action was barred. The applicability of the continued course of treatment exception to the time of accrual was, therefore, not squarely before the court in *Shearin*.

In the case *sub judice*, however, the plaintiff alleged that the defendant was negligent in continuing to prescribe narcotic drugs for the plaintiff during the years 1962 to 1974. This case directly

presents the question of whether or not North Carolina recognized the continued course of treatment rule at common law, and, therefore, this is a case of first impression.

Both the discovery rule and the continued course of treatment rule are exceptions to the harsh common law rule which provides that the action accrues at the time of the defendant's negligence. Each rule, however, is designed to apply to a distinct factual pattern. *See, Ehlen v. Burrows*, 51 Cal. App. 2d 141, 124 P. 2d 82 (1942); *Billings v. Sisters of Mercy*, 86 Idaho 485, 389 P. 2d 224 (1964); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A. 2d 825 (1965); *Jones v. Sugar*, 18 Md. App. 99, 305 A. 2d 219 (1973); *Murray v. Fox*, 300 Minn. 373, 220 N.W. 2d 356 (1974). The discovery rule applies to the "latent injury" cases in which the doctor negligently harms the patient, but the patient is unaware of the injury. It usually involves one distinct act of negligence. *See, Tortorello v. Reinfeld*, 6 N.J. 58, 77 A. 2d 240 (1950); *Woodgeard v. Miami Valley Hospital Society*, 47 Ohio Misc. 43, 72 Ohio Ops. 2d 387, 354 N.E. 2d 720 (1975); 61 Am. Jur. 2d Physicians, Surgeons and Other Healers, § 183. The continued course of treatment rule, however, applies to situations in which the doctor continues a particular course of treatment over a period of time. The theory is that "so long as the relationship of surgeon and patient continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done and, therefore, the cause of action against him arose at the conclusion of his contractual relationship." *DeLong v. Campbell*, 157 Ohio St. 22, 25, 47 Ohio Ops. 27, 104 N.E. 2d 177, 178 (1952). 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers, § 185. *Shearin* clearly falls within the former factual pattern. Here, however, the plaintiff alleged that the defendant's negligent acts continued until 1974. "[W]here the injurious consequences arise from a continuing course of *negligent* treatment . . . the statute does not ordinarily begin to run until the injurious treatment is terminated. . . . The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician or surgeon in continuing and repeating the *wrongful* treatment." 6 N.J. at 66, 77 A. 2d at 244.

The rejection of the discovery rule exception to the time of accrual of a cause of action in malpractice does not require the rejection of the continuing course of treatment exception. Several states have rejected the discovery rule but have judicially adopt-

ed the continued course of treatment exception. *See* generally *Budoff v. Kessler*, 284 App. Div. 1049, 135 N.Y.S. 2d 717 (1954); *DeLong v. Campbell, supra*, later modified by *Melnyk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 61 Ohio Ops. 2d 430, 290 N.E. 2d 916 (1972); *Peteler v. Robinson*, 81 Utah 535, 17 P. 2d 244 (1932). Compare *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 and 49 Ga. App. 758, 176 S.E. 829 (1934) with *Parker v. Vaughan*, 124 Ga. App. 300, 183 S.E. 2d 605 (1971); compare, *Tortorello, supra*, and *Fernandi v. Strully*, 35 N.J. 434, 173 A. 2d 277 (1961), with *Weinstein v. Blanchard*, 109 N.J.L. 332, 162 A. 601 (1932); and compare *Hotelling v. Walther*, 169 Or. 559, 130 P. 2d 944 (1942) with *Wilder v. Haworth*, 187 Or. 688, 213 P. 2d 797 (1950) overruled, *Frohs v. Greene*, 253 Or. 1, 452 P. 2d 564 (1969). Therefore, the holding by the North Carolina Supreme Court in *Shearin* does not preclude the adoption of the continued course of treatment rule at this time.

Statutes of limitation are designed to prevent stale claims and to protect potential defendants from protracted fear of litigation. 51 Am. Jur. 2d Limitation of Actions §§ 17-18. The "discovery" rule, if judicially adopted, would permit suit to be brought many years after the act of negligence which caused the injury. This exception runs afoul of both policies for placing time limits on bringing actions. (It should be noted that the legislature, in adopting the "discovery" rule in 1971 placed a 10-year limitation on such claims.) The continued course of treatment rule, however, offends neither of these purposes, since suit must be brought within three years after the termination of the continued negligent treatment by the physician. Consequently, the facts and circumstances surrounding the treatment are still relatively fresh, and the physician can be sure that after three years from severing a relationship with a patient, the patient is barred from bringing suit for such treatment.

[5] We therefore hold that the continued course of treatment rule is applicable to this case, and therefore the cause of action did not automatically accrue in 1962 as asserted by the defendant.

The continued course of treatment exception is a limited one. Several courts have held that the statute begins to run at the time the patient knew or should have known of his injury, even if this occurs prior to the severance of the doctor-patient relation-

ship. *See, Ehlen v. Burrows, supra, Hundley v. St. Francis Hospital*, 161 Cal. App. 2d 800, 327 P. 2d 131 (1958); *Jones v. Sugar, supra; Waldman v. Rohrbaugh, supra; McFarland v. Connally* (Tex. Civ. App.), 252 S.W. 2d 486 (1952). We hold that the cause of action accrued at the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury.

The facts in this case clearly show that the plaintiff had knowledge of his addiction in 1962. However, "the limitation period starts to run when the patient discovers . . . the negligent act which caused his injury. . . ." *Jones v. Sugar*, 18 Md. App. at 105, 305 A. 2d at 223. "[T]he injury may be readily apparent but the fact of *wrong* may lay hidden until after the prescribed time has passed." (Emphasis added.) *Jones, supra*, 18 Md. App. at 105, n. 3, 305 A. 2d at 223, n. 3. *See, Lopez v. Swyer*, 62 N.J. 267, 274, 300 A. 2d 563, 567 (1973). In *Hundley, supra*, the plaintiff underwent abdominal surgery and during the operation her ovaries were removed without her prior consent. The doctor informed her that the operation was necessary due to ovarian cysts. The patient later discovered that her ovaries had been healthy and the surgery was not necessary. The court held that the action accrued when she discovered that the operation was unnecessary.

[6] Although *Hundley* involved a "latent injury" and the court applied the "discovery" rule in effect in California in determining when the action arose, the same rule is applicable in ascertaining when the plaintiff knew or should have known of his injuries in the case at bar. Here, the plaintiff, although aware of his addiction, contends that he was not aware that the treatment provided by the defendant was not necessary to relieve the pain of Charcot-Marie-Tooth disease. There is conflicting evidence relating to whether the plaintiff knew or should have known that the medication was not necessary prior to the termination of the doctor-patient relationship in 1974. This is a question for the jury to decide.

Since there exists a genuine issue as to material fact as to when the plaintiff knew or should have known that the treatment was not necessary, summary judgment was not appropriate.

For the reasons stated above defendant's motion for summary judgment was improvidently granted.

Reversed and remanded for proceedings consistent with this opinion.

Judges PARKER and ERWIN concur.

L. PHILIP COVINGTON v. MICHAEL R. RHODES AND MARY R. RHODES, INDIVIDUALLY AND AS NEXT FRIENDS OF SHERWIN G. RHODES, A MINOR, DEFENDANTS; AND WAKE COUNTY BOARD OF EDUCATION, RESPONDENT

No. 7710SC973

(Filed 19 September 1978)

1. **Attorneys at Law § 7.1— discharged attorney—reasonable value of services recoverable—no recovery on contingent fee contract**

An attorney discharged with or without cause can recover only the reasonable value of his services as of that date, and an attorney, whose clients have discharged him prior to final disposition of the case, may not recover on a contingent fee contract.

2. **Attorneys at Law § 7.1— charging lien filed by attorney—attorney discharged—no interest in recovery**

In an action by plaintiff attorney to recover on a contingent fee contract whereby plaintiff was to represent defendants in an action against defendant school board arising out of an automobile accident, plaintiff was not entitled to judgment in his favor against the school board by virtue of the charging lien he had filed against any recovery defendants might have from the school board, since, at the time when this purported charging lien would have attached, the time of judgment in favor of defendants against the school board, the judgment was not a fund recovered by plaintiff's aid, as he had been discharged, and plaintiff was therefore entitled to no interest in the fund.

3. **Judgments § 3— judgment entered severally against three defendants—error**

In an action to recover on a contingent fee contract, the trial court erred in entering judgment for plaintiff severally against three defendants who were members of one family and who sought to recover against defendant school board for injuries received in one accident, since plaintiff prepared for one lawsuit for the sake of all three defendants; they approached him jointly to represent them; and defendants' testimony clearly showed that they expected plaintiff would represent them as a group.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 23 August 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 30 August 1978.

Covington v. Rhodes

Plaintiff, an attorney, filed this action to recover on a contingent fee contract. Defendants Michael and Mary Rhodes and their minor child Sherwin originally sought to have plaintiff represent them in an action against the Wake County School Board arising out of an automobile accident between the Rhodes car and a Wake County school bus. The parties entered into an oral contingent fee contract. Some 14 months after plaintiff was hired and began work on the case defendants discharged him. Thereafter, defendants obtained a recovery of $21,950 from the school board, and they were represented by another attorney, Arnold Smith.

In the pretrial order each side stipulated its contentions as to the terms of the oral contract. According to the plaintiff, he was to have received 25% of the recovery if a satisfactory settlement could be negotiated prior to filing; 30% if the case was settled after filing but before going to trial; or 33⅓% of the amount awarded at trial. However, defendants contended that plaintiff was to have received 20%, 25% and 30% respectively. Defendants also claimed, as a defense to the contract action and as a counterclaim which was dismissed prior to trial, that plaintiff was discharged because he failed to represent them adequately.

Prior to trial plaintiff filed a charging lien for his contingent fee against any recovery defendants might have from the School Board. Notice of the lien was given to the Board and the Board was served as a defendant in this action. Plaintiff also moved for summary judgment, which was denied.

At trial defendant Michael Rhodes was allowed to testify, over plaintiff's objections and contrary to defendants' pretrial stipulations, that the fee agreement had been for plaintiff to take only 20% of the recovery.

Upon inquiry by the court, plaintiff testified that he had spent 29½ hours representing defendants before being discharged, and that his hourly charge was $35.00.

The court found that the parties had entered a contract but that the amount of the contingent fee was not established. Although plaintiff had lost some papers and missed or cancelled

meetings, he was found to have performed in a reasonably professional manner. It was further found by the court that Arnold Smith had guaranteed to defendants that he, Smith, would pay any attorney fees, up to $7,316, which defendants might owe plaintiff.

The court concluded that plaintiff was not entitled to the $7,316.66 he sought to recover on the contract, but awarded him $2000 in quantum meruit, in judgments severally against the defendants as follows: against Mary Rhodes, $1500; against Michael Rhodes, $400; against their minor child, $100. The court refused plaintiff's request that it make findings of fact and conclusions of law relative to the liability, if any, of the School Board by virtue of plaintiff's lien.

Plaintiff appeals.

L. Philip Covington for plaintiff appellant.

George R. Barrett for defendant appellees Rhodes.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., for respondent appellees.

ARNOLD, Judge.

I.

[1] The major issue presented by this appeal is whether an attorney may recover on a contingent fee contract when his clients have discharged him prior to final disposition of the case. We find no North Carolina case which decides this point, and there is a split of authority in other jurisdictions. Some courts have held that the attorney is entitled to the contract amount, others that he may recover only the reasonable value of the services which he has performed. 7 Am. Jur. 2d, Attorneys at Law § 256, and cases cited therein; 136 A.L.R. 231; 7 C.J.S., Attorney & Client, §§ 168 & 169a(2).

Plaintiff cites two North Carolina cases to support his position that he should recover the contract amount. In *Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921), the attorney was al-

lowed recovery of the contract amount, and the court indicated that the contingent fee contract constituted an equitable assignment of the judgment. However, in *Casket Co.*, unlike this case, the attorney prosecuted the case to its conclusion. Likewise in *Higgins v. Beaty*, 242 N.C. 479, 88 S.E. 2d 80 (1955), the attorney recovered the contract amount where the contract provided for a fixed amount, not a contingent fee.

Since we find no North Carolina cases which are determinative, we shall briefly examine the law of other jurisdictions. The older rule, and still the rule in some jurisdictions, is that where the attorney is discharged without cause, he may recover the entire contingent fee. *See, e.g., Warner v. Basten*, 118 Ill. App. 2d 419, 255 N.E. 2d 72 (1970); *Thomas v. Mandell & Wright*, 433 S.W. 2d 219 (Tex. App. 1968). Plaintiff cites us to *Chambliss, Bahner & Crawford v. Luther*, 531 S.W. 2d 108 (Tenn. App. 1975), for this proposition, but we note that, while declining to overrule an earlier case that allowed the full contract recovery, the Tennessee court stated: "It would seem to us that the better rule is that because a client has the unqualified right to discharge his attorney, fees in such cases should be limited to the value of the services rendered or the contract price, whichever is less." *Id.* at 113. The rationale in these cases has been that the general law of contract applies, and that when the client breaches by discharging his attorney without cause, the attorney can recover the contract price.

What we perceive to be the modern trend, and, we believe, the better rule, is that an attorney discharged with or without cause can recover only the reasonable value of his services as of that date. A number of well-reasoned opinions have taken this view, beginning as early as 1916 with *Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46. *E.g., Fracasse v. Brent*, 6 Cal. 3d 784, 100 Cal. R. 385, 494 P. 2d 9 (1972); *610 Lincoln Rd., Inc. v. Kelner, P.A.*, 289 So. 2d 12 (Fla. App. 1974); *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958, 234 S.E. 2d 282 (1977). *See also Brookhaven Supply Co., Inc. v. Rary*, 131 Ga. App. 310, 205 S.E. 2d 885 (1974); *Wright v. Fontana*, 290 So. 2d 449 (La. App. 1974); *Dill v. Public Utility District No. 2 of Grant Co.*, 3 Wash. App. 360, 475 P. 2d 309 (1970).

In a recent federal case the attorney, in a situation practically identical to the one before us, was awarded only the reasonable

value of his services. *Potts v. Mitchell*, 410 F. Supp. 1278 (W.D.N.C. 1976). That court, in our view, followed the correct rule, and we further agree that any equitable interest by the plaintiff in the recovery of defendants in the case at bar could not attach "until the case was prosecuted to a favorable judgment or settled *by the contracting attorney.*" *Id.* at 1282 (emphasis added).

It is a settled rule that because of the special relationship of trust and confidence between attorney and client the client may terminate the relationship at any time, with or without cause. 7 C.J.S., Attorney & Client § 109. Plaintiff does not dispute this rule, but argues that a client who discharges his attorney without cause must still pay the contract price. *Fracasse v. Brent, supra*, answers his argument:

> The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered.

Id. at 789, 100 Cal. R. at 388, 494 P. 2d at 12.

The courts which follow the modern trend also base their holdings on the view that a client's discharge of his attorney is not a breach of contract. "Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate the contract at will." *Id.* at 791, 100 Cal. R. at 389, 494 P. 2d at 13. *See also Martin v. Camp, supra.*

The plaintiff argues that such a rule ignores the realities of the contingent fee system and will prevent its use in the future. We believe he is mistaken in more than one respect. First, we reject his assumption that the main purpose of the contingent fee system is to allow lawyers to balance their budgets, with high fees in some cases making up for other cases in which there are no recoveries. In *Casket Co. v. Wheeler, supra*, the North Carolina Supreme Court found contingent fees acceptable and

said: "[O]therwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights." *Id.* at 466, 109 S.E. at 382. And in *610 Lincoln Rd., Inc. v. Kelner, P.A., supra,* the Florida Court noted: "Contingent fee agreements are primarily for the benefit of indigents or those not capable of employing capable counsel . . . ." *Id.* at 15.

Second, we find no merit in plaintiff's suggestion that clients will take advantage of the rule, using the lawyer's services until all the work is done, then discharging him and settling the case themselves. *Fracasse v. Brent* answers this also:

> Nor do we believe that abandonment of the [contract recovery] rule will lead to a wholesale discharging of attorneys by clients motivated solely by a desire to save attorney's fees. To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required . . . to pay the former attorney for the reasonable value of his services. . . . To the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services.

Id. at 791, 100 Cal. R. at 389-90, 494 P. 2d at 13-14 (citations omitted).

A contract for legal services is not like other contracts. The client has the right to discharge his attorney at any time, and it is our view that upon such discharge the attorney is entitled to recover the reasonable value of the services he has already provided. As the New York Court noted in *Martin v. Camp, supra:* "The rule secures to the attorney the right to recover the reasonable value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential." *Id.* at 176, 114 N.E. at 48.

We believe that the learned trial judge has adequately compensated plaintiff for the reasonable value of his services, and we affirm the judgment awarding $2000 in quantum meruit.

II.

We find it unnecessary to discuss plaintiff's argument that the court erred in denying his motion for summary judgment. There were genuine issues of material fact to defeat the motion.

Moreover, while we agree that it was error for the trial court to allow certain testimony which differed from the terms of the contract which defendants had stipulated, it was harmless error. We have found already that the terms of the contract do not determine the measure of damages.

III.

[2] Plaintiff asserts also that, by virtue of the charging lien he filed against any recovery defendants might have from the School Board, he was entitled to a judgment in his favor against the Board. We disagree. Plaintiff cites to us no North Carolina authority on the common law attorney's charging lien, and we have found none. The charging lien is an equitable lien which gives an attorney the right to recover his fees "from a fund recovered by his aid." 7 Am. Jur. 2d, Attorneys at Law § 281. The charging lien attaches not to the cause of action, but to the judgment at the time it is rendered. *Id.* § 296. At the time when this purported charging lien would have attached, the time of judgment in favor of defendants against the School Board, the judgment was not a fund recovered by plaintiff's aid, as he had been discharged. Plaintiff was entitled to no interest in the fund.

IV.

[3] Finally, we agree with plaintiff that the court erred in entering judgment for him severally against the three defendants. "A several judgment is not ordinarily proper against defendants whose liability is on a joint obligation or other joint cause of action. . . ." 49 C.J.S. Judgments § 36b. The plaintiff here prepared for one lawsuit for the sake of all three defendants. They approached him jointly to represent them, with Michael Rhodes the spokesman for the family. The record shows defendants' testimony. Michael Rhodes: "I told him I wanted him to handle the whole thing." Mary Rhodes: "I don't remember too much about the agreement we had with Mr. Covington regarding representing *us* in the case regarding *our* accident. I let Mike and Phil handle all that." (Emphasis added.) Clearly the defendants ex-

pected that plaintiff would represent them as a group, and judgment for his compensation for doing so should have been entered jointly and severally. The judgment is so modified.

We find it unnecessary to reach plaintiff's remaining assignments of error. The judgment as modified is

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. FORREST LEE FATE ALIAS RAYMOND SHARPE

No. 787SC345

(Filed 19 September 1978)

1. **Constitutional Law § 52— speedy trial—no showing that delay was negligent or wilful and prejudicial**

The trial court did not err in denying defendant's motion to dismiss for failure to provide a speedy trial where defendant was picked up in New York on 4 February 1977 and returned to N.C. for trial on 28 September 1977; he was incarcerated for other offenses during the delay; he made no written request for final disposition of the indictment, as required by the Interstate Agreement on Detainers, N.C.G.S. 15A-761, Art. III(a); and there was no showing in the record that, had there been a hearing on the merits of the motion, defendant could have shown wilfulness, neglect or prejudice in the delay.

2. **Criminal Law §§ 66.9, 66.16— pretrial photographic identification—propriety—independent origin of in-court identification**

A pretrial photographic identification procedure which occurred six weeks after the alleged crime was not impermissibly suggestive where the robbery victim was shown ten double photographs, full face and profile, of persons similar to defendant in age, build and features, and the victim chose defendant's photograph from among them; moreover, even if the pretrial photographic identification had been impermissibly suggestive, evidence was sufficient to support a finding that the victim's in-court identification of defendant was of independent origin where it tended to show that the victim observed defendant at the well lighted crime scene for at least a minute; the robber's face was uncovered except for dark glasses; and the victim testified that her identification of defendant was based solely on her observation of him at the crime scene.

3. **Indictment and Warrant § 17.4— robbery—ownership of property taken—no variance between indictment and proof**

There was no fatal variance between an indictment which charged robbery of a motel and evidence which showed robbery of both the motel and an employee of the motel, since an indictment need not specify the person who owned the property taken.

4. **Criminal Law § 87— witness acquainted with juror—no motion to strike testimony—no request for voir dire**

Defendant's contention that it was error to admit the testimony of a rebuttal witness who was acquainted with a juror and whose name had not been given to the defense prior to trial is without merit, since defendant, when he learned of the witness's acquaintance with the juror, neither moved to strike the witness's testimony nor requested a voir dire to determine the relationship between the juror and the witness; moreover, the witness's testimony went only to a peripheral matter and not to the crime with which defendant was charged.

5. **Criminal Law § 113.9— jury instruction on possible verdicts—"not guilty" omitted—error corrected**

Defendant was not prejudiced where the trial court failed to include "not guilty" in his statement of the possible verdicts, since the judge immediately corrected himself when his error was pointed out and then stated correctly the two possible verdicts of guilty and not guilty.

6. **Criminal Law § 126— polling jury—failure of juror to answer questions—no inquiry required**

Where a juror answered only two of the four questions put to him during polling of the jury, the trial court did not err in failing to inquire into the juror's failure to answer those questions, since defendant did not ask the judge to inquire further at the time and the juror did answer twice that the guilty verdict was his verdict.

APPEAL by defendant from *James, Judge.* Judgment entered 29 November 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 23 August 1978.

Defendant was indicted and tried for armed robbery. Prior to trial defendant asked that the charges against him be dismissed because he had been denied a speedy trial. The judge denied the motion.

The State presented evidence that at about 10:45 p.m. on 4 January 1977, Esther Vinson, the clerk at the Wilson Holiday Inn, was robbed by a very young black man wearing dark glasses and a toboggan. The robber pointed a gun at Ms. Vinson and took from her about $300 of the motel's money and $30 of her own

money. Esther Vinson testified that she saw the robber face to face in the bright light of the motel lobby for at least a full minute. She said that she had been robbed before, and was not upset or frightened during the robbery.

When the police officers came to investigate, Esther Vinson told them that the robber was very young and short, a slightly-built black man wearing a toboggan and dark glasses. She did not describe his facial features to them, but she testified that she had noticed his large nose and mouth.

On 13 February 1977, Detective Moore of the Wilson Police Department visited Esther Vinson at her home. He gave her a group of ten double photographs, full face and profile, and asked her whether there was a photograph in the group of the man who had robbed her. Detective Moore testified that Forrest Fate was a suspect at the time, and the photographs had been selected to be similar to Fate's in age, build, features, etc. Esther Vinson testified that she studied the photographs for several minutes and went over them two or three times before picking out the photograph of the defendant.

Ms. Vinson identified the defendant at trial as the man who had robbed her. She testified on *voir dire* that her in-court identification was based on her observations during the hold-up and nothing else.

The defendant testified that he did not go to the Holiday Inn at all on 4 January, and that he had never worn a toboggan or dark glasses. He was at his aunt's house with his family when the robbery occurred. Fate's cousin testified that she had been with him in his aunt's house at that time.

The State presented a rebuttal witness to impeach defendant's credibility. Defendant objected to this witness when he was called since his name had not been furnished prior to trial as a potential witness.

Defendant was convicted of armed robbery and sentenced to 16 to 20 years. From that conviction defendant appeals.

Attorney General Edmisten, by John R. B. Matthis, Special Deputy Attorney General, and Alan S. Hirsch, Assistant Attorney General, for the State.

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

ARNOLD, Judge.

I.

[1] The defendant first assigns as error the denial of his motion for dismissal for failure to provide a speedy trial. Defendant was picked up in New York on 4 February 1977, and returned to North Carolina for trial on 28 September 1977. As defendant testified on cross-examination, "I have been in jail since February 4th. That was not because of this case." Defendant made no written request for final disposition of the indictment, as required by the Interstate Agreement on Detainers, N.C.G.S. § 15A-761, Art. III(a). There is no showing in the record that had there been a hearing on the merits of the motion defendant could have shown wilfulness, neglect or prejudice in the delay, as he is required to do. 3 Strong's N.C. Index 3d, Constitutional Law § 52.

Defendant's incarceration on other offenses during the delay, while not mitigating against his rights to a speedy trial, *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973), is an indication of lack of prejudice. *State v. Smith*, 270 N.C. 289, 154 S.E. 2d 92 (1967). In the absence of a motion for speedy trial, or any showing of prejudice or purposeful delay, this Court has repeatedly held that the right to a speedy trial has not been denied. *See, e.g., State v. Weddington*, 28 N.C. App. 269, 220 S.E. 2d 853 (1976); *State v. Baysinger*, 28 N.C. App. 300, 220 S.E. 2d 831 (1976); *State v. Jackson*, 27 N.C. App. 675, 219 S.E. 2d 816 (1975). We find no error in the denial of the motion.

II.

[2] The defendant next contends that the trial judge should not have allowed Esther Vinson to identify him in court. He appears to argue both that the pretrial identification was tainted and that there was no basis other than the photographs for the in-court identification. We disagree on both points.

The due process test for pretrial identification procedures is whether the total circumstances were so unnecessarily suggestive as to offend fundamental standards of justice. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), modified on other grounds, 428 U.S. 902 (1976); 4 Strong's N.C. Index 3d, Criminal Law § 66.3. Our Supreme Court has held that it is not improper for the police to submit to the victim of an armed robbery 7 or 8 photographs that generally fit the victim's description of the robber, *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970), as was done in this case. Photo identifications prior to trial repeatedly have been found not suggestive where, as here, a number of similar photographs were given in a group to the victim for her inspection. *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Johnson*, 20 N.C. App. 53, 200 S.E. 2d 395 (1973), *app. dismissed* 284 N.C. 620, 202 S.E. 2d 276 (1974); *State v. Bumper*, 5 N.C. App. 528, 169 S.E. 2d 65, *aff'd* 275 N.C. 670, 170 S.E. 2d 457 (1969). Defendant suggests that the time between the robbery and the photo identification was impermissibly long, but in *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977), the court did not suggest that the month that passed between the crime and the witness's identification of the defendant's photo was long enough to make the identification violative of due process. Neither do we find that the six week period here made the identification procedure impermissibly suggestive.

Even if the pretrial identification had been impermissibly suggestive, there is sufficient evidence in the record to support a finding that Ms. Vinson's in-court identification of defendant had an independent basis. "An in-court identification is competent, even if the pretrial . . . identification procedures were improper, where the in-court identification . . . is based on the witness' observations at the time and scene of the crime." 4 Strong's N.C. Index 3d, Criminal Law § 66.14. When asked "Then are you basing your identification here in court today on what happened in January at the Holiday Inn and nothing else at all?" Ms. Vinson testified, "That's right." In addition, there was testimony that Ms. Vinson stood face to face with the robber for at least a minute in a brightly-lighted place, and that the robber's face was uncovered except for dark glasses. Ms. Vinson testified that she had no doubt of the correctness of her identification. "Where there is a

reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness's identification of the defendant is for the jury. . . ." 4 Strong's N.C. Index 3d, Criminal Law § 66.1. The judge did not err in allowing the in-court identification.

Nor is there merit to defendant's contention that Esther Vinson identified the defendant merely because he was seated next to defense counsel. "Defendant's contention that a robbery victim came to the courtroom mentally preconditioned to identify as the robbers whoever might be the defendants on trial . . . has been held without merit." 4 Strong's N.C. Index 3d, Criminal Law § 66, citing *State v. Tyson,* 278 N.C. 491, 180 S.E. 2d 1 (1971).

III.

[3] Defendant's assertion that his motion for arrest of judgment should have been allowed for fatal variance between the indictment and the evidence is answered by *State v. Johnson:* "[A]n indictment for robbery need not specify the person who owned the property taken." *Supra* at 55, 200 S.E. 2d at 396. There was no fatal variance when the indictment charged robbery of the Holiday Inn and the evidence showed the robbery of both the Holiday Inn and Ms. Vinson.

IV.

[4] Next the defendant argues that it was error to admit the testimony of a rebuttal witness who was acquainted with a juror, and whose name had not been given to the defense prior to trial. The contention is that the defense was deprived of an opportunity to question prospective jurors about any relationship with the witness and determine whether such a relationship would affect the weight given by the jury to the witness's testimony. However, as the State points out, when the fact that one juror was known to the witness came out on the final question in cross-examination, the defense neither moved to strike the witness's testimony nor requested a *voir dire* to determine the relationship between the juror and the witness. The defense has not shown any prejudice on the part of the juror, nor asked at the appropriate time to investigate the possibility of such prejudice. In addition, the witness's testimony went only to a peripheral matter and not to the robbery with which defendant was charged. In

light of these facts we find the defendant's argument without merit.

V.

[5] The defendant assigns error to a number of phrases in the charge to the jury. We will deal only with the judge's statement of the possible verdicts, that is: "[Y]ou may return a verdict of guilty of robbery with a firearm, as charged; or, you may return a verdict of guilty." On being corrected by the District Attorney, the judge then corrected himself, saying: "I beg your pardon. You may return a verdict of guilty, number one, or, you may return a verdict of not guilty, number two, one of those two possible verdicts." Defense counsel argues that this misstatement of the possible outcomes was irreparably prejudicial. We disagree. The judge immediately corrected himself when his error was pointed out, and then stated correctly the two possible verdicts. It is absolutely unreasonable to infer that the jurors failed to understand that "not guilty" was a possible verdict in this criminal trial.

VI.

[6] Finally, we deal with defendant's contention that the trial court accepted a jury verdict that was not unanimous. The record shows that after the jury's verdict was returned, defense counsel asked that the jury be polled. Carney Lee Roberson was the first juror questioned, as follows:

> "CLERK: Do you find the defendant, Forrest Lee Fate, guilty of the charge of robbery with a firearm?
>
> "A. Yes.
>
> "CLERK: Is this your verdict?
>
> "A. (No response)
>
> "CLERK: Do you still assent thereto?
>
> "A. (No response)
>
> "CLERK: Do you still say this is your verdict?
>
> "A. Yes."

The defendant argues that the trial judge should have inquired into the juror's failure to answer the second and third questions.

We note that defendant could at that time have asked the judge to inquire further. We find it is sufficient that the juror twice answered that the guilty verdict was his verdict. In numerous North Carolina cases variant answers by jurors to the clerk's questions when polling have been found to be no error. *See Nolan v. Boulware*, 21 N.C. App. 347, 204 S.E. 2d 701, *cert. denied* 285 N.C. 590, 206 S.E. 2d 863 (1974); 4 Strong's N.C. Index 3d, Criminal Law § 126.1. The important thing is that all jurors clearly indicate their assent to the verdict, and Roberson did so here.

VII.

Having also found no merit in defendant's other assignments of error, we find that defendant received a fair trial and the judgment of the trial court is upheld.

No error.

Chief Judge BROCK and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. TERRY RAY HILL

No. 785SC320

(Filed 19 September 1978)

1. **Burglary and Unlawful Breakings § 5.6— breaking and entering—inference of intent to commit larceny**

The jury could properly find that defendant broke into and entered a building with the intent to commit larceny therein, although no property was actually taken, where the evidence tended to show that a forcible entry was made into the building through the front door, the owner of the building blocked the front door with his car, and defendant fled from the building through a skylight while officers were at the back of the building, and there was no evidence of a lawful intent.

2. **Criminal Law § 122.1— jury's request for additional instructions—sufficiency of court's inquiry**

In a prosecution for felonious breaking or entering and resisting arrest, the trial judge made a sufficient inquiry into the jury's request for further instructions where the jury requested the court to "enumerate the four charges again," the jury answered negatively when the court asked whether the jury wanted further instructions on the elements of resisting arrest, the jury answered positively when the court asked whether the question was what the

jury could find defendant guilty or not guilty of, the court then enumerated the jury's possible verdicts, and the jury asked no further questions but retired and returned the verdict in 15 minutes.

3. **Arrest and Bail § 6.2— resisting arrest—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for resisting arrest where it tended to show that when defendant was apprehended by officers while fleeing from the scene of a breaking and entering, he pulled away and struggled and had to be restrained while the officers handcuffed him.

APPEAL by defendant from *Webb, Judge.* Judgment entered 6 December 1977, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 21 August 1978.

Defendant was indicted and tried for breaking or entering, larceny and receiving, and for resisting arrest. The assignments of error on appeal go to the sufficiency of the evidence to show intent to commit larceny inside the building, the adequacy of the judge's inquiry into the jury's request for further instructions, and the sufficiency of the evidence to support a conviction for resisting arrest.

The State presented evidence that at about 7:30 on the evening of 13 May 1977, Charles G. Mullins, the owner of Mullins Plant Food Laboratories, approached the plant and found that the fence was locked but the outside light was on, which he considered unusual. A white male fitting the general description of the defendant and unknown to Mr. Mullins looked out through a partially opened door. Noting that the striker plate on the door had been torn off, Mr. Mullins blocked the door with his car so the person inside could not escape and went next door to have the Sheriff called.

Mr. Mullins kept the intruder inside until two deputies arrived. While Mr. Mullins was being questioned by them at the back of the building there was a thump at the front of the building and a white male was seen running away from the building towards the woods. The deputies fired warning shots into the air and called to the man to stop as they chased him approximately a quarter mile into the swamp. There he became stuck and they were able to catch up with him. The deputies, both in uniform, placed him under arrest and restrained him as he struggled and tried to pull away and go forward into the swamp. Deputy Long testified that

he assisted Deputy Dietz in handcuffing defendant because "defendant was struggling . . . and I saw [Dietz] was having a problem," and that they had a hard time getting defendant out of the woods.

A search at the time of arrest revealed a lock, a wrench and two screwdrivers in defendant's back pocket, and a large folding knife in his front pocket. Nothing was found to be missing inside the building, but a table had been moved underneath a skylight, the skylight had been broken, and a fire extinguisher had been removed from its wall rack.

Defendant testified that he never entered the building, but was brought to the site by a man driving a white 1959 or 1960 Chevrolet, and that the man picked him up when he was hitchhiking home after his car broke down. The tools and knife found in his pockets were those he used at work. He testified that he remained standing outside the building as Mr. Mullins ran by him three times at a distance of five feet. When he saw the deputies with their revolvers drawn he was scared and ran through the woods toward his home.

On redirect, Mr. Mullins testified that there was no white car parked in front of the building when he pulled up, and that he did not see defendant standing where defendant testified he had been. Deputy Dietz also testified that he saw no white Chevrolet at the building, and none was found in the immediate area.

The parties stipulated that samples of fiberglass taken from defendant's shirt were shown by analysis to match in color refractive index and dispersion the fiberglass samples taken from the broken skylight.

Defendant was found guilty of felonious breaking or entering and of resisting arrest, and was sentenced to 5 years on the breaking or entering conviction and 6 months for resisting arrest, to run concurrently. Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Norman M. York, Jr., for the State.

George H. Sperry for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in failing to dismiss the charge of felonious breaking or entering, and in charging the jury as to his intent to commit larceny. We disagree.

N.C.G.S. § 14-54 makes it a crime to break or enter any building "with intent to commit . . . larceny therein." An essential element of the crime is that the intent exist at the time of the breaking or entering. Defendant argues that the evidence, considered as it must be in the light most favorable to the State, *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971), is not sufficient to show his intent to commit larceny inside the building.

Defendant relies on *State v. Cochran*, 36 N.C. App. 143, 242 S.E. 2d 896 (1978), for the proposition that intent must be proved by acts or conduct. However, the "conduct" in *Cochran* was a later written statement by defendant that "he and Miller were looking for a Christmas tree when they began discussing the break-in." *Supra* at 897. The court makes no reference to that statement in reaching its decision, but instead follows the settled rule 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 . . . in the nighttime." *Supra* at 897. *See also State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Redmond*, 14 N.C. App. 585, 188 S.E. 2d 725 (1972). This Court in *Cochran* makes clear that such inferred intent is sufficient to avoid dismissal: "In this case, there was an unlawful entry . . ., and there was no showing of any lawful motive. . . . 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." *Supra* at 897.

A number of other North Carolina cases with facts similar to the instant case reach the same conclusion. In *State v. Lakey*, 270 N.C. 786, 154 S.E. 2d 900 (1967), and *State v. Hunt*, 14 N.C. App. 157, 187 S.E. 2d 366 (1972), the respective defendants were seen running from buildings which had been broken into, but from which it appears nothing was taken. In both cases the evidence was sufficient to go to the jury. *Accord, State v. Oakley*, 210 N.C. 206, 186 S.E. 244 (1936); *State v. Hargett*, 196 N.C. 692, 146 S.E. 801 (1929).

The fact that the evidence is circumstantial does not make it insufficient. *State v. Oakley, supra* at 210 ("The evidence in the present case is circumstantial, although sufficient to be submitted to a jury."). "Intent . . . is a mental attitude, which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred; . . . the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged." 4 Strong, N.C. Index 3d, Criminal Law, § 2, p. 34. The test for going to the jury on circumstantial evidence is "whether there is substantial evidence against the accused of every essential element that goes to make up the offense charged." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956). That evidence of every material element is present here.

[2] Defendant also assigns error to the judge's response to a jury request for further instructions. After the charge to the jury the following took place:

> JUROR NO. ONE: Your Honor, can you enumerate the four charges again, please?
>
> COURT: You mean the four things that is [sic] necessary for you to be satisfied of beyond a reasonable doubt in order to find the defendant guilty of resisting arrest?
>
> JUROR NO. ONE: No. The whole thing.

At this point the judge called the lunch recess, after which the interchange continued:

> COURT: Now, Ladies and Gentlemen, . . . [i]s the question 'What you may find the defendant guilty or not guilty of?'
>
> JUROR NO. ONE: Yes, sir. The four things, two or three words each.

The judge then enumerated the jury's possible findings: guilty of felonious breaking or entering, or guilty of non-felonious breaking or entering, or not guilty of breaking or entering; also, guilty or not guilty of resisting arrest.

Counsel for defendant argues that the judge did not inquire sufficiently into the precise matters about which the jury was confused. We disagree again. The judge asked whether the jury

wanted further instruction on resisting arrest and was told, "No. The whole thing." Then after the lunch recess the judge inquired whether the question was "What you may find the defendant guilty or not guilty of?" and was answered "Yes." After the judge's re-enumeration of the possible verdicts the jury asked no further questions but retired and returned a verdict after 15 minutes. We agree with the State's contention that these were actions of a jury that was not confused, and we find that the judge sufficiently inquired into the jury's request for further instructions.

[3] Defendant finally contends that the charge of resisting arrest should have been dismissed for lack of sufficient evidence, arguing that there was evidence of flight but not of resisting. However, both deputies testified for the State that defendant was pulling away and struggling and had to be restrained while they handcuffed him. This was sufficient evidence to go to the jury. *See State v. Fuller*, 24 N.C. App. 38, 40, 209 S.E. 2d 805, 806 (1974) (sufficient evidence to go to the jury on resisting arrest where defendant "had run . . . and actively resisted the officer's attempt to handcuff him").

Having reviewed all of defendant's assignments of error we hold that defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

Ellis v. Ellis

ELLEN S. ELLIS (WIDOW) PLAINTIFF APPELLEE v. HILLIARD RAY ELLIS (SINGLE); MARY ELIZABETH ELLIS RHODES AND HUSBAND, THOMAS LAWRENCE RHODES; BOBBY RICHARD GLOSSON AND RICHARD LAWSON MAGUIRE DEFENDANTS AND ANNIE BELLE ELLIS CURRIE AND HUSBAND, CAREY L. CURRIE; MARTHA DALE ELLIS GLOSSON; AND FRANCES MILDRED ELLIS MAGUIRE APPLICANT APPELLANTS

No. 7714SC950

(Filed 19 September 1978)

Rules of Civil Procedure § 24— action to quiet title—no intervention as matter of right or by permission

In an action to quiet title to a homeplace brought by plaintiff mother against her children and their spouses who refused to execute a quitclaim deed to her for the homeplace, applicant-intervenors, who were children and their spouses who had executed the quitclaim deed to plaintiff, were not entitled to intervene as a matter of right pursuant to G.S. 1A-1, Rule 24(a)(2), since they did not have an interest in the subject matter of this action, their interest being to have their quitclaim deed set aside; moreover, the trial court did not abuse its discretion in denying applicant-intervenors permission to intervene pursuant to G.S. 1A-1, Rule 24(b)(2).

APPEAL by applicant-intervenors from *Hobgood* and *Lee, Judges.* Orders entered 26 August 1977 and 23 September 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 August 1978.

Plaintiff Ellen Ellis lived with her husband, Clyde Ellis, on their homeplace owned solely by the husband. On 10 June 1972, the husband executed a power of attorney naming his wife attorney-in-fact for him. On 28 July 1972, plaintiff, acting pursuant to the power of attorney, executed a deed to herself and her husband in order to create a tenancy by the entirety in the homeplace. Thereafter, the husband died, and the plaintiff claimed the homeplace.

Plaintiff desired as a precaution to have her children and their spouses execute a quitclaim deed to her for the homeplace. Some of the children and spouses executed the requested quitclaim deed and some refused. Plaintiff instituted the present civil action against her children and their spouses who refused to execute the quitclaim deed seeking to quiet her title to the homeplace. Defendants answered and asserted as further defenses that their father, Clyde Ellis, was incompetent and could

not execute a valid power of attorney to the plaintiff; the deed by which the tenancy by the entirety had been created should be set aside on several grounds; and that a constructive trust should be declared in the property in favor of the defendants as their interest would appear under the Intestate Succession Act. The parties held a pre-trial conference on 21 April 1977.

On 17 June 1977, some (but not all) of the children and spouses who had signed the quitclaim deed moved to intervene. Along with their motion, they filed an answer in which they adopted defendants' further defenses and also asserted that the quitclaim deed which they executed to plaintiff should be set aside since their signatures on it had been obtained by fraud, the deed was without consideration, and the acknowledgment by the notary public was improper. Judge Hobgood entered an order denying the motion to intervene. Judge Lee denied the intervenors' motion for findings of fact. Applicant-intervenors appealed.

Kenneth C. Titus, for applicant-intervenors appellants.

W. Y. Manson and Lucy D. Strickland, for plaintiff appellee.

Felix B. Clayton, for defendant appellees.

ERWIN, Judge.

The first question presented by this appeal is whether the trial court erred in denying applicant-appellants' motion to intervene. We find no error in the order entered by Judge Hobgood.

G.S. 1A-1, Rule 24, provides in part:

> (a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest,

unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.*—Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The applicant-intervenors moved under Rule 24 to intervene in this civil action. In their brief, they contend that they are entitled to intervene as a matter of right pursuant to Rule 24(a)(2) of the Rules of Civil Procedure. Rule 24(a)(2) requires three prerequisites to non-statutory intervention as a matter of right: (1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties.

Plaintiff in her action proposes to remove a cloud upon her title against some of her children and their spouses, who failed to execute a quitclaim deed to her for the homeplace, which plaintiff acquired by deed. The deed was executed by her as attorney-in-fact for her husband to her husband and herself as tenants by the entirety. The husband is now deceased, and plaintiff claims the entire tract as her sole property. The applicant-intervenors allege that "[p]laintiff claims title through a power of attorney, deed executed by the attorney in fact, and a quitclaim deed signed by intervenors." Applicant-intervenors propose to have their deed to the plaintiff for the real property in question set aside on three grounds:

"1. The signatures of intervenors on the quitclaim deed were fraudulently induced through representations by the plaintiff that the deed was for the eleven acres of the property to be sold to a church, which plaintiff knew at the time to be untrue. . . .

2. The quitclaim deed transfer was without good and valid consideration.

3. The acknowledgment of the signatures by a notary public was improper as the deed was signed outside of the notary's presence and none of the intervenors acknowledged to the notary that the signature was his own."

To us, the intervenors have apparently conveyed their interest in the real property in question to the plaintiff. This being true, we hold that applicant-intervenors do not meet the requirements of Rule 24(a)(2). They do not have an interest in the subject matter of this action. The relief sought by the applicant-intervenors is to have their deed set aside. We concede that the deed relates to the same property in question, but it relates to a different transaction than those complained of by the plaintiff. *See Bank v. Robertson*, 25 N.C. App. 424, 213 S.E. 2d 363 (1975).

Now we must scrutinize the trial court's use of its discretion in denying the applicant-intervenors' motion to intervene under Rule 24(b)(2), "Permissive Intervention." The Court's discretion in this regard is not reviewable in the absence of a showing of abuse. The trial court entered its order which reads in part as follows:

"AND IT FURTHER APPEARING TO THE COURT, after hearing arguments of all counsel, that the ends of justice would not be met by allowing the Motion to Intervene and that same should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above said Motion to Intervene is not allowed and the same is hereby dismissed, this 26 day of August, 1977."

"With only minor exceptions, Federal Rule 24 and North Carolina Rule 24 are substantially the same. Where the phrase 'Statute of the United States' appears in the Federal Rule, the word 'statute' is used in the North Carolina Rule." Shuford, N.C. Civil Practice and Procedure, § 24-1, p. 206.

The United States Court of Appeals, Fifth Circuit, held as follows in *Weiser v. White*, 505 F. 2d 912, 917 (5th Cir. 1975), *cert. denied*, 421 U.S. 993 (1975):

> "Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States v. California Co-op. Canneries*, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interest in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. . . ."

We have not found any cases on point from this Court or our Supreme Court decided since the effective date of the North Carolina Rules of Civil Procedure; however, *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E. 2d 313, 316 (1968), (decided after our Rules were adopted but before their effective date) held: "It is ordinarily within the discretion of the court to permit proper parties to intervene. *Childers v. Powell*, 243 N.C. 711, 92 S.E. 2d 65."

The record before us does not reveal that the trial judge abused his discretion. We note that the pre-trial order had been entered prior to the motion to intervene.

In summary, we hold that: (1) the applicant-intervenors were not entitled to intervene pursuant to Rule 24(a)(2) as a matter of right; (2) the trial court did not abuse its discretion in denying applicant-intervenors permission to intervene pursuant to Rule 24(b)(2); and (3) better practice would require applicant-intervenors to specify the section of Rule 24 they wished to proceed under.

In view of our holding above, we deem it unnecessary to consider applicant-intervenors' assignment of error Number 2. The orders appealed from are

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. COUNCIL GRAHAM

No. 7816SC285

(Filed 19 September 1978)

1. **Homicide § 30.3— necessity for instruction on involuntary manslaughter**

The trial court in a homicide case erred in failing to instruct the jury on involuntary manslaughter where defendant testified that he fired one shot not aimed at anybody but intended to break up a fight, and that he then fired the fatal shot unintentionally when defendant came at him with a knife and he "throwed up the gun and it went off."

2. **Criminal Law § 45.1— experimental evidence—cutting shirt with knife—circumstances not similar**

In a homicide prosecution in which defendant testified that deceased had cut his shirt with a knife during the altercation which resulted in deceased's death, the trial court erred in permitting the district attorney to ask defendant to try to cut the shirt worn by defendant at the time of the incident with deceased's knife since the experiment was not conducted under circumstances substantially similar to those existing when defendant's shirt was allegedly cut by deceased.

APPEAL by defendant from *Lee, Judge.* Judgment entered 15 September 1977, Superior Court, ROBESON County. Heard in the Court of Appeals 15 August 1978.

Defendant was charged with murder. At trial, the district attorney announced that he would seek no greater verdict than a verdict of guilty of second degree murder. Defendant was convicted of voluntary manslaughter and appeals from the judgment entered on the jury verdict.

The State's evidence tended to show the following events:

Defendant, deceased, and several other people were at a house in Lumberton on Saturday night, 13 February 1977. The house was known as "Hole in the Wall", and, according to one witness, "a lot of drinking was going on there". Deceased and S. L. Graham got into a fight outside the house. They were separated by some of the people at the house, who took deceased about 30 feet from the house near some woods. He was "cussing and going on". S. L. Graham and defendant started toward deceased, S. L. Graham carrying a stick and Council Graham carrying a "blue-black revolver type gun". They were asked to stop before someone got hurt. They did so, and defendant turned and

went back into the house. Deceased started back to the house still "cussing and carrying on". Defendant came out of the house, and he and deceased began cursing at each other. Deceased was between two cars. Defendant walked over next to the car and shot across the roof of the car. Deceased "hunched down close to the roof and ducked his head down". State's witnesses testified that they saw deceased "do nothing with his hands". That shots hit a Ford Courier truck and a black Grand Torino. The cursing continued. One witness testified that deceased remained "crouched down" after the first shot and that defendant said: "Son of a bitch, I'll kill you", and walked around the car and shot deceased with the barrel of the gun only "a couple of inches" from deceased's head. Another witness testified that deceased "stooped down at the end of the car when the gun was fired. He then stood back up and continued to cuss at Council. Council went around the back of the car and shot Willie". Both witnesses testified that deceased fell to the ground and that defendant walked away carrying the gun without offering any assistance to the victim.

Defendant testified that he "knew of" Willie Lee Lowrey before this incident but did not know him; that he had been to a cookout at Wyvin Locklear's that night, leaving about 11 o'clock; that after leaving the cookout, he went to the home of Brantley Chavis in Pembroke; that Brantley asked defendant to take him to his brother-in-law's place called "Big Johnny's"; that defendant had drunk only "a couple of beers" that night; that defendant, "Wyvin Locklear, Brantley Chavis, J. R. Graham, and S. L. Locklear (sic) . . . all went there together"; that after they got inside, a "little ruckus" started, and Willie Lee Lowrey hit Brantley Chavis "upside the head"; that as they were attempting to break up the fight, Willie Lee Lowrey pulled out a knife; that the knife was open, and Willie Lee swung it at defendant as defendant tried to break up the fight; that S. L. Graham grabbed Willie Lee, pulled him outside, and threw him on the ground; that the two men were pulled apart, and some others pulled Willie Lee away; that Willie Lee was saying, "I'm going to kill him the son of a bitch. I'm going to kill him"; that about this time, Willie Lee started at defendant who ran in front of a car to get out of his way; that defendant had pulled his gun out and "shot it trying to keep him away"; that he shot the gun up in the air, but Willie continued to come; that defendant was facing the automobile on the right hand

side "toward the front" and was not aiming at anybody when he shot; that two men grabbed Willie Lee, and defendant thought they had control of him and was attempting to get by him to his car, intending to leave; Willie Lee was between him and his car, still had the knife, and was still threatening defendant; Willie broke loose and began running at him with a knife; that Willie was right at defendant when he swung the knife at defendant and cut defendant's shirt and undershirt; that when Willie Lee came at him and tried to cut him, defendant "throwed up the gun and it went off and he fell and I touched to see if he was dead"; that he was told that Willie Lee was dead, and he tried to feel his pulse; that he figured there might be more trouble, so he told the others to tell the deputies he would be home when they came for him; that he then took the men home who came with him and went home.

Additional facts necessary for decision are set out in the opinion.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Norman M. York, Jr., for the State.

Edwards and Johnston, by Rudolph L. Edwards, for defendant appellant.

MORRIS, Judge.

[1] Defendant contends, by his fifth assignment of error, that the court erred in failing to charge the jury that they could return a verdict of guilty of involuntary manslaughter as a possible verdict. We are inclined to agree that defendant's evidence makes this instruction necessary. The State argues that the record reflects that defendant was the aggressor throughout the altercation and that, after shooting at deceased and missing him he moved closer and shot a second time, killing him. This is certainly what the State's evidence tended to show. However, the defendant testified for himself. His version was entirely different. He maintained that neither shot was fired *at* anybody. He said that when he fired the first time, he did not aim at anybody. As to the fatal shot, he said that as deceased was coming at him, "he throwed up the gun and it went off".

> "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to kill or inflict serious bodily injury.* [Citations omitted.]" *State v. Wrenn,* 279 N.C. 676, 682, 185 S.E. 2d 129, 132 (1971).

Here the defendant's testimony was, in its entirety, a version of an *unintentional* killing. He fired two shots, the first aimed at no one but intended to break up a fight, and the second, accidentally when "he throwed up the gun and it went off". If believed by the jury, defendant's evidence is sufficient to support a verdict of guilty of involuntary manslaughter. *See State v. Davis,* 15 N.C. App. 395, 190 S.E. 2d 434 (1972) (where defendant testified that she and deceased were "fumbling with the gun", he tried to get it away from her, and the gun "went off"); and *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1962) (where deceased grabbed a gun lying across defendant's knees, he got it away from her, she got it again near the end of the barrel, and "the gun went off").

Because the court failed to submit an issue of involuntary manslaughter to the jury, there must be a new trial.

[2] Defendant's other assignments of error are without merit, with the exception of his first assignment of error. During his cross-examination of defendant, the district attorney put the shirt worn by defendant at the time of the incident before the defendant, handed defendant the knife, and directed defendant to try to cut the shirt. Over defendant's objection, the witness was directed to cut the shirt.

> "The competency of experimental evidence depends upon its trustworthiness to aid in the proper solution of the problem in hand. [Citations omitted.] When the experiment is carried out under substantially similar circumstances to those which surrounded the original transaction, and in such a manner as to shed light on that transaction, the results may be received in evidence, although such experiment may not have been performed under precisely similar conditions as attended the original occurrence. The want of exact similarity would not perforce exclude the evidence, but would go to its weight with the jury. 1 Michie on Homicide, 832. Whether the circumstances and conditions are sufficiently similar to render the results of the experiment competent is of course a

preliminary question for the court, and unless too wide of the mark, the ruling thereon will be upheld on appeal. [Citations omitted.]

'The general rule as to the admissibility of the result of experiments is, if the evidence would tend to enlighten the jury and to enable them to more intelligently consider the issues presented and arrive at the truth, it is admissible. The experiment should be under circumstances similar to those prevailing at the time of the occurrence involved in the controversy. They need not be identical, but a reasonable or substantial similarity is sufficient'—*Edwards, J.*, in *Shepherd v. State*, 51 Okla. Crim., 209, 300 P., 421." *State v. Phillips*, 228 N.C. 595, 598, 46 S.E. 2d 720, 722 (1948).

We think it obvious that this experiment fell far short of being conducted under circumstances substantially similar to those existing at the time of the incident when the defendant's shirt was allegedly cut and was thus "too wide of the mark" to be upheld on appeal.

New trial.

Judges HEDRICK and WEBB concur.

IN THE MATTER OF THE FORECLOSURE OF A CERTAIN DEED OF TRUST FROM: MARVIN J. WATTS AND WIFE, H. RUTH WATTS, TO THOMAS S. BENNETT, SUBSTITUTE TRUSTEE, FOR JUDITH W. SMITH

No. 773SC947

(Filed 19 September 1978)

Mortgages and Deeds of Trust § 25— foreclosure under power of sale—hearing de novo before Superior Court Judge—no equity jurisdiction

Pursuant to G.S. 45-21.16(d) providing for foreclosure under a power of sale, the Clerk of Superior Court is limited to finding the existence of a valid debt of which the party seeking foreclosure is a holder, default, right to foreclose under the instrument and notice to those entitled, and the Superior Court Judge is similarly limited in a hearing *de novo* and is not authorized to invoke equity jurisdiction.

In re Watts

APPEAL by respondent from *Lewis, Judge.* Judgment entered 8 August 1977 in Superior Court, CARTERET County. Heard in the Court of Appeals 24 August 1978.

On 26 May 1977, the respondent (mortgagee) filed a Petition and Notice of Hearing pursuant to G.S. 45-21.16 alleging that the petitioners (mortgagors) were in default in the payment of a promissory note secured by a deed of trust, dated 1 November 1976.

On 16 June 1977, the Clerk of Superior Court of Carteret County found that petitioners were in default since the petitioners had failed to make the monthly installment payments by the 15th day of each month as required by the security agreement and deed of trust. The Clerk found that the respondent was entitled to proceed with foreclosure under the power of sale provision in the deed of trust.

Pursuant to G.S. 45-21.16(d), petitioners appealed *de novo* to the Superior Court.

At the hearing in Superior Court the mortgagee and mortgagors testified, and the court, in pertinent part, found facts as follows:

> "7. That Marvin J. Watts and wife, H. Ruth Watts, made the initial payment due under said indebtedness on November 1, 1976, as required. That the payment for December, 1976 was made by check dated December 17, 1976, and Judith W. Smith advised and made demand of the said Marvin J. Watts and wife, H. Ruth Watts, that the lateness of said payment constituted a default and without waiving any of her rights under the security instrument demanded that future payments be made on time. That in spite of said request, said Marvin J. Watts and wife, H. Ruth Watts, made the payment for January 1977 by check dated January 22, 1977. That the payment for February 1977 was made by check dated February ---, 1977. By letter dated March 21, 1977, counsel for Judith W. Smith notified the said Marvin J. Watts and wife, H. Ruth Watts, that the monthly installment payments were being made at a date in excess of the period allowed under the security instrument and called to their attention the fact that said late payments constituted default under the instrument. That the payment for the month of

March was tendered by check dated March 19, 1977, but not accepted by Judith W. Smith, and the payment for April 1977 was tendered on April 22, 1977, but not accepted by Judith W. Smith. That the payment for the month of May, 1977 was tendered on May 14, 1977, but was not accepted by Judith W. Smith. That the payment for the month of June has been tendered, but not accepted by Judith W. Smith;

* * *

9. That at the closing, at which time Mr. and Mrs. Watts assumed a first mortgage, the mortgagee, Mrs. Smith, told them that the bank would permit them to make monthly payments on the first mortgage at any time during the month; and the mortgagors were under the erroneous impression that they could make the payments on the second mortgage to Mrs. Smith with the same concessions as to time of payment;"

The court then made the following Conclusions of Law:

"1. That by failing to make the March payment until 21 March 1977 the mortgagors, Mr. and Mrs. Watts, were in default, but they were unaware of the significance and importance of making their payments on time;

2. That there is a valid debt due the mortgagee; that she has the right to foreclose under the instrument introduced; that she has given proper notice to the mortgagors;

3. That for eqitable reasons and in the interest of justice the mortgagee should not be permitted to foreclose this property under the facts found at this time."

The judge thereupon ordered:

"1. That the action of the Clerk in permitting the foreclosure action to proceed is SET ASIDE AND REVERSED and this cause DISMISSED:"

Marquardt and Simpson by John P. Simpson for respondent appellant.

No counsel contra.

CLARK, Judge.

The sole question presented on appeal is whether a Superior Court Judge is authorized to invoke equity jurisdiction in a hearing *de novo* on appeal pursuant to G.S. 45-21.16(d) or is limited to hearing the same matters in controversy which were before the Clerk of Superior Court.

G.S. 45-21.16 provides that prior to a foreclosure under a power of sale, the mortgagee must notify the mortgagor of the impending sale and must provide notice of a hearing before the Clerk of Superior Court. The Clerk is directed in subsection (d) to find the existence of a "(i) valid debt of which the party seeking to foreclose is a holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled. . . ."

The statute was amended in 1977 (effective 1 October 1977) to provide that: "Appeals from said act of the clerk shall be heard de novo."

The respondent contends that the hearing *de novo* is limited in scope to a hearing on the same four questions at issue before the Clerk, and that therefore the trial judge was not authorized to invoke equitable jurisdiction.

The intent of the legislature controls the interpretation of a statute. In ascertaining this intent the courts should consider the language of the statute and what it sought to accomplish. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Galligan v. Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1970). G.S. 45-21.16 was enacted in response to *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975). In *Turner*, the court held that the statutory procedures governing foreclosure under a power of sale did not comport with due process because the procedures did not provide adequate notice or a hearing prior to foreclosure and the mortgagor had not waived notice and hearing. The court noted that the procedures for upset bids and for injunctive relief were not sufficient to protect the mortgagor's property interest because these remedies presuppose that the mortgagor is aware of the threatened foreclosure. The injunctive relief provided by G.S. 45-21.34 is available prior to the confirmation of the foreclosure sale. *Certain-teed Products Corp. v. Sanders*, 264 N.C. 234, 141 S.E. 2d 329 (1965); *Whitford v. North Carolina Joint-Stock Land*

Bank, 207 N.C. 229, 176 S.E. 740 (1934). The court noted that without prior notice, the mortgagor was often unaware of the foreclosure until the purchaser at the foreclosure sale sought possession of the land. Without the notice contemplated by the court in *Turner*, "the option of seeking equitable relief was . . . substantially foreclosed." 389 F. Supp. at 1258, n. 37.

The notice and hearing required by G.S. 45-21.16 were designed to enable the mortgagor to utilize the injunctive relief already available in G.S. 45-21.34. The hearing was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief. A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action. 389 F. Supp. at 1258; 10 Thompson on Real Property, § 5175, p. 204 (1957); Note, Power of Sale Foreclosure After Fuentes, 40 U. Chi. L. Rev. 206 (1972). To construe the statute so as to provide a full hearing on matters at issue other than those before the Clerk would make the foreclosure by power of sale as costly and as time-consuming as foreclosure by action, since a mortgagor could obtain a full hearing on all issues merely by appealing to the Superior Court for a hearing *de novo*. It is clear that the legislature did not intend such a result. The Clerk of Superior Court is limited to making the four findings of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*. *See* G.S. 1-276 which limits appeals to "matters in controversy" before the Clerk.

Although a Superior Court Judge has general equitable jurisdiction, N.C. Const. Art. IV, § 1, *Hospital v. Comrs. of Durham*, 231 N.C. 604, 58 S.E. 2d 696 (1950), a court is without jurisdiction unless the issue is brought before the court in a proper proceeding. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330 (1950); *Johnston County v. Ellis*, 226 N.C. 268, 38 S.E. 2d 31 (1946). The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34. *See, Crain v. Hutchins*, 226 N.C. 642, 39 S.E. 2d 831 (1946); *Sineath v. Katzis*, 219 N.C. 434, 14 S.E. 2d 418 (1941); *Insurance Co. v. Smathers*, 211 N.C. 373, 190 S.E. 484 (1937).

The trial judge in the case *sub judice* exceeded the permissible scope of review at the hearing *de novo* by invoking equitable jurisdiction to enjoin the foreclosure sale.

Reversed and remanded for proceedings consistent with this opinion.

Judges PARKER and ERWIN concur.

ROBERT MILLER v. LENORA JACKSON MILLER

No. 7721DC905

(Filed 19 September 1978)

1. Divorce and Alimony § 3— venue in divorce action

While the proper venue in a divorce action is the county in which either the husband or the wife resides, venue is not jurisdictional but is only ground for removal to the proper county upon a timely objection made in the proper manner. G.S. 50-3; G.S. 1-82.

2. Venue § 7— removal for improper venue—no discretion in court—waiver of proper venue

Where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. However, proper venue may be waived by express or implied consent.

3. Divorce and Alimony § 3; Venue § 1— waiver of right to change of venue—failure to appear for hearing

Defendant impliedly waived her right to a change of venue in a divorce action where almost a year passed between the time defendant filed her motion and the first hearing date on the motion, at which time defendant received a continuance, and defendant failed to appear on the second hearing date five months later.

4. Divorce and Alimony § 2.2; Pleadings § 9; Rules of Civil Procedure § 12— motion for change of venue—extension of time for filing answer

Defendant in a divorce action had 20 days after notice of the court's action on her Rule 12(b) motion for change of venue in which to file her answer; therefore, the court erred in finding that the time for pleading had expired and in entering judgment for plaintiff on the same day the court ruled on defendant's motion for a change of venue and before defendant had filed an answer. G.S. 1A-1, Rule 12(a)(1)a.

5. Divorce and Alimony § 2.4; Rules of Civil Procedure § 38— divorce action—request for jury trial—time for making

Where defendant's time for filing an answer in a divorce action had not expired, her time for demanding a jury trial had not expired, since she was entitled to demand a jury trial until 10 days after the service of the last pleading. G.S. 50-10; G.S. 1A-1, Rule 38(b).

APPEAL by defendant from *Alexander (Abner), Judge.* Judgment entered 1 June 1977, in District Court, FORSYTH County. Heard in the Court of Appeals 21 August 1978.

Plaintiff husband brought an action for divorce, and defendant wife moved for a change of venue under Rule 12(b). Her motion was dismissed for failure to properly pursue it, and a divorce was granted to plaintiff that same day. Defendant assigns as error the dismissal of her motion and the granting of divorce before her time to answer had expired.

On 24 November 1975, plaintiff filed a complaint in Forsyth County seeking a divorce, stating that both parties were residents of Guilford County. On 22 December 1975, defendant moved under N.C.G.S. § 1A-1, Rule 12(b)(3) for removal, stating that venue in Forsyth County was improper since both parties were residents of Guilford County. The motion was scheduled for hearing on 13 December 1976, at which time defendant received a continuance, and again on 31 May 1977, when defendant did not appear.

On 1 June 1977, the judge dismissed defendant's motion for removal on the ground that she had not pursued it as required. Also on 1 June 1977, the judge heard plaintiff's evidence and granted him a divorce, finding as fact that defendant had filed no answer nor request for a jury trial, that no extension of time to file had been granted, and that the time for pleading had expired.

From the dismissal of her motion and the granting of divorce defendant appeals.

No counsel for plaintiff appellee.

Tate & Bretzmann, by Raymond A. Bretzmann, for defendant appellant.

ARNOLD, Judge.

[1] The proper venue in a divorce action is the county in which either the husband or the wife resides. N.C.G.S. §§ 50-3, 1-82. Here, the action was filed in Forsyth County, but both husband and wife were residents of Guilford County. However, venue is not jurisdictional, but is only ground for removal to the proper county upon a timely objection made in the proper manner. *Farmers Cooperative Exchange, Inc. v. Trull*, 255 N.C. 202, 120 S.E. 2d 438 (1961); 13 Strong's N.C. Index 3d, Venue, § 1, p. 269. The place of trial may, of course, be changed whenever: "the county designated for that purpose is not the proper one, . . . the convenience of witnesses and the ends of justice would be promoted by the change, . . . the judge has, at any time, been interested as party or counsel, . . . motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons." N.C.G.S. § 1-83.

Defendant made a timely motion for removal under Rule 12(b), which requires that the motion be made at or before the time of filing an answer, and the motion was made in the proper manner. Defendant contends that whenever an action has been brought in the wrong county such a properly made motion for change of venue must be granted.

[2] The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. *Mitchell v. Jones*, 272 N.C. 499, 158 S.E. 2d 706 (1968) (dicta); *Swift and Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E. 2d 464 (1975) (dicta); 1 McIntosh, N.C. Practice & Procedure, § 832, p. 434 (2d ed., 1956). The provision in N.C.G.S. § 1-83 that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "must change." *Jones v. Statesville*, 97 N.C. 86, 2 S.E. 346 (1887). *Contra, Lassiter v. Norfolk & Carolina R.R. Co.*, 126 N.C. 507, 36 S.E. 47 (1900).

[3] However, since venue is not jurisdictional it may be waived by express or implied consent, 13 Strong's N.C. Index 3d, Venue, § 1, p. 269, and a defendant's failure to press his motion to remove has been found to be a waiver. *Jones v. Brinson*, 238 N.C. 506, 78 S.E. 2d 334 (1953); *Oettinger v. Hill Live Stock Co.*, 170 N.C. 152, 86 S.E. 957 (1915); *Swift and Co. v. Dan-Cleve Corp.*,

supra; Strong's N.C. Index 3d, *supra*. The question then is whether this defendant's failure to appear on the second hearing date, having received a continuance at the first hearing date five months earlier, is a failure to pursue her motion sufficient to constitute a waiver.

In *Jones v. Brinson*, *supra*, removal was by consent of the parties, but when both parties failed for a period of five months to tend to the administrative details required of them for removal, the plaintiff was found to have waived his right to object when defendant sought in the court of original venue to have the order of removal rescinded. The court in *Oettinger*, *supra*, denied defendant's motion for removal, but gave him time to file additional affidavits, which he failed to do. The case was continued at defendant's request for five months, at which time the motion was renewed and denied. The court found that defendant's failure to file the affidavits and to except to or appeal the denial of his motion constituted a waiver. Recently this Court in the *Swift* case, *supra*, found no waiver in a delay of four months, but in that case the defendant neither sought a continuance nor failed to appear on the hearing date, but merely took no action during the period.

Here, almost a year passed between the time defendant filed her motion and the first hearing date, but defendant sought a continuance at that time, and on the second hearing date five months later failed to appear. The trial court was justified in finding an implied waiver of defendant's right to a change of venue by her failure to pursue her motion for removal. The motion was properly dismissed and defendant's argument to the contrary is rejected.

[4] However, defendant correctly contends that the trial court erred in granting plaintiff a divorce on the same day the court ruled on defendant's Rule 12(b) motion, and prior to defendant's filing an answer in the action. As a general rule defendant has 30 days after service of the complaint upon him to file his answer. N.C.G.S. § 1A-1, Rule 12(a)(1). However, service of a Rule 12 motion alters the time period, giving defendant 20 days after notice of the court's action on the motion to file his answer. *Moseley v. Branch Banking & Trust Co.*, 19 N.C. App. 137, 198 S.E. 2d 36, cert. denied 284 N.C. 121, 199 S.E. 2d 659 (1973); N.C.G.S. § 1A-1, Rule 12 (a)(1)a; 1 McIntosh, *supra*, § 833. Defendant in this action

filed a Rule 12 motion upon which the court ruled on 1 June 1977. Defendant was entitled to notice of this action, and to 20 days after the notice to file an answer to plaintiff's complaint. The court erred in finding as fact that the time for pleading had expired and in entering judgment for plaintiff.

[5] Defendant also argues that, as her time for answering had not expired, neither had her time for demanding a jury trial. A party is entitled to demand trial by jury until 10 days after the service of the last pleading. N.C.G.S. §§ 50-10; 1A-1, Rule 38(b). Here, as the time for service of an answer had been extended by Rule 12(a), so had the time for demanding a jury trial.

We find that defendant's motion for removal was properly dismissed, but that the trial court erred in entering judgment before the time to answer had expired. Judgment is therefore vacated.

Affirmed in part, and

Reversed and remanded in part.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JOYCE BARNHILL VIETTO

No. 785SC391

(Filed 19 September 1978)

1. Schools § 14— compulsory school attendance law—nonpublic school—teachers and curricula not "approved"

In a prosecution of defendant for violation of the compulsory school attendance law, G.S. 115-166, by placing her child in a nonpublic school not having teachers and curricula approved by the State Board of Education, the trial court properly permitted school officials to testify that the school in which the child was placed was not an "approved" nonpublic school.

2. Schools § 14— compulsory school attendance law—willfulness

In a prosecution of defendant for a violation of G.S. 115-166 by placing her child in a nonpublic school not having properly approved teachers and curricula, the trial court did not err in excluding defendant's evidence that she did not willfully violate the statute but acted in good faith in withdrawing her

child from public schools, since willfulness is not an element of the crime charged.

3. **Schools § 14— violation of school attendance law—instructions—contentions of State—burden of proof**

In a prosecution for a violation of the compulsory school attendance law, the court did not shift the burden of proof to defendant in instructing that the State contended that defendant's witnesses did not testify that the nonpublic school defendant's child attended had been approved by the State Board of Education.

APPEAL by defendant from *Webb, Judge.* Judgment entered 29 November 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 29 August 1978.

Defendant was charged under N.C.G.S. 115-166 with violating the "General Compulsory Attendance Law." The evidence tended to show that in April 1977, defendant removed her 12-year-old daughter from the public schools. Defendant placed her daughter, a sixth-grade student, in "Learning Foundations," which the State's evidence tended to show was not a nonpublic school having teachers and curricula approved by the State Board of Education.

Defendant offered evidence tending to show that she removed her child from the public schools because of her concern over the quality of education the child was receiving, the child's emotional state, and her belief that the child was in need of private tutorial assistance in order to better prepare her academically as her education continued.

The jury found defendant guilty, and she received a suspended sentence and was fined $50.00. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

Prickett & Scott, by Carlton S. Prickett, Jr., and James K. Larrick, for defendant appellant.

ERWIN, Judge.

Defendant presents several questions on this appeal. We have carefully considered them all and conclude that defendant had a fair trial free of prejudicial error.

[1] First, defendant contends that the trial court erred in admitting evidence that "Learning Foundations" was not an "approved" nonpublic school. The testimony complained of was that of George Talley, Principal of Tileston School, the public school from which defendant removed her daughter; Hilda Worth, Attendance Counselor of the New Hanover County Schools; and Heyward Bellamy, New Hanover County Superintendent of Schools. These witnesses were all public school officials and, we feel, competent to testify as to whether or not "Learning Foundations" was an "approved" nonpublic school under N.C.G.S. 115-166. The evidence was also sufficient as to "Learning Foundations" failure to meet statutory requirements.

[2] Next, defendant earnestly argues that she should have been allowed to present evidence as to whether or not she had willfully violated G.S. 115-166. Essentially, she asserts that she acted in good faith, with just cause, and in her child's best interests by withdrawing her child from the public schools. We hold that the trial court did not err in excluding such evidence.

The record clearly shows that defendant was fully aware that her actions in withdrawing her child from public school and in placing her in "Learning Foundations" might subject her to criminal prosecution. In fact, the record reveals that public school officials offered to place her child in another public school for the remainder of the 1976-77 school year. Defendant had this and other alternatives. She could have placed her child in an "approved" nonpublic school, or she could perhaps have secured tutorial assistance for her child to supplement the instruction she was receiving in the public schools. Instead, she elected to place her daughter in a nonpublic learning environment which did not meet the mandate of the statute. This she chose to do in lieu of public, "approved" nonpublic, or supplemental instruction, and it is this which the statute proscribes.

We note that G.S. 115-166 does not compel every child to attend public schools exclusively for the prescribed period. Such a law would be invalid. *See Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925). Here there is no doubt that defendant was aware of the attendance laws and yet deliberately removed her child from the public schools. We find that *State v. Miday*, 263 N.C. 747, 140 S.E. 2d 325 (1965), is not controlling, as

that case involved an unintentional violation of G.S. 115-166 in which defendant was asserting what he perceived his rights to be under another statute.

In any event, willfulness is not contained in G.S. 115-166 as an element of the offense, and we decline to engraft such an element on the statute. Counsel for defendant have very ably and sincerely presented her case, but we must note that many parents from time to time become dissatisfied with the quality of instruction in our public schools, and such concern may to them be justified. As noted above, however, there are permissible alternatives to public school instruction. Few convictions, if any, could be obtained under G.S. 115-166 and 169 if parents could merely assert justification for noncompliance in order to avoid criminal liability.

[3] Defendant contends that the following portion of the court's charge improperly shifted the burden of proof to defendant:

> "The State contends that even by the testimony of the faculty of the Learning Foundations that they did not testify that they were a school whose teachers and curricula had been approved by the State Board of Education."

The trial court was merely stating contentions and in its charge, clearly placed the burden on the State to prove beyond a reasonable doubt the elements of the offense, including "that she did not attend any school, either a public school" or "a school which had been approved by the State Board of Education."

Defendant's remaining assignments of error have been carefully considered and are overruled.

In the trial below, we find

No error.

Judges PARKER and CLARK concur.

DOUGLAS STOLTZ v. FORSYTH COUNTY HOSPITAL AUTHORITY, INC., A NON-PROFIT NORTH CAROLINA CORPORATION, LEASING AND OPERATING FORSYTH MEMORIAL HOSPITAL IN FORSYTH COUNTY, NORTH CAROLINA

No. 7721SC992

(Filed 19 September 1978)

Negligence § 30.1— plate glass window in hospital—plaintiff's fall through—summary judgment for hospital proper

Defendant was entitled to summary judgment in plaintiff's action to recover for injuries which he suffered when he fell and stumbled against a plate glass window adjacent to the outer set of two sets of glass doors in defendant's emergency room foyer, since the window panel had a push bar across it and was constructed in accordance with all applicable building codes, and defendant was not negligent in using plate glass rather than some safety glass material.

APPEAL by plaintiff from *Wood, Judge.* Order entered 24 August 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 August 1978.

Plaintiff walked into the defendant hospital's emergency room on 11 August 1973 seeking treatment for a minor cut on his wrist. He received treatment and was leaving, walking through the foyer of the emergency room, when he became dizzy and fell, striking his head against a plate glass window adjacent to the outer set of two sets of glass doors. The window panel through which plaintiff fell had a push bar across it approximately 38½" from the floor. The window and bar had been installed at the time of construction of the hospital, and were properly in place at the time of plaintiff's fall. Plaintiff received severe cuts from the broken glass, and was hospitalized for several weeks as a result of his injuries.

Plaintiff instituted this civil action, alleging defendant's negligence and seeking damages. Defendant moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (G.S. 1A-1, Rule 56). His motion was argued before Judge William Z. Wood in the Superior Court of Forsyth County, who found that there was no genuine issue as to any material fact and ordered judgment entered in favor of the defendant. From this order plaintiff appealed.

Bailey and Thomas, by Thomas G. Jacobs and George S. Thomas, for the plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson, by Robert J. Lawing and Grover Gray Wilson, for the defendant.

MARTIN (Robert M.), Judge.

The sole question presented by this appeal is whether summary judgment was properly allowed in favor of the defendant. We find that it was.

Summary judgment is properly 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." G.S. 1A-1, Rule 56(c). Defendant, as the moving party in this case, had the burden of establishing that no genuine issue as to any material fact exists. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). "It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist." G.S. 1A-1, Rule 56, *Comment.* There is no controversy here as to the facts; in dispute is the legal significance of those facts. Therefore this is an appropriate case for summary adjudication. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). Appellant has aptly pointed out in his brief that issues of negligence are not ordinarly disposed of by summary judgment. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). However, on the record before us no issue of negligence appears. Plaintiff was an invitee on the defendant's premises, and as such the defendant was not an insurer of his safety. The standard of care applicable to the defendant is the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warning of hidden perils or unsafe conditions insofar as can be ascertained by reasonable inspection and supervision. *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917 (1944). Absent a negligent breach of this duty by the defendant, there can be no liability. *Cupita v. Country Club, Inc.*, 252 N.C. 346, 113 S.E. 2d 712 (1960).

Plaintiff has shown only that he has suffered an injury. No presumption or inference of negligence arises upon proof of an injury only. *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365

(1965); Strong's N.C. Index 3rd, *Negligence* § 53.4. It is not contested that the plaintiff, through no fault of the defendant, stumbled and fell through the plate glass panel in the foyer of the walk-in entrance to the defendant's emergency room. It is not contested that the window panel had a push bar across it, and was constructed in accordance with all applicable building codes. The only negligence of the defendant alleged by plaintiff is that plate glass, rather than some safety glass material, was used in the window panel. He argues that the defendant, operating a hospital, should reasonably foresee that sick persons could become unsteady on their feet and fall against the window panel, causing it to break and receiving injury. In support of his contentions, plaintiff cites a number of cases from various jurisdictions. Without enumerating them here, we find them distinguishable on their facts and inapplicable to the instant case. The glass panel in question was not a doorway of deceptive appearance, nor was it an unmarked and invisible divider between another area of the building and an exit. It was adjacent to a set of manifestly apparent doors at the outside entrance of the foyer. Nothing in the design or construction of the panel led plaintiff to come in contact with it.

Plaintiff has failed to prove any facts which will support any inference of negligence on the part of the defendant. Therefore summary judgment pursuant to Rule 56 was properly ordered for the defendant, and the order of the trial court is affirmed.

Affirmed.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. LARRY MICHAEL SCARBORO

No. 7826SC402

(Filed 19 September 1978)

1. Attorneys at Law § 2— representation by foreign attorneys—failure to follow statutory requirements—no prejudice to defendant

The trial court did not err in permitting defendant's retained attorneys from Alabama to represent defendant at his trial without complying with the

requirements of G.S. 84-4.1 that written motions be filed by the foreign attorneys and that local counsel be associated with the foreign attorneys since (1) defendant waived objection to his foreign attorneys by failing to raise the question of their competency at trial, and (2) the statute was not designed to protect defendant but was intended to subject foreign counsel to the jurisdiction of this State's courts on a continuing basis.

2. Criminal Law § 46.1— instruction on flight—search for defendant

There was ample evidence in the record that a sufficient search was timely made for defendant after the commission of the crime charged so as to justify the trial court's instruction on flight.

APPEAL by defendant from *Friday, Judge.* Judgment entered 27 January 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 August 1978.

Defendant was indicted for armed robbery and assault with intent to kill inflicting serious bodily injury. He was tried and convicted and sentenced to 20 to 30 years on the first count, and 5 to 10 years on the second count, those terms to run consecutively. In response to a petition by attorneys Hiram Dodd, Jr. and Louis Wilkinson of the Alabama Bar, the trial court made certain findings and permitted the two attorneys to appear on defendant's behalf. At a hearing on defendant's motion to dismiss based on a denial of his right to a speedy trial, attorney Dodd testified that on the basis of conversations and transactions with the Birmingham authorities the defendant had been arrested twice before 1976 and the North Carolina authorities had been aware of this and had not attempted to extradite the defendant. An officer of the Charlotte Police Department testified that he investigated the crime in question in 1969, and that he issued the warrants for the defendant's arrest. He stated that after this he sought defendant at his Charlotte address, at his sister's address, at his mother's address, and at his place of business. In 1971 pursuant to a stop notice from Birmingham, certified copies of the warrants were forwarded to Alabama, but they were returned unserved with a notation that the defendant could not be found. Officer Smith testified that no other notices were received from Birmingham until 1976, and that this notice resulted in defendant's return and trial. The court found that the State exercised reasonable diligence in the search for defendant, that he was not in North Carolina and that there was no willful delay on the part of the State of North Carolina since defendant's absence

was voluntary. For these reasons the judge denied the motion to dismiss on the grounds of a failure to grant a speedy trial. At trial the State presented evidence from Ruth Wardlaw that on the evening of 13 October 1969 as she and Michael Reames were working in the Little General Store, defendant entered the store on three separate occasions between 5:00 p.m. and 9:30 p.m. and on the third visit he pulled a gun, beat the two clerks and robbed the store. George Puckett testified that around 9:30 on the evening in question he saw the defendant behind the counter collecting money from customers and pocketing it. Defendant testified that he left Charlotte on 10 October 1969 for Birmingham, Alabama, where he had resided until 1976. He stated that he did not know the State's witnesses and he did not rob the store or pistol whip Ruth Wardlaw. From his conviction, defendant appeals, assigning error.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Harris & Bumgardner by Don H. Bumgardner, for the defendant.

MARTIN (Robert M.), Judge.

[1] The defendant contends that the trial court erred in permitting his retained counsel from Alabama to appear before the court in his behalf without complying strictly with the provisions of G.S. 84-4.1. We do not agree, and overrule this assignment of error for two reasons. First, the defendant was allowed to have those counsel whom he wanted to defend him. They were retained by him and allowed to practice in the North Carolina courts on his motion. At no time during the proceedings did he express concern regarding their competency, and we deem any such objection now waived. Secondly, the statute upon which defendant relies to press his claim of error, G.S. 84-4.1, was not designed for his protection, and does not vest in him any rights to counsel other than what he would ordinarily possess in the absence of the statute. It is apparent that this statute was intended to subject foreign counsel to the jurisdiction of this State's courts on a continuing basis. G.S. 84-4.1(5) provides for mandatory association of local counsel so that at all times in a proceeding the court has power to compel, if necessary, foreign counsel to fulfill the duties placed upon them by G.S. 84-4.1 (1-4). Even though the trial judge did not

require written motions of the lawyers from Alabama and the defense counsel did not associate local counsel, as mandated by the statute, the trial court found as a fact that the Alabama counsel were competent at trial and they were allowed to represent defendant without objection. Defendant may not now be heard to complain. Any error resulting from non-compliance with G.S. 84-4.1 on these facts is found to be harmless.

[2] Defendant also assigns as error the trial judge's instruction on flight, contending that there was not sufficient evidence to support such a charge and the resulting inference in favor of the State. We disagree. There is ample evidence in the record that a sufficient search was timely made for the defendant after the commission of the crime so as to justify the challenged instruction. *See, State v. Lee,* 287 N.C. 536, 215 S.E. 2d 146 (1975); *State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697 (1973).

The remaining assignments of error by the defendant are without merit and are overruled. We conclude that on the record the defendant had a fair trial free of prejudicial error.

No error.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. GERALD MAURICE LEWIS

No. 7821SC326

(Filed 19 September 1978)

Criminal Law § 134.4— youthful offender—failure to make "no benefit" finding

The trial court erred in sentencing the 19 year old defendant to prison without first finding that he would not benefit from treatment and supervision as a committed youthful offender.

APPEAL by defendant from *Long, Judge.* Judgment entered 1 December 1977, in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 August 1978.

Defendant was charged with armed robbery of Bonnie Fishel on 10 August 1977. He was found guilty as charged and appeals from judgment imposing imprisonment.

The evidence for the State tends to show that Bonnie Fishel, after leaving a bank, went to her car in the parking lot. Defendant and Reginald Pankey approached, asked for her pocketbook, and ordered her to get in the car. She screamed and ran. Pankey shot her in the arm and hip.

There was another witness to the crime who supported the testimony of Ms. Fishel.

Defendant and Pankey testified that defendant did not participate in the crime, did not know Pankey had a gun, and ran from the scene because he was scared.

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

Hatfield and Allman by Donald M. VonCannon for defendant appellant.

CLARK, Judge.

The only question raised by defendant's exceptions and brought forward in his brief is whether the trial court erred in denying defendant's motions for judgment of nonsuit. The evidence for the State was more than sufficient to require submission to the jury and fully supports the verdict of guilty as charged.

However, it does appear from the warrant for his arrest that defendant's date of birth was 14 October 1958, and he testified that he was 19 years of age. The trial court imposed a prison sentence without finding that the youthful offender would not benefit from treatment and supervision as a committed youthful offender.

This court required such "no benefit" finding in *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975). Such finding is now mandated by G.S. 148-49.14.

In *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977), it was held that G.S. 148-49.14 requiring the "no benefit" finding does not apply to convictions or pleas of guilty for which death or a life sentence is the mandatory punishment.

The trial court having failed to make a "no benefit" finding before imposing the prison sentence, we must remand for *de novo* sentencing hearing. To comply with the statutory mandate of G.S. 148-49.14 the sentencing judge must make a determination of whether the defendant would benefit from treatment and supervision as a committed youthful offender. This determination should be based on the trial evidence and evidence presented in the sentencing hearing. In making this determination circumstances relevant to the imposition of the sentence may be considered by the judge which were not considered by a judge who failed to comply with the statutory mandate in imposing sentence. Fairness to the defendant in imposing sentence requires that the resentencing be *de novo* with the sentencing judge having authority to impose a new sentence rather than limiting resentencing to a determination of whether the youthful offender would benefit from treatment as a committed youthful offender. On resentencing the judge may find that defendant would benefit from treatment as a committed youthful offender and impose a sentence as provided by G.S. 148-49.14, or make a "no benefit" finding and impose the same sentence, or a lesser sentence, or a greater sentence if based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969).

In the case *sub judice*, it appears that the narrative summary of the trial evidence in the record on appeal would provide the sentencing judge with sufficient knowledge of the trial evidence. *See State v. Sampson*, 34 N.C. App. 305, 237 S.E. 2d 883 (1977), *cert. denied*, 294 N.C. 185, 241 S.E. 2d 520 (1978).

No error in the trial, but judgment vacated and remanded for resentencing proceedings and sentencing consistent with this opinion.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. CAREY JOHNSON, JR.

No. 7818SC317

(Filed 19 September 1978)

Criminal Law § 155.1— failure to serve and docket record within extended times

A criminal appeal is dismissed for failure of appellant to serve and docket his record on appeal within the extended times permitted by an order of the Court of Appeals.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 9 June 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 August 1978.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery of Spradley Supermarket, Inc., Flash Market #9. At trial he was identified by the two employees of Flash Market #9, one of whom had seen defendant on several occasions before the time of the robbery. Although defendant's defense was that he was ill and in the bed at the time of the robbery, the State's evidence was clearly sufficient to require that the case be submitted to the jury and to support the jury's verdict of guilty as charged. Judgment of imprisonment for a period of not less than 16 nor more than 22 years was entered. Defendant gave notice of appeal.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Assistant Public Defender, Frederick G. Lind, for the defendant.

BROCK, Chief Judge.

On 9 June 1977, the day defendant gave notice of appeal, the trial judge allowed defendant 60 days to serve his proposed record on appeal.

On 2 August 1977 Judge Browning allowed defendant additional time until 28 September 1977 to serve his proposed record on appeal.

On 25 October 1977 Judge Seay allowed defendant additional time until 14 November 1977 to serve his proposed record on ap-

peal. Judge Seay's Order also allowed the State until 24 November 1977 to serve objections, amendments, or proposed alternative record on appeal.

On 31 October 1977, based upon Judge Seay's 25 October 1977 Order, defendant filed in this Court a motion for an extension of time beyond 150 days after giving notice of appeal within which to file the record on appeal in this Court.

By Order entered in this Court on 11 November 1977 this Court extended the time within which defendant should file the record on appeal in this Court upon the following terms: "Upon service of a proposed record on appeal and service of objections or proposed alternative record on appeal within the time limits set by the trial court extension order of 25 October 1977, the record shall be settled within the relevant time limit set by App. R. 11(c) and certified within the time limit set by App. R. 11(e). The record may then be filed within ten days thereafter, as required by App. R. 12(a), even though such filing might be more than 150 days after notice of appeal was given."

This Court's Order required defendant to serve his proposed record on appeal on or before 14 November 1977 in accordance with the trial court extension order. This the defendant did not do. He did not serve his proposed record on appeal until 31 March 1978.

The compliance with this Court's extension order required defendant to serve, settle, have certified, and file in this Court the record on appeal on or about 9 January 1978. This the defendant did not do. He did not file the record on appeal in this Court until 5 April 1978.

The time schedules set out in the rules, and such extension orders as may be entered, are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. "Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process." *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E. 2d 836 (1976).

The North Carolina Rules of Appellate Procedure are mandatory. "These rules govern procedure in all appeals from the

courts of the trial divisions to the courts of the appellate division; . . . ." App. R. 1(a).

Appeal dismissed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM LESLIE OAKES

No. 7821SC398

(Filed 19 September 1978)

Criminal Law § 114.2— statement by defendant—court's use of word "incriminating"—no expression of opinion

In a prosecution for second degree murder where defendant had before trial stated the gun was in his hand when it went off, firing the shot which hit the victim in the face, the trial court did not misstate the evidence or express an opinion on the evidence by characterizing defendant's statement as "incriminating."

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 2 February 1978. Heard in the Court of Appeals 29 August 1978.

Upon his plea of not guilty, defendant was tried on a charge of murder in the second degree of Ulysses Harrison Leonard. At trial the State presented evidence to show that on the afternoon of 4 November 1977, the defendant stormed with a gun in his hand into the living room of Agnes Beatrice Wilson, where Wilson, Leonard and an insurance agent were seated. As the three jumped up to flee out the back door, the defendant began shooting and hit Wilson in the leg. The defendant chased Leonard on out behind the house, caught up with him and shot him in the head, causing his death.

The defendant offered no evidence.

The jury found the defendant guilty as charged. From judgment imposing a prison sentence of not less than sixty nor more than seventy years, the defendant appealed.

Attorney General Edmisten by Michael Todd, Associate Attorney, N.C. Department of Justice, for the State.

Morrow, Fraser & Reavis by John F. Morrow for the defendant.

PARKER, Judge.

The defendant's sole contention in this appeal is that the trial court expressed an opinion on the evidence in his instructions to the jury when he commented as follows on a statement the defendant had made to the police:

> Also, Members of the Jury, there has been some evidence introduced in this trial which tends to show that the defendant made an incriminating statement concerning this case at an earlier time. If you find that the defendant made this incriminating statement, then you should consider all the circumstances under which it was made in determining whether it was a truthful incrimination, and the weight that you will give it.

This Court recently found reversible error where the trial court instructed the jurors as to a statement made by a defendant to the police by saying, "There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case." *State v. Bray*, 37 N.C. App. 43, 245 S.E. 2d 190 (1978). The present case is distinguishable.

In *Bray*, the defendant had not, in fact, "confessed that he committed the crime charged." The defendant in that case was charged with second degree murder, and while he had admitted to the investigating officer that he had fired the fatal shot, he had not *confessed* to murdering or otherwise unlawfully taking the life of the decedent, but contended throughout that he had acted lawfully. Under these circumstances this court held that by using the terms "confessed" and "confession," the trial judge inadvertently expressed an opinion on the evidence, since it was "very likely that the jury received the impression that the court felt that the evidence showed that defendant had 'confessed,' that he had admitted the truth of a charge against him." 37 N.C. App. at 46, 245 S.E. 2d at 192. The trial court's characterization of the defendant's statement in *Bray* as a *confession* to the crime charg-

ed was a misstatement of the facts clearly resulting in prejudice to the defendant in that case.

In the present case, on the other hand, the statement by the defendant was in fact incriminating, precisely as the trial court characterized it. In the statement, although the defendant did not admit to intentionally shooting Leonard, the defendant did say that the gun was in his hand when it went off, firing the shot which hit Leonard in the face. The court in the present case neither misstated the evidence nor expressed an opinion on the evidence by characterizing defendant's statement to the officer as "incriminating."

In defendant's trial and in the judgment entered we find

No error.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. RANDY MARTIN

No. 7817SC348

(Filed 19 September 1978)

Criminal Law § 75.13— confession to private individual—voluntariness—voir dire required

Defendant was entitled to a voir dire hearing to determine the voluntariness of his confession to a private individual where defendant filed a written motion to suppress in compliance with G.S. 15A-977(a); the motion and affidavit filed in support thereof alleged that the confession was made after defendant and his companion had been beaten by the individual in question; and, following arraignment, defendant made an oral motion to suppress, called to the court's attention the earlier written motion, and demanded a voir dire on that motion.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 16 December 1977 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 23 August 1978.

State presented evidence which tended to show that on the evening of 11 September 1977 Bernice Ray Dalton parked his van with the keys in it in the parking lot of the Red Barn Saloon

around 1:00 a.m. When he came out 45 minutes later, it was gone. Some days later, Dalton encountered defendant and James Nance at the Red Barn. Believing that they had stolen his van, Dalton struck Nance, who fled. Dalton then had a conversation with defendant during which at least one blow was struck before defendant said he had taken the van and left it near the Mayo River. Defendant also answered yes when asked by Everett Brown if he had taken the van, but during this time Dalton was guarding defendant with a cue stick keeping him from leaving.

Defendant was convicted of felonious larceny of an automobile. From a judgment imposing a prison sentence, he appealed.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

McLeod, Campbell & Wilkins, by Frederick B. Wilkins, Jr., for the defendant.

MARTIN (Robert M.), Judge.

The question presented is whether the defendant was entitled to a *voir dire* hearing to determine the admissibility of his confession to a private individual. At the time the confession of the defendant was made, he was not in custody and was not under police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, is inapplicable. Nevertheless, the voluntariness requirement applies to statements made to private individuals as well as to persons in authority. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975).

The defendant, on 14 October 1977, filed a motion to suppress evidence of statements by the defendant to Bernice Dalton and Everett Brown. Attached to that motion was an affidavit by the defendant in which the defendant alleged that he made his statements to Dalton after his companion James Nance had been struck by Dalton with a pool cue and after the defendant himself had been beaten by Dalton. The defendant, following arraignment, made a verbal motion to suppress evidence of the statements made by the defendant to Dalton and called to the attention of the court the earlier written motion. Furthermore, the defendant demanded a *voir dire* on that motion. The motion was denied by

the court with no evidence being presented. The defendant objected to questions seeking to elicit testimony concerning the conversation between Martin and Dalton and to testimony of Everett Brown concerning the conversation between Martin and Dalton. Defendant introduced no evidence from his own witnesses concerning the conversation between Dalton and Martin.

The defendant contends the court should have conducted a *voir dire* examination to determine whether the admissions to Dalton and Brown were freely and voluntarily made. As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

By the provisions of G.S. 15A-977(c)(1) and G.S. 15A-977(c)(2), only when "the motion [to suppress] does not allege a legal basis for the motion; or [if] . . . [t]he affidavit does not as a matter of law support the ground alleged," may the court summarily deny the motion. *See State v. Philyaw*, 291 N.C. 312, 230 S.E. 2d 370 (1976). Defendant's motion to suppress was made in proper form and complied with the provisions of G.S. 15A-977(a). The motion set forth with sufficient particularity the legal basis of the motion and the affidavit supported the ground alleged. Thus, an issue was presented to the court for its determination as to whether or not defendant's alleged confession was freely and voluntarily made and admissible against him or whether or not it was made under duress and coerced and inadmissible against him.

The trial court erred in failing to hold a suppression hearing based on defendant's motion to determine the admissibility of the extra judicial statement and set forth in the record his findings of fact and conclusions of law. G.S. 15A-977(d)(f).

New trial.

Chief Judge BROCK and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 SEPTEMBER 1978

STATE v. ARMSTRONG No. 783SC399	Craven (77CR9192)	Affirmed
STATE v. AVENT No. 787SC371	Nash (77CRS6885)	No Error
STATE v. CHURCH No. 7819SC344	Randolph (77CRS9145)	No Error
STATE v. MURPHY No. 7824SC329	Mitchell (77CR573)	No Error
STATE v. SMITH No. 7816SC327	Robeson (78CR0006) (77CR16076) (77CR16075)	No Error
STATE v. STANFIELD No. 782SC312	Martin (77CRS3189)	No Error

FILED 19 SEPTEMBER 1978

AUSTIN v. ROYALL No. 7717SC543	Surry (75CVS97)	No Error
FURNITURE FAIR, INC. v. STEEL CORP. No. 774SC960	Onslow (73CVS1235)	No Error
IN RE SURF & SKI SHOPS No. 771SC959	Dare (77SP31)	Affirmed
IVESTER v. IVESTER No. 7729DC922	Henderson (75CVD555)	Affirmed
REYNOLDS v. REYNOLDS No. 772DC865	Washington (77CVD15)	Affirmed in Part; Vacated in Part
STATE v. ASHFORD No. 7812SC425	Cumberland (76CRS46822)	No Error
STATE v. GILES No. 7810SC428	Wake (77CRS18096)	Affirmed
STATE v. GYOKER No. 789SC311	Person (77CR1676)	No Error
STATE v. McCOY No. 7818SC360	Guilford (77CRS18428)	No Error
STATE v. McINTOSH No. 7812SC307	Hoke (77CRS53)	No Error

STATE v. MINCEY No. 7812SC282	Cumberland (77CRS32490) (77CRS32492) (77CRS32493) (77CRS32521)	No Error
STATE v. RUSH No. 7817SC389	Rockingham (76CR12756) (76CR12757)	No Error

NORTH CAROLINA NATIONAL BANK v. TED R. BURNETTE AND WIFE, IRMA M. BURNETTE

No. 7724SC852

(Filed 3 October 1978)

1. **Uniform Commercial Code § 47— sale of collateral—notice to debtor—burden of proof**

In actions by a creditor to obtain a deficiency judgment, the creditor has the burden of proving that notice of sale of the collateral was properly sent to the debtor. G.S. 25-9-603.

2. **Uniform Commercial Code § 47— public sale of collateral—notice to debtor—jury question**

In an action to obtain a deficiency judgment, the trial court erred in granting plaintiff's motion for judgment n.o.v. on the issue of whether plaintiff had given defendants sufficient notice of the public sale of the collateral where there was evidence that plaintiff sent the notice to a different address than that shown for defendants on the security agreement, and that defendants did not in fact receive the notice until after the sale of the collateral had taken place.

3. **Uniform Commercial Code § 47— public sale of collateral—notice to debtor—commercial reasonableness**

The notice to the debtor of the public sale of collateral required by G.S. 25-9-603 is mandatory and is a distinct and separate requirement from the requirement of commercial reasonableness.

4. **Uniform Commercial Code § 46— public sale of collateral—whether equipment was collateral**

In an action to obtain a deficiency judgment after the sale of collateral pursuant to a security agreement covering certain road grading and rock crushing equipment "together with all equipment, parts, and accessories now or hereafter used in connection therewith," the trial court erred in granting defendants' motion for judgment n.o.v. on the issue of whether plaintiff creditor had disposed of property of the debtors which was not collateral for the loan where all of the items sold by plaintiff and not specifically listed in the security agreement could fit within the category of equipment used in connection with the listed equipment.

5. **Interest § 2; Judgments § 55— action on note—recovery of interest**

In an action to recover a deficiency judgment on a promissory note obligating defendants to pay a specified sum "with interest after maturity at the maximum lawful rate," the trial court erred in awarding plaintiff only six percent interest from the date of the judgment, since plaintiff was entitled to twelve percent interest on the judgment from the date the note became due and payable. However, where plaintiff sought twelve percent interest only from the date the complaint was filed, plaintiff's recovery of interest will be limited to that period of time.

6. Attorneys at Law § 7.4— action on note—attorney fees called for in note

In an action on a promissory note, the trial court erred in failing to award plaintiff attorney fees in the amount of fifteen percent of the outstanding balance on the note where defendants agreed in the note to pay such amount as reasonable attorney fees if the account was referred to an attorney to enforce collection of any unpaid balance on the note.

Chief Judge BROCK concurring in result.

APPEAL by defendant and cross-appeal by plaintiff from *Lewis, Judge*. Judgment entered 10 January 1977, in Superior Court, MITCHELL County. Heard in the Court of Appeals 15 August 1978.

On 28 January 1974, defendants Ted R. and Irma M. Burnette executed a promissory note to the plaintiff for an indebtedness of $190,000 which represented primarily a consolidation of existing loans. Plaintiff and defendants also executed a security agreement which granted to plaintiff a security interest in certain road grading and rock crushing equipment listed in the security agreement "together with all equipment, parts, and accessories now or hereafter used in connection therewith. . . ." The note provided that payments be made in consecutive monthly intallments.

Defendants never made any payments on the indebtedness. Over a period of months, plaintiff and defendants had numerous discussions about various arrangements which would allow defendants to pay the indebtedness. On 29 July 1974, plaintiff, through its agent Thomas Bledsoe, wrote letters to defendants demanding payment. On 27 September 1974, plaintiff mailed to defendants a notice of sale of the rock crushing equipment pursuant to the terms of the security agreement on 18 October 1974. The notice was sent by certified mail, return receipt requested, and was received by defendants. The same notice of sale was also posted at the McDowell County Courthouse on 27 September 1974.

On 24 October 1974, plaintiff mailed to defendants and posted at the Yancey County Courthouse a copy of a notice of sale of the road grading equipment. The sale was scheduled for 31 October 1974. This notice also was sent by certified mail, return receipt requested, but was sent to a different address from the one used for the first notice. Defendants did not receive this notice until 7

November 1974, well after the sale of the road grading equipment.

After applying the proceeds of both sales to defendants' account, there remained a deficiency of approximately $89,000. On 22 November 1974, plaintiff filed suit for a deficiency judgment. Defendant Ted R. Burnette's answer averred that the two sales were not conducted in a commercially reasonable manner as required by G.S. 25-9-504. The issues were tried before a jury. At the close of all the evidence, plaintiff made several motions for directed verdicts as to defendants' various answers, defenses and counterclaims. Some of these motions were allowed but, since they are not the subject of this appeal, we need not detail them here. The issues eventually submitted to the jury (with the jury's responses in parentheses) are as follows:

"1. In what amount, if any, are the defendants indebted to the plaintiff, North Carolina National Bank, by way of a deficiency judgment?

ANSWER: ($89,008.23).

"2. Did the plaintiff Bank dispose of the crusher equipment in a commercially reasonable manner?

ANSWER: (No).

"3. If not, what amount, if any, is the defendant, Ted R. Burnette entitled to recover for loss caused by the failure of the Bank to dispose of the crusher equipment in a commercially reasonable manner?

ANSWER: ($40,000).

"4. Did the plaintiff Bank dispose of the grading equipment in a commercially reasonable manner?

ANSWER: (No).

"5. If not, what amount, if any, is the defendant, Ted R. Burnette entitled to recover for loss caused by failure of the Bank to dispose of the grading equipment in a commercially reasonable manner?

ANSWER: (49,008.23).

"6. Did the plaintiff Bank dispose of property of the defendant, Ted R. Burnette which was not collateral for the loan of January 28, 1974?

ANSWER: (No).

"7. If so, what amount is the defendant, Ted R. Burnette entitled to recover for loss of his property?

ANSWER: $--."

Following the jury's verdict, plaintiff moved for judgment notwithstanding the verdict (JNOV) pursuant to G.S. 1A-1, Rule 50(b) on issues two, three, four, and five, and, in the alternative, for a new trial. Defendants moved for judgment notwithstanding the verdict on issues one, six, and seven, and, in the alternative, for a new trial. The trial court granted a JNOV for plaintiff as to issues two through five and for defendants as to issues six and seven. The court found that the defendants were entitled to a JNOV of $15,000 in issue seven as a setoff against the deficiency judgment. Both plaintiff's and defendants' alternative motions for a new trial were denied.

To the judgment, defendants excepted and appealed. Plaintiff filed a cross-appeal.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton and Robert A. Wicker, and Watson and Dobbin, by Richard A. Dobbin, for plaintiff.

McLean, Leake, Talman & Stevenson, by Wesley F. Talman, Jr. and Joel B. Stevenson, for defendants.

MARTIN (Robert M.), Judge.

Defendants' Appeal

Defendants bring forward two arguments on this appeal. The first is that the trial court erred in entering judgment notwithstanding the verdict as to issue four. Defendants' contention is that the plaintiff had, as a matter of law, failed to comply with statutory requirements of notice of the sale of the grading equipment. While we do not agree that plaintiff as a matter of law failed to comply with the statutory requirements of notice, we do find that the trial court erred in granting plaintiff's motion for JNOV as to issue four.

The test for determining the appropriateness of a judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50 is the same as is applied on a motion for a directed verdict. *Snelling v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. denied* 279 N.C. 727, 184 S.E. 2d 886 (1971). Under this test, all the evidence which supports defendants' claim must be taken as true and considered in the light most favorable to the non-moving party, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom. *See, e.g. Wilson v. Miller*, 20 N.C. App. 156, 201 S.E. 2d 55 (1973). In ruling on a motion for a directed verdict, our Supreme Court, in *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), has emphasized the importance of determining in such questions who has the burden of proof. We do not believe that *Cutts v. Casey* stands for the proposition that a directed verdict may *never* be granted in favor of the party with the burden of proof. Chief Justice Sharp wrote in that opinion:

> "The established policy of this State—declared in both the constitution and statutes—is that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless this right is waived. [Citation omitted.] Whether there is a 'genuine issue of fact' is, of course, a preliminary question for the judge. There may be, as suggested by Phillips, § 1488.10 (1970 Supp.), 'a few situations in which the acceptance of credibility as a matter of law seems compelled.' If so, we will endeavor to recognize that situation when it confronts us." *Id.* at 421. 180 S.E. 2d at 314.

Nevertheless, it is clear that the granting of a directed verdict in favor of the party with the burden of proof will be more closely scrutinized than otherwise. Since our courts should treat a motion for judgment notwithstanding the verdict under the same standards applied to a motion for a directed verdict, we begin our analysis by determining who in the instant case had the burden of proof.

[1] G.S. 25-9-504, which deals with the secured party's right to dispose of collateral after the debtor's default, states in pertinent part:

> "(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more

> contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale."

While the statute itself does not address the question of burden of proof, this Court in *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976), held that a creditor, when suing for a deficiency judgment, has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. Likewise, we believe that, in actions by a creditor to obtain a deficiency judgment, the burden of proving that notice was properly sent by the creditor to the debtor rests with the creditor. *See also Universal C.I.T. Credit Co. v. Rone*, 248 Ark. 665, 453 S.W. 2d 37 (1970).

[2] In the present case, the issue in question, issue four read, "Did the plaintiff bank dispose of the grading equipment in a commercially reasonable manner?" While we do not expressly approve of this statement of the issue, since it combines two questions which the jury was called upon to decide, we think the trial judge's instructions to the jury made clear that this issue covered not only the question of the commercial reasonableness of the sale but also the question of reasonable notice to defendants. Since the plaintiff had the burden of proving reasonable notice to defendants and since there was contradictory evidence concerning that notice, we hold that the trial court's JNOV on issue four was improper.

Under the terms of the security agreement, the plaintiff was obligated to mail a copy of its notice of public sale to defendants at the address shown on the agreement. That address was Route 1, Box 271, Spruce Pine, North Carolina 28777. The notice concerning the sale of the crushing equipment was in fact sent to,

and received by, defendants at this address. According to one of plaintiff's witnesses, however, the notice concerning the sale of the grading equipment was sent to defendants at Route 1, Little Switzerland, North Carolina 28749. This was so despite the fact that on the face of the notice was the statement that the notice was mailed to defendants at Route 1, Box 271, Spruce Pine. Plaintiff's agent, Thomas Bledsoe, admitted in his testimony that he knew that there was no Route 1, Little Switzerland. Plaintiff argues that, since the demand note sent 29 July 1974 reached defendants at the Route 1, Little Switzerland address, the bank's mailing constituted reasonable notice. We note, however, that the return receipt on the demand letters indicated receipt by defendants at P. O. Box 121, Little Switzerland. While there was evidence that defendants did live in Little Switzerland, there was uncontroverted evidence that defendants did not in fact receive the notice until 7 November 1974, well after the sale of grading equipment had taken place.

[3] Plaintiff argues that, under G.S. 25-9-601, it is entitled to a conclusive presumption of commercial reasonableness. G.S. 25-9-601 reads:

> "Disposition of collateral by public proceedings as permitted by G.S. 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has substantially complied with the procedures provided in [part 6] shall conclusively be deemed to be commercially reasonable in all aspects."

G.S. 25-9-603, which is within Part 6, outlines the requirement of notice:

> "(1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notices, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.
>
> "(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale,

mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement:

"(a) at the actual address of the debtors, if known to the secured party, or

"(b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address."

Plaintiff's contention is that since it *substantially* complied with the notice requirement of G.S. 25-9-603 by posting the notice at the Yancey County Courthouse and mailing the notice to defendants at a non-existent address, it is entitled to a conclusive presumption of commercial reasonableness. We do not, however, accept the construction of Part 6 which plaintiff advocates. Carried to its logical extreme, a creditor could substantially comply with all the other provisions of Part 6, fail to give *any* notice to the debtor, and still be entitled to the exclusive presumption of commercial reasonableness. We believe and hold that the notice required under G.S. 25-9-603 is mandatory and is a distinct and separate requirement from the requirement for commercial reasonableness. We point out that other sections of Part 6 are not written in language as strong as G.S. 25-9-603. For example, G.S. 25-9-602, dealing with the contents of the notice, contains the mandate that the notice "shall *substantially*" include certain items of information. G.S. 25-9-604 and -605, dealing respectively with exceptions as to perishable property and postponement of public sale, use the word "may" which is discretionary language. On the other hand, G.S. 25-9-603 uses the unmodified word "shall." We, therefore, conclude that the requirements of G.S. 25-9-603 for notice of sale must be complied with. As stated above, under the facts of the case before us, the jury might reasonably have found that G.S. 25-9-603 was not followed; hence the judgment notwithstanding the verdict for issue 4 was improperly granted.

Defendants' second argument is that the court erred in entering judgment notwithstanding the verdict as to issues 2 and 4 because the application of G.S. 25-9-601 *et seq.* in the JNOV amounted to a deprivation of defendants' property without due process. Since we have construed G.S. 25-9-601 *et seq.* in a way which requires notice to defendants and since defendants have failed to argue specifically why the JNOV for issue 2 violated

defendants' due process rights, we see no need to address this question.

Plaintiff's Appeal

[4] Plaintiff's first of three arguments is that the trial court erred in allowing the defendants' motion for a JNOV on Issues 6 and 7. Assuming that the JNOV was granted against the party with the burden of proof on the issue of collateral, we then must review the evidence in the light most favorable to plaintiff, giving it the benefit of every reasonable inference which may legitimately be drawn therefrom. With this standard before us we conclude that plaintiff submitted enough evidence, which the jury apparently believed, to withstand the JNOV. The security agreement sufficiently described the collateral and covered "all equipment, parts and accessories now or hereafter used in connection therewith. . . ." While there was contradictory evidence concerning what had been sold and what remained, it was clear that defendants had not checked the site of the rock crushing operation to determine whether certain allegedly illegally sold items remained. All of the items admittedly sold by plaintiff and not specifically listed in the security agreement could fit within the category of equipment used in connection with the listed equipment. We therefore find that the trial court's JNOV on Issues 6 and 7 was error.

[5] The second question presented by plaintiff's appeal is whether the trial court erred in entering final judgment without awarding plaintiff interest from the date the complaint was filed. Under the terms of the promissory note, defendants were to pay plaintiff $253,586.37, "with interest after maturity at the maximum lawful rate." Plaintiff, on 29 July 1974, declared the note mature and immediately due and payable.

We believe that the trial court did err in awarding plaintiff six percent interest from the date of the judgment. Plaintiff is entitled to twelve percent interest on $40,000 from the date the promissory note became due and payable. Since, however, plaintiff seeks twelve percent interest only from the date the complaint was filed in this action, we limit its recovery to that period of time.

[6] Plaintiff's final argument on this appeal is that the trial court erred in entering the final judgment without granting plaintiff attorneys' fees in the amount of fifteen percent of the outstanding balance. We agree that for attorneys' fees the plaintiff was entitled to an award of fifteen percent of the final judgment ($40,000). The promissory note read:

> "If this account is referred to an attorney to acquire possession of the Collateral described below or to enforce collection of any unpaid balance hereunder, DEBTOR agrees to pay all collection expenses and reasonable attorneys' fees of Secured Party. DEBTOR stipulates and agrees that 15% of the sum of the unpaid balance hereof at the time the matter is referred to an attorney shall be deemed reasonable attorneys' fees."

See G.S. 6-21.2.

In summary, in defendants' appeal, the case is reversed and remanded in part and affirmed in part. In plaintiff's appeal, the case is reversed and remanded. On remand, the trial court shall enter judgment consistent with this opinion.

As to defendants' appeal, reversed and remanded in part and affirmed in part.

As to plaintiff's appeal, reversed and remanded.

Judge MITCHELL concurs.

Chief Judge BROCK concurs in the result.

Chief Judge BROCK concurring in the result.

I concur in the result reached by the majority opinion in this case; however, I disapprove of the language of the opinion insofar as it intimates that a mere allegation by the debtor that the sale was *not* conducted in a commercially reasonable manner or an allegation by the debtor of an inadequate and unreasonably low price would justify submission of such issue to the jury. The majority opinion does not hold that such allegations require submission to the jury but the intimation appears strong. This Court recently held in *Trust Co. v. Murphy*, 36 N.C. App. 760 (*appeal dismissed, cert. denied*, 295 N.C. 557, 248 S.E. 2d 734 [1978]) that

the allegations of a debtor of any inadequate and unreasonable price obtained for the collateral at public sale does not justify a hearing upon the question of commercial reasonableness if the creditor has shown that there was in fact a public sale following substantial compliance with the procedures provided in Part 6 of Article 9 of the Uniform Commercial Code (G.S. 25-9-601 through 25-9-607). *Trust Co. v. Murphy* further held that 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 either the Constitution of the United States or the Constitution of North Carolina.

The purpose of this concurrence is only to point out that in my opinion and in the opinion of this Court in *Trust Co. v. Murphy* when the creditor shows substantial compliance with Part 6 the question of commercial reasonableness does not arise.

CORNELIA D. MARTIN, BY HER GUARDIAN AD LITEM, HAZELINE MARTIN v. AMUSEMENTS OF AMERICA, INC., MORRIS J. VIVONE, JOHNNY VIVONE, AND FERNANDO DOMINQUEZ

No. 7726SC908

(Filed 3 October 1978)

1. Negligence § 27— hiring practices in prior years—irrelevancy

In an action to recover for personal injuries received by minor plaintiff when she fell from an amusement ride operated by defendant, the trial court properly excluded evidence of defendant's hiring practices and training procedures in years prior to the year in which the accident occurred, since such evidence was irrelevant to the issue of defendant's negligence at the time in question.

2. Evidence § 19; Negligence § 27— fall from amusement ride—testimony and film about another ride—no showing of similar conditions

In an action to recover for personal injuries received by minor plaintiff when she fell from an amusement ride operated by defendant at a fair, the trial court erred in permitting an employee of a permanent amusement park to testify about a newer model of the ride located in the amusement park and in permitting the jury to view a film of the newer ride in operation, since there was no showing of similarity in operating conditions of the two rides. However, such error was not prejudicial to plaintiff where neither the testimony nor the film would unduly confuse or mislead the jury.

3. Games and Exhibitions § 2.1; Negligence § 53.6— patron of amusement park—duty of concessionaire

The patron of an amusement park occupies the status of an invitee, and this imposes the duty on the concessionaire to inspect the premises and devices and to exercise oversight and supervision over their operation. Moreover, the degree of care required of the concessionaire is affected by the fact that young children are permitted on an amusement ride and may require additional precautions not necessary in the case of adults or older children.

4. Games and Exhibitions § 2.2; Negligence § 37.3— duty of operator of amusement ride to minor patron

The trial court adequately instructed the jury on the duty of care required of a concessionaire of an amusement ride toward a minor patron on such ride.

5. Negligence § 40— instructions—negligence as a proximate cause

The trial court sufficiently instructed the jury that plaintiff need not prove that the negligence of defendant was the sole proximate cause of plaintiff's injury when it instructed that "there can be more than one proximate cause of an injury or damage" and that plaintiff had to prove that defendant's "negligence was one of the proximate causes and resulted in [plaintiff's] falling or being thrown from the ride in question."

6. Negligence § 19; Parent and Child § 3— negligence of parent not imputed to child—instructions

In an action to recover for injuries suffered by minor plaintiff in a fall from an amusement ride, there was no necessity for the trial court to instruct the jury that any negligence by minor plaintiff's mother, who was on the ride with minor plaintiff, could not be imputed to minor plaintiff so as to bar his recovery where the court correctly and adequately instructed the jury with respect to multiple proximate causes of an injury as it related to the issue of negligence.

APPEAL by plaintiff from *Grist, Judge*. Judgment entered 6 June 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 August 1978.

This is a civil action wherein the minor plaintiff, Cornelia D. Martin, by and through her guardian ad litem, Hazeline Martin, the mother, seeks to recover damages for personal injuries allegedly sustained by the minor plaintiff as a proximate result of the defendants', Amusements of America, Inc., and Fernando Dominquez, negligent operation of an amusement park ride known as a Trabant. The defendants by answer denied negligence and alleged that any injuries to the minor plaintiff were caused by the sole negligence of the minor plaintiff's mother. Plaintiff introduced evidence tending to show that on 7 October 1972 the minor

plaintiff, twenty-two months of age, and her mother went to the Metrolina Fair in Charlotte and rode an amusement ride known as a Trabant. After the ride had gained momentum, the minor plaintiff fell or was thrown from the ride and sustained serious injuries to her hip.

Defendant offered evidence tending to show that, once seated on the ride, the minor plaintiff's mother had not kept an adequate hold on her child, and that she had diverted her attention from the child to save her wig just before the minor plaintiff fell from the ride.

The following issues were submitted to and answered by the jury as indicated:

1. Was the minor Plaintiff, Cornelia D. Martin, injured or damaged as the result of the negligence of the Defendants?

Answer: No

2. Was the mother of the minor Plaintiff, Hazeline Martin contributorily negligent?

Answer: [not answered]

3. What amount, if any, is Hazeline Martin, the mother of the minor plaintiff, entitled to recover as damages from the Defendants?

Answer: [not answered]

4. What amount, if any, is the minor Plaintiff, Cornelia D. Martin, entitled to recover as damages from the Defendants?

Answer: [not answered]

From a judgment entered on the verdict, plaintiff appealed.

Haynes, Baucom, Chandler & Claytor, P.A., by W. J. Chandler, and Olive, Downer & Price, by Larry E. Price, for the plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews and Harvey L. Cosper, Jr., for the defendant appellee.

HEDRICK, Judge.

[1] The plaintiff's first two assignments of error concern evidentiary rulings by the trial court. Plaintiff objects first to the exclusion of deposition testimony relating to the hiring procedures of defendant on the grounds that such testimony was necessary to show that the "standard of care" of defendant in hiring and training ride operators was inadequate to ensure the safety of its patrons. We believe the trial court's exclusion of the offered testimony was proper as the evidence was irrelevant to the issue of defendant's negligence.

Evidence is relevant if it has any logical tendency, however slight, to prove or disprove the existence of a material fact in the case. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E. 2d 350 (1974), *cert. denied*, 286 N.C. 420, 211 S.E. 2d 800 (1975); 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). The deposition testimony appellant argues was erroneously excluded relates to the hiring practices of defendant in years prior to 1972, the year in which the accident occurred. The hiring practices and training procedures used by the defendant in these earlier years are not a material issue in the case and such evidence lacks any significant probative value with regard to whether or not the defendant exercised reasonable care in selecting and training individuals to operate the Trabant in question in 1972. The trial court properly allowed plaintiff to introduce into evidence testimony of the ride foreman detailing the hiring and training of the two operators who were allegedly in control of the Trabant at the time of the accident, as this testimony was relevant to the issue of defendant's negligence in operating the amusement ride at the time of the injury to the minor plaintiff.

[2] Plaintiff's second assignment of error is as follows:

> The court committed error by the admission of evidence relative to the operation of an amusement ride known as the "Wagon Wheel" at Carowinds during the year 1977 and the subsequent admission of eight millimeter film to illustrate such testimony in that no foundation was laid to correlate the Trabant which was the subject of this action with the machine at Carowinds and there was no evidence of similar construction or mechanical operation.

The trial court, over objection of the plaintiff, permitted an employee of Carowinds amusement park to testify about a newer model Trabant known as a "Wagon Wheel" located at Carowinds and allowed the jury to view a film of the "Wagon Wheel" in operation. Plaintiff's primary objection is that this testimony and the film caused the jury to correlate "the sophisticated technology and managerial techniques utilized by Carowinds" with the "method of operation employed by a traveling carnival."

The rule in North Carolina is that evidence of similar occurrences or conditions may be admitted upon a showing of "substantial identity of circumstances and reasonable proximity in time." 1 Stansbury's N.C. Evidence § 89, at 277 (Brandis rev. 1973). *See also Jenkins v. Hawthorne*, 269 N.C. 672, 153 S.E. 2d 339 (1967); *Miller v. Lucas*, 267 N.C. 1, 147 S.E. 2d 537 (1966); *Vanhoy v. Phillips*, 15 N.C. App. 102, 189 S.E. 2d 557 (1972). We agree with the plaintiff that an insufficient foundation was laid for the admission of defendant's evidence with respect to the operation of the "Wagon Wheel" amusement ride. The testimony of the Carowinds employee was clearly irrelevant on the issue of defendant's negligence. The eight millimeter film, while relevant to illustrate the witness' testimony, was also irrelevant to the issue of defendant's negligence.

When the circumstances or conditions depicted by such evidence are so dissimilar that the evidence offered lacks substantial probative value, there arises the danger that the jury's confusion of the issues will outweigh any benefit to be derived from admitting the evidence, and in such a case the evidence should be excluded. *See Mason v. Gillikin*, 256 N.C. 527, 124 S.E. 2d 537 (1962); *Rouse v. Huffman*, 8 N.C. App. 307, 174 S.E. 2d 68 (1970); 1 Stansbury's N.C. Evidence § 89, at 281 (Brandis rev. 1973). Particularly with respect to the film, the danger of undue prejudice as a result of the jury's placing inordinate weight on it is always present in light of the tremendous dramatic impact of motion pictures. *See Balian v. General Motors*, 121 N.J. Super. 118, 296 A. 2d 317 (1972); Paradis, "The Celuloid Witness," 37 U. Colo. L. Rev. 235 (1965). We conclude that the trial court should have excluded this evidence as irrelevant.

The admission of evidence that is irrelevant or immaterial, however, is harmless unless it has a tendency to mislead or dis-

tract from the issue being tried to the prejudice of the objecting party. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966); 1 Jones on Evidence § 4:6, at 395 (6th ed. 1972). "Not every erroneous ruling on the admissibility of evidence, however, will result in a new trial. The burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *Wilson County Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E. 2d 281, 285 (1970); *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953); 1 Stansbury's N.C. Evidence § 9, at 20-21 (Brandis rev. 1973). Here plaintiff argues only that the evidence regarding the "Wagon Wheel" was "patently prejudicial."

While the film does show a more modern model of the Trabant, the machine depicted is not so dissimilar that we can assume automatically that its showing was unduly prejudicial to plaintiff. We conclude that on its face neither the testimony of the Carowinds employee nor the film's contents would unduly confuse or mislead the jury and that plaintiff has failed to demonstrate sufficient prejudice so as to require a new trial. Plaintiff's second assignment of error has no merit.

This disposition of assignment of error number two makes it unnecessary for us to discuss the other exceptions upon which this assignment of error is based.

By assignments of error three and four, plaintiff challenges the adequacy of the court's instructions to the jury. Plaintiff contends the court erred in "failing to adequately define the duty of care owed by the concessionaire, Amusements of America, Inc., to the minor plaintiff," in "failing to instruct the jury that the negligence of the guardian ad litem, if any, could not be imputed to the minor plaintiff," and in "refusing to incorporate the plaintiff-appellant's request for instructions into the charge as pertains to multiple proximate causes."

[3] It is clear that the patron of an amusement park occupies the status of an invitee; *Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854 (1948), and this imposes the duty on the concessionaire to inspect the premises and devices and to exercise oversight and supervision over their operation. *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652 (1951). In *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 413, 142 S.E. 2d 29, 34 (1965), the court stated:

> An owner or general concessionaire is not an insurer of the safety of invitees. His duty is that of reasonable care under the circumstances. Where, for instance, the instrumentality or device is inherently dangerous and the patrons are children of tender years, the care exercised must be commensurate with the peril and likelihood of injury.

Courts of other states that have confronted this issue have also held that the standard of care required of the concessionaire is affected by the fact that children are permitted on the amusement ride and may require additional precautions not necessary in the case of adults or older children. *See e.g., Thomas v. Pacheco*, 163 Colo. 170, 429 P. 2d 270 (1967); *Brown v. Columbia Amusement Co.*, 91 Mont. 174, 6 P. 2d 874 (1931).

[4] An examination of the charge reveals that the court quite thoroughly and adequately instructed on the duty of care required. In addition to the above quoted language, the court charged the jury with respect to the duty owed to children:

> In the operation of an amusement ride it is the duty of the operator to be alert and to exercise reasonable care to see that the riders are safe during the operation, and if such an operator invites children who have not reached an age where they are to understand and appreciate and avoid danger incident to a device to which they are thus invited, ordinary care should dictate that he must take such steps as are necessary for their protection.

The portion of the court's charge dealing with the duty of care owed by the concessionaire is fully in accord with the law and plaintiff's assignment of error relating thereto is overruled.

[5] Plaintiff also challenges the court's instructions to the jury regarding multiple proximate causes. Plaintiff's primary objection is that the court failed to give the requested instruction that plaintiff "need not prove that the negligence of [defendant] was the *sole* proximate cause of the injury." The court instructed the jury that "there can be more than one proximate cause of an injury or damage" and that plaintiff had to prove that defendant's "negligence was *one* of the proximate causes and resulted in [plaintiff's] falling or being thrown from the ride in question." (emphasis added).

The court is not required to give the instructions requested in the exact language of the request, it being sufficient if the pertinent and applicable instructions requested are given substantially in the charge. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967). This assignment of error likewise is without merit.

[6] Plaintiff also assigns as error the failure of the trial court to include in its charge an instruction that any negligence of the plaintiff's mother could not be imputed to the minor plaintiff. Although the plaintiff did not specifically request such an instruction, it now contends that the omission was error as a matter of law.

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the evidence. G.S. § 1A-1, Rule 51(a); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972); *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387 (1971).

It is true, as plaintiff contends, that North Carolina follows the majority rule that the negligence of a parent, guardian, or other custodian of a child non sui juris in permitting the child to be exposed to danger cannot be imputed to the child so as to preclude an action by the child against a third party whose negligence has resulted in injury to it. *Davis v. Seaboard Airline Railroad Co.*, 136 N.C. 115, 48 S.E. 591 (1904).

Since the court correctly and adequately instructed the jury with respect to multiple proximate causes of an injury as it related to the first issue, there was no necessity for the trial court to instruct the jury that any negligence of the mother could not be imputed to the infant plaintiff so as to bar its recovery. Such an instruction on the first issue would have been surplusage.

We hold the plaintiff had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DAISEY SPICER WILLIAMS

No. 7818SC297

(Filed 3 October 1978)

1. **Homicide § 21.9— involuntary manslaughter—sufficiency of evidence**

Evidence was sufficient to support a verdict of guilty of involuntary manslaughter where it tended to show that defendant was attempting to shoot herself when her husband, the deceased, interfered; the gun went off killing her husband; and defendant never intended to shoot her husband.

2. **Criminal Law § 119— request for instructions—verbatim charge not required**

The trial judge charged the jury in substantial conformity with defendant's request, and he was not required to give her requested charge verbatim.

3. **Criminal Law §§ 73.4, 74.1— defendant's statement not part of res gestae—statement not part of original confession**

The trial court in a homicide prosecution did not err in excluding the testimony of an officer that defendant told him shortly after the shooting that she was trying to kill herself and deceased tried to stop her, since (1) such statement was not a part of the *res gestae*, not being of spontaneous character and not happening contemporaneously with the incident in question and (2) the statement was not a part of defendant's original confession to a police dispatcher and therefore defendant was not entitled to have it introduced when the State offered the original confession.

APPEAL by defendant from *Albright, Judge*. Judgment entered 4 November 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 August 1978.

Defendant was indicted and placed on trial for the felony of second degree murder in the killing of her husband, Patterson Milo Williams, on 28 February 1977. She was convicted of involuntary manslaughter and judgment of imprisonment for a term of five years was entered. The trial judge recommended her for the Work Release Program.

The State's evidence tended to show that at about one o'clock on the morning of 28 February 1977 defendant called the Greensboro Police Department by telephone and stated that she had just shot her husband. She requested that the police and an ambulance be sent. When the police officers and ambulance attendants arrived at her mobile home residence defendant admitted them and directed them to her husband. The deceased had been shot one

time with a .38 cal. revolver from a distance of more than four feet. The projectile entered deceased's right eye, traveled straight back at approximately the same level and lodged in the right back of his skull. In the opinion of the pathologist the deceased would have been instantaneously incapacitated, and death occurred within a minute or so of receiving the wound. The .38 cal. pistol which fired the fatal shot was found on the dresser of the bedroom of defendant's residence. It had four live rounds and one empty casing under the hammer. A stipulation between defendant and the State was entered as follows: "That a .38 caliber Smith and Wesson chrome revolver, serial number J427635, was seized by law enforcement officers in the early morning hours of February 28, 1977, at 724 Creekridge Road, Lot 130. That this named weapon was a weapon that fired a .38 caliber slug into the skull of the decedent, Patterson Milo Williams, resulting in his death." A switch-blade knife was also found on the dresser in defendant's bedroom, and a shotgun was standing in the corner of the bedroom. In the closet there was a ladies pocketbook with a .25 cal. automatic pistol and a blackjack.

The deceased's pickup truck was parked in the yard of the residence. A shotgun was in the rack across the rear window of the cab, and deceased's clothing was stacked neatly on the seat. All of the rooms in the mobile home residence were neat and not in disarray. The defendant was crying and was taken to the hospital by the officers where she was given a sedative before going to the police station.

Defendant's evidence tended to show that she and deceased enjoyed a good marriage, but that he spent all of his spare time hunting. They discussed this problem and decided to undertake a trial separation to see if it would improve or change their relationship. Defendant assisted deceased in putting some of his clothes in his pickup truck, and he was going to stay with his grandmother for a time. When defendant went back into her residence she decided to kill herself. She took the .38 cal. pistol out of the dresser drawer and sat down on the bed. She pulled the hammer back and placed the barrel to her head. Her plan was to wait for her husband to drive away before pulling the trigger. Suddenly her husband appeared at the bedroom doorway and asked what she was doing. She stood up, the pistol in her hand fired, and her husband fell. She ran to him, saw that he was

bleeding, and she called the police emergency. She did not deliberately point the pistol at her husband, did not intend to shoot him, and does not know how or why the pistol fired.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

E. S. Schlosser, Jr. for the defendant.

BROCK, Chief Judge.

We will not discuss defendant's assignment of error which relates to the trial court's denial of her motion for nonsuit made at the close of the State's evidence. By offering evidence in her own behalf defendant waived the motion for nonsuit made at the close of the State's evidence, and therefore she may now rely only upon her motion for nonsuit made at the close of all the evidence. G.S. 15-173.

[1] The record on appeal discloses that at the conclusion of all the evidence the defendant made the following motion: "At the conclusion of all the evidence, the defendant moves for Judgment as of nonsuit." The bill of indictment charged defendant with murder. As such the indictment also charged the included lesser offenses of voluntary manslaughter and involuntary manslaughter. Defendant's motion obviously was addressed to the entire bill of indictment and was not limited to any one or more degrees of the crime charged. A motion addressed to the entire bill cannot be allowed if there is evidence to support any degree of the crime charged. *State v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684 (1951). Under these circumstances, since defendant was convicted of involuntary manslaughter, it is merely academic whether the State's evidence would support a verdict of murder or of voluntary manslaughter. Therefore we will consider only whether the State's evidence was sufficient to withstand defendant's motion for nonsuit as to the included lesser offense of involuntary manslaughter.

"On motion to nonsuit, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and to every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant

nonsuit. Only the evidence favorable to the state will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the state, will not be considered." *State v. Henderson*, 276 N.C. 430, 438, 173 S.E. 2d 291, 296 (1970). When the evidence is considered in the light most favorable to the State, if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied, and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *State v. Mayo*, 9 N.C. App. 49, 175 S.E. 2d 297 (1970).

In our opinion when all of the evidence, and every reasonable inference therefrom, is considered in the light most favorable to the State it is ample to support a verdict of guilty of involuntary manslaughter.

Defendant further argues that the denial of her motion for nonsuit placed upon her the burden of proving that the shooting was an accident. This is a novel assertion, but it is clearly without merit.

[2] In her second assignment of error defendant asserts that the trial judge failed to instruct the jury in accordance with her timely filed written request for instructions. We have reviewed defendant's requested instructions and have reviewed the instructions to the jury as given by the judge. In our opinion the substance of the requested instructions was given by the judge. Although the judge must charge the jury in substantial conformity with a prayer for instruction which is legally correct in itself and is supported by the evidence, the judge is "not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel." *State v. Davis*, 291 N.C. 1, 14, 229 S.E. 2d 285, 294 (1976).

By her third and fourth assignments of error the defendant asserts that the trial judge erroneously instructed the jury on the elements of involuntary manslaughter and so stated the contentions of the parties as to express an opinion upon the evidence. We have reviewed these assignments of error and defendant's arguments thereon. In our opinion when the trial judge's instructions to the jury are considered as a whole they fairly and adequately submitted the issue to the jury upon applicable principles

of law. We see no reason to feel that the jury was misled or confused as to its duties or the legal principles applicable. We find no intimation of an opinion on the evidence by the trial judge. These assignments of error are overruled.

[3] Defendant's fifth assignment of error asserts that the trial judge committed prejudicial error in refusing to allow the State's witness, Officer Alley, to state on cross-examination what the defendant told him about how the shooting occurred. In the presentation of its evidence the State introduced defendant's statement to the police dispatcher that defendant had just shot her husband. However the State offered no statement by defendant made to the officers who talked with defendant later in person. On cross-examination of Officer Alley defendant asked: "What did she tell you happened concerning his death?" After the State's objection was sustained defendant was allowed to place Officer Alley's answer in the record in the absence of the jury. It was: "The defendant, Daisey Spicer Williams, stated that 'I was trying to kill myself, and he tried to stop me'."

Defendant argues that this statement was a part of the *res gestae* and should have been admitted. According to the testimony four minutes had elapsed between defendant's original call to the dispatcher and the arrival of Officer Alley at defendant's residence. We are left to speculate as to how much time elapsed between the fatal shooting and defendant's telephone call. Also we are left to speculate how much time elapsed between Officer Alley's arrival at defendant's residence and her statement to him. But be that as it may the statement does not qualify as part of the *res gestae*. "Declarations are competent as part of the *res gestae* if the declaration (1) is of such spontaneous character as to preclude the likelihood of reflection and fabrication, (2) is made contemporaneously with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom, and (3) has some relevancy to the fact sought to be proved." *State v. Cox*, 289 N.C. 414, 420, 222 S.E. 2d 246, 251 (1976). Defendant's statement to Officer Alley fails tests (1) and (2) enumerated above. Defendant's argument that the State offered only a part of defendant's confession and that defendant is entitled to have the entire confession offered is based on sound legal principles but is not applicable. The State offered everything that defendant said to the police dispatcher, and authenticated it by the mechanical

recording of the conversation. What defendant said later to another officer is simply not a part of the first statement. Defendant's further assertion that the exclusion of her statement to Officer Alley was prejudicial error because the statement was exculpatory is not convincing. In the first place, the statement "I was trying to kill myself, and he tried to stop me", can as easily be read as inculpatory. More importantly, this purported exculpatory statement made by the defendant was sought to be brought out on cross-examination of the State's witness during the State's presentation of its evidence. It was made to an officer after he had come to the defendant's residence and was not made in response to interrogation. "It is settled by repeated adjudications, that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received; and they are competent only when they accompany and constitute part of the *res gestae*." *State v. Norris*, 284 N.C. 103, 105, 199 S.E. 2d 445, 446 (1973). We have already concluded that these excluded statements of the defendant were not part of the *res gestae*. So far as prejudice to the defendant is concerned the defendant was later permitted to call Officer Alley to testify in corroboration of her own testimony that she did make the statement to him. This assignment of error is overruled.

We have reviewed defendant's remaining assignments of error and conclude that they warrant no discussion. Although this was a tragic incident for all involved the jury has heard the entire evidence, observed the witnesses, and rendered its verdict. Defendant has received a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and WEBB concur.

RALEIGH PAINT AND WALLPAPER CO. v. PEACOCK & ASSOCIATES, INC., RAY A. KANOY AND WIFE, SHERRY D. KANOY, GREAT CENTURY, INC., TRUSTEE, AND BUILDERS FEDERAL SAVINGS & LOAN ASSOCIATION OF ROCKY MOUNT

No. 7710DC886

(Filed 3 October 1978)

Laborers' and Materialmen's Liens § 3— materialman's lien—claimant need not personally deliver materials to site

A lien claimant who furnished materials for the improvement of real estate pursuant to a contract with the owner is not required by G.S. 44A-8 and G.S. 44A-10 to deliver such materials personally to the site of the improvement in order to be entitled to a materialman's lien so long as the claimant furnished the materials with the intent that they would later be placed on the site and they were so placed, and the lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site.

APPEAL by defendants Ray A. Kanoy and wife, Sherry D. Kanoy, Great Century, Inc., Trustee, and Builders Federal Savings and Loan Association of Rocky Mount, from *Barnette, Judge*. Judgment entered 15 August 1977 in the District Court, WAKE County. Heard in the Court of Appeals 17 August 1978.

The plaintiff initiated this civil action pursuant to G.S. 44A-13 to enforce a materialman's lien. The plaintiff furnished materials on 2 November 1976, and their installation was completed 5 November 1976. Claim of lien was filed pursuant to G.S. 44A-12 on 9 February 1977. This action was commenced 14 March 1977. Plaintiff filed a motion for summary judgment 14 July 1977, supported by its verified complaint and the answers to requests for admissions of fact. The defendant Peacock & Associates, Inc., neither answered the complaint nor presented affidavits opposing the motion for summary judgment. Defendants Ray A. Kanoy and wife, Sherry D. Kanoy; Great Century, Inc., Trustee; and Builders Federal Savings and Loan Association of Rocky Mount answered the complaint and denied all of the material allegations.

The uncontroverted facts show that Bruce Peacock of Peacock & Associates, Inc., during the second week of October 1977, visited plaintiff's store to inform plaintiff that he was building a house for Ray A. Kanoy and wife, Sherry D. Kanoy. Defendant Peacock informed plaintiff that the Kanoys would come

to the store to select carpet and wallpaper. Plaintiff was authorized to charge the items selected to Peacock & Associates, Inc., owner of Lot 27, Cambridge Subdivision. According to the arrangements, the Kanoys placed orders for wallpaper and carpet costing $1,170.79.

The wallpaper was delivered to Bruce Peacock 2 November 1976 and was installed in the house located on Lot 27, Cambridge Subdivision. There is no evidence with respect to where the wallpaper was actually delivered by the plaintiff or who delivered it to the site. The carpet was delivered to Jimmy Coats who completed installation of the carpet for Peacock & Associates, Inc., in the house on Lot 27, Cambridge Subdivision, on 5 November 1976. Again there is no evidence with respect to where plaintiff actually delivered the carpet or who delivered the carpet to the site.

By warranty deed dated 12 November 1976 and recorded in Deed Book 2451, at page 456, Wake County Registry, Peacock & Associates, Inc., conveyed to Ray A. Kanoy and wife, Sherry D. Kanoy, all of Lot 27, Cambridge Subdivision. Ray A. Kanoy and wife, Sherry D. Kanoy, executed a deed of trust and note to Great Century, Inc., Trustee for Builders Federal Savings & Loan Association of Rocky Mount, on 16 November 1976.

On 25 July 1977, summary judgment for the plaintiff was granted in the amount of $1,190.81, with interest from 2 February 1977. The judgment was declared a lien upon the property, relating back to 2 November 1976, with priority over the subsequent deed of trust executed by the defendants Kanoy to the defendant Great Century, Inc., Trustee for Builders Federal Savings and Loan of Rocky Mount. Defendants Kanoy, Great Century, Inc., and Builders Federal Savings and Loan of Rocky Mount appealed.

Brenton D. Adams for plaintiff appellee.

Seay, Rouse, Johnson, Rosser and Harvey, by Larry D. Johnson, for defendant appellants.

MORRIS, Judge.

The ultimate issue in this case is whether a lien claimant who furnishes materials for the improvement of real estate pursuant

to a contract with the owner must himself deliver such materials to the site of the improvement before the claimant is entitled to a valid materialman's lien pursuant to Part 1, Article 2, Chapter 44A of the General Statutes.

The defendants contend that there exists, based upon the record, a genuine issue of material fact which would require a reversal of the granting of plaintiff's motion for summary judgment. *See* G.S. 1A-1, Rule 56(c). In support of its motion for summary judgment, the plaintiff submitted its verified complaint and answers to interrogatories. The defendant submitted no verified answer, affidavits, or other pleadings in opposition to the motion for summary judgment.

There is no question but that the material was delivered by someone and that it was used in the construction. The material issue of fact asserted to exist by the defendants concerns whether the materials supplied by the plaintiff were delivered to the site of the construction by plaintiff or his agent. The materiality of this fact question depends upon whether the statute requires actual delivery to the site by the lien claimant. "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972). Because we find, as discussed below, that the statute does not require delivery to the site personally by the lien claimant, any question of fact as to who delivered the material is not controlling; and, since there is no material issue of fact, it is unnecessary to determine whether the defendants' mere denials in their answer sufficiently raised the genuine issue of fact on summary judgment. *See* G.S. 1A-1, Rule 56(e); *Hickory White Trucks, Inc. v. Bridges*, 30 N.C. App. 355, 227 S.E. 2d 134 (1976).

The defendant contends that G.S. 44A-8, read in conjunction with subsequent provisions of Article 2, Chapter 44A, requires, as a prerequisite to the attaching of a materialman's lien, that the materials be delivered to the site of the improvement by the person claiming the lien. For the reasons discussed below, we disagree.

The statutory provisions under consideration read, in pertinent part, as follows:

> "§ 44A-8. . . . Any person who . . . furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for . . . *material furnished* pursuant to such contract." (Emphasis added.)
>
> "§ 44A-10. . . . Liens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)
>
> "§ 44A-12. . . . (b) . . . Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)
>
> "§ 44A-13. . . . (a) An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials *at the site of the improvement by the person claiming the lien.*" (Emphasis added.)

The defendant contends that the language emphasized in G.S. 44A-8, supra, should be read as meaning "material delivered at the site of the improvement by the person claiming the lien." This interpretation has been suggested by the authors of two recent articles. Humphrey: *Position, Priorities and Protection of Parties and Statutory Liens in N. C.*, Bar Association Foundation Institute on Troubled Real Estate Ventures and New Use and Ownership Concepts, IV 1-23 (p. 11) (May 1975); Urban and Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 Wake Forest L. Rev. 283 (1976). Although this interpretation could fit consistently into the statutory language, it imposes an additional burden on the lien claimant that is unwarranted, considering the language, policy, and scheme of the statute.

Statutory rights to materialmen's liens are based upon the equitable principle that it is just to grant a lien against property which has been enhanced in value by the use of the materialmen's goods. 57 C.J.S. Mechanics' Liens § 1. Like North Carolina, the vast majority of the states provide for priority of the materialman's liens depending upon the time materials are furnished at the site of the improvement. *See e.g.*, G.S. 44A-10; Fla. Stat. Anno. 713.01 *et seq.* (West); Minn. Stat. Anno. § 514.01 and 514.05; N.D. Cent. Code § 35-27-01 *et seq.*; Tenn. Code Anno. § 64-1101 *et seq. But see* Md. [Real Property] Code Anno. § 9-101 *et seq.* The requirement of furnishing materials at the site provides visible notice to subsequent lienors and encumbrances of the priority of suppliers of material. *Cf.* Minn. Stat. Anno. § 514.01 and 514.05; Tenn. Code Anno. § 64-1101 ("Visible commencement of operations"); Tex. [Liens] Code Anno. Title 90, Vernon's Ann. Civ. St. § 5459(2)(a). An inspection of the premises, like a search of the county land records for recorded liens and encumbrances, provides actual notice of superior liens. The visible placement of materials on the premises, like the proper filing of documents affecting land title, impart constructive notice to all persons of the priority of that lien. No lien shall attach prior to actual and visible placement of materials on the ground. *Dunham Assoc., Inc. v. Group Inv., Inc.*, 301 Minn. 108, 223 N.W. 2d 376 (1974) (interpreting Minn. Stat. Anno. § 514.01 and 514.05 which is in relevant language and structure essentially the same as G.S. 44A-8 and 44A-10). The test of whether the placement is sufficiently visible is whether a person is able, in the exercise of reasonable diligence, to see that materials have been placed on the site. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 226 N.W. 2d 603 (1975). The requirement for visible placement is, of course, for the protection of third parties. *Botsford Lumber Co. v. Schriver*, 49 S.D. 68, 206 N.W. 423 (1925) (interpreting S.D. Compiled Laws Anno. § 44-9-1 and 44-9-7—essentially the same as G.S. 44A-8 and 44A-10 and Minn. Stat. Anno. noted supra).

The requirement of visibly placing materials on the site of the improvement does not of necessity impose the further requirement that the lien claimant himself actually deliver the materials to the site. Such a requirement would not serve to further the requirement of notice to third parties. Consequently, other courts have properly refused to impose such a requirement

on the lien claimant. Delivery to a place other than the site of the improvement, if made with the intent that materials will be later placed on the site, and if they are so placed, will support a lien. *Dealers Supply Co. v. First Christian Church*, 38 Tenn. App. 568, 276 S.W. 2d 769 (1954); *cf. Atlantic Jewish Community Center, Inc. v. Tom Barrow Company*, 130 Ga. App. 608, 203 S.E. 2d 921 (1974); *see also Builder's Lumber Co. v. Stuart*, 6 Wis. 2d 356, 94 N.W. 2d 630. (1959); 57 C.J.S. Mechanics' Liens § 42.

For the foregoing reasons, we hold that the lien claimant is not required by statute to make the delivery personally of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site.

Affirmed.

Judges HEDRICK and MITCHELL concur.

RALEIGH PAINT AND WALLPAPER CO. v. PEACOCK & ASSOCIATES, INC., ROBERT E. STROTHER AND WIFE, EDNA N. STROTHER, FIRST FINANCIAL SERVICE CORPORATION OF RALEIGH, TRUSTEE, AND FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH

No. 7710DC887

(Filed 3 October 1978)

Laborers' and Materialmen's Liens § 3— materialman's lien—claimant need not personally deliver materials to site

A lien claimant who furnished materials for the improvement of real estate pursuant to a contract with the owner is not required by G.S. 44A-8 and G.S. 44A-10 to deliver such materials personally to the site of the improvement in order to be entitled to a materialman's lien so long as the claimant furnished the materials with the intent that they would later be placed on the site and they were so placed, and the lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site.

APPEAL by defendants, Robert E. Strother and wife, Edna N. Strother, First Financial Service Corporation of Raleigh, Trustee,

and First Federal Savings and Loan Association of Raleigh, from *Barnette, Judge.* Judgment entered 15 August 1977 in the District Court, WAKE County. Heard in the Court of Appeals 17 August 1978.

The plaintiff initiated this civil action pursuant to G.S. 44A-13 to enforce a materialman's lien. The plaintiff filed its claim of lien pursuant to G.S. 44A-12 on 15 February 1977. This action was commenced 9 March 1977. Plaintiff filed a motion for summary judgment 18 July 1977 supported by its verified complaint and answers to interrogatories. The defendant Peacock & Associates, Inc., neither answered the complaint nor filed affidavits opposing the motion for summary judgment. Defendants Robert E. Strother and wife, Edna N. Strother, First Financial Service Corporation of Raleigh, Trustee, and First Federal Savings and Loan Association of Raleigh answered the complaint denying all material allegations.

During November 1976 Bruce Peacock, of Peacock and Associates, Inc., visited the plaintiff's North Hills store to inform the plaintiff that he was building a house for Robert E. Strother and wife, Edna N. Strother. Peacock informed plaintiff that the Strothers would be in later to select carpet and wallpaper for the house being built on Lot 29, Coachman's Trail. Plaintiff was authorized to charge the selected items to the account of Peacock & Associates, Inc. Subsequently the Strothers ordered wallpaper and carpeting costing $1,497.71.

The wallpaper was delivered on 26 November 1976 and on 1 December 1976 to Terry Andrews, a wallpaper hanger for Peacock & Associates, Inc. The wallpaper was thereafter installed by Terry Andrews in the house located on Lot 29, Coachman's Trail. There is no clear evidence with respect to where the wallpaper was delivered or with respect to who delivered it. There is also no direct evidence of the exact date on which these materials were delivered to the site. The carpet was picked up by Bruce Peacock on 30 November 1976 in Aberdeen. It was then delivered to Jimmy Coats who installed the carpet in the house located on Lot 29, Coachman's Trail. Neither is there any evidence of the exact date on which these materials were delivered to the site.

After the furnishing of materials, Peacock & Associates, Inc., conveyed all of Lot 29, Coachman's Trail to defendants Robert E. Strother and wife, Edna N. Strother, by deed recorded in Deed Book 2467, page 82, Wake County Registry. The date of the deed does not appear in the record. Defendants Robert E. Strother and wife, Edna N. Strother, executed a deed of trust and note to First Financial Service Corporation of Raleigh, Trustee for First Federal Savings and Loan Association of Raleigh, recorded in Book 2467, page 83, Wake County Registry.

Summary judgment for the plaintiff was granted in the amount of $1,830.20 with interest from 15 February 1977 on 15 August 1977. The judgment was declared a lien upon the property relating back to 26 November 1977. Defendants Strother, First Financial Service Corporation of Raleigh, Trustee, and First Federal Savings and Loan Association of Raleigh appealed.

Brenton D. Adams for plaintiff appellee.

Seay, Rouse, Johnson, Rosser and Harvey, by Larry D. Johnson, for defendant appellants.

MORRIS, Judge.

This case presents essentially the same question presented by appeal No. 7710DC886 which was combined with this appeal for oral arguments. The question is whether a lien claimant who furnishes materials for the improvement of real estate pursuant to a contract with the owner must himself deliver such materials to the site of the improvement before the claimant is entitled to a valid materialman's lien pursuant to Part 1, Article 2, Chapter 44A of the General Statutes.

The defendants in this case contend that there exists, based upon the record, a genuine issue of material fact which would require a reversal of the granting of plaintiff's motion for summary judgment. *See* G.S. 1A-1, Rule 56(c).

The plaintiff's verified complaint and answers to interrogatories establish that the materials were furnished before the defendant Peacock & Associates, Inc., conveyed the subject property to defendants Strother and before the deed of trust was executed to the defendant First Financial Service Corporation of Raleigh, Trustee for First Federal Savings and Loan Association

of Raleigh. Therefore, if the lien is valid, plaintiff is entitled to a lien on the subject property superior to the lien of defendant First Federal. For the reasons stated in our opinion in *Raleigh Paint and Wallpaper v. Peacock & Associates, Inc.*, et al, No. 7710DC886, we hold that the plaintiff's lien was valid and summary judgment proper.

Nevertheless, since the actual date of the furnishing of materials to the site is not established by the record, the judgment of the trial court must be modified. The judgment is modified by striking "from and after the 26th day of November, 1976" and substituting in its place the following: "with priority over the lien of defendants First Financial Service Corporation of Raleigh, Trustee for First Federal Savings and Loan Association of Raleigh".

Modified and affirmed.

Judges HEDRICK and MITCHELL concur.

STATE OF NORTH CAROLINA v. JAMES ALTON (BUCK) GRADY

No. 7814SC323

(Filed 3 October 1978)

1. **Constitutional Law § 30— false testimony at first trial—no prejudice on retrial**

There was no merit to defendant's contention upon retrial in a homicide prosecution that he was denied due process when a witness to the crime was allowed to testify for the State at the first trial, contrary to true facts known to a detective and the district attorney, that he did not have a gun on the night of the crime, since the false testimony, regardless of whether corrected, was at a former trial and did not prejudice defendant because he was afforded a new trial on other grounds; furthermore, there was overwhelming uncontradicted testimony that the decedent had no gun and that defendant had been wounded in an exchange of fire occurring after the witness struggled with defendant and took away defendant's gun.

2. **Constitutional Law § 30— bullet removed from defendant lost—no denial of material evidence**

In view of the unequivocal and unimpeached testimony of a ballistics expert that the marks on a bullet taken from defendant's back were compatible with marks left by the type gun belonging to defendant and in view of the un-

contradicted testimony that the decedent had no gun, defendant in a homicide prosecution failed to show how the unavailability of the lost bullet which had been taken from his back denied him material evidence essential to his defense.

3. **Criminal Law § 57— bullet removed from defendant—type of weapon involved—expert opinion evidence admissible**

The trial court in a homicide prosecution did not err in allowing a ballistics expert to testify that a lost bullet which had been removed from defendant's back could not have been fired from any Colt .38 caliber weapon, the kind of gun found in an eyewitness's car, since the witness expressed an opinion based on knowledge within his sphere of expertise and in response to a properly phrased hypothetical question.

4. **Criminal Law § 53— homicide—deceased's inability to use hand—expert opinion evidence admissible**

In a homicide prosecution where defendant contended that deceased began the altercation in question by slapping defendant, opening his car door and attempting to pull defendant out of his car by his pants leg, the trial court did not err in allowing a doctor who had treated deceased twenty-four years earlier to testify concerning deceased's complete inability to use his right hand to accomplish any of the acts alleged by defendant, and the lapse of time from the doctor's treatment of deceased to the time of the alleged crime went to the weight to be accorded the doctor's opinion, not its admissibility.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 10 November 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 August 1978.

Defendant was indicted 28 May 1974 for the first degree murder of William O'Neal. The defendant was originally tried on the charge of first degree murder, found guilty of second degree murder, and sentenced. The conviction was affirmed by the Court of Appeals and discretionary review was denied by the Supreme Court. The defendant was subsequently afforded a new trial based upon *Mullaney v. Wilbur*, 421 U.S. 684 (1975), upon his petition for a writ of habeas corpus to the United States District Court, Middle District of North Carolina.

At the second trial, the evidence tended to show: On Saturday evening, 18 May 1974, the deceased, his wife, two daughters and the husband of each, and a friend, E. C. Ray, went to a private club known as the Wagon Wheel. They arrived in two separate cars. At about 1:00 o'clock a.m. the O'Neal party left the club and started toward their cars. The deceased, who was not drunk but who had been drinking, started to get into the back

seat of the car with his wife. His daughter and son-in-law were seated in the front. At approximately the same time, E. C. Ray approached his car and started to unlock the door. Their cars were parked about 150 feet apart.

Before either O'Neal or Ray had entered his car, another car was driven into the parking lot. The automobile was stopped near the O'Neal car and faced in the opposite direction. The passenger side of the other car faced the passenger side of O'Neal's car. The two cars were approximately the width of a car or car and one-half apart. The defendant, James Alton "Buck" Grady, was sitting in the front passenger seat of the other car. The defendant began cursing at the deceased. The deceased told defendant Grady not to use such language because his wife and daughter were with him. The decedent started walking towards the defendant's car. As he approached the car, more words were exchanged, and the defendant cracked open the car door. The decedent, while holding his hands in front of him, started stepping backwards. The defendant then shot the decedent.

The defendant testified that before his car stopped O'Neal had asked, without provocation, if defendant was looking for trouble. He testified that as his brother tried to drive off, O'Neal slapped him through the open window, opened the door, and tried to pull him out of the car by his pants leg. The defendant testified that during the struggle he came up with the gun, which was stored between the front seats, without being conscious of what he was doing. He testified that before he knew what was happening, the gun went off, and O'Neal grabbed himself and staggered backwards.

After the shot was fired, E. C. Ray, before ever entering his car, ran over to Buck Grady's car. There he found the decedent staggering from his wound and the defendant standing outside the car holding a gun. A struggle between E. C. Ray and the defendant ensued. By this time William Grady, the defendant's brother and driver of the car, had climbed out of the car on the opposite side. Ray took the gun from the defendant and shots were exchanged between Ray and William Grady.

E. C. Ray was shot twice—once in each shoulder with a .22 caliber bullet. The defendant was shot once in the back and his brother once in the arm.

State's Exhibit No. 5, a Rohm, RG-10 .22 caliber revolver, was found in the Grady car. State's Exhibit No. 8 is the lead slug removed from the shoulder of E. C. Ray. According to the ballistics expert, this .22 caliber bullet was fired from State's Exhibit No. 5. The defendant's weapon, State's Exhibit No. 3, was identified as a Rohm caliber .38 special revolver. State's Exhibit No. 7 is a .38 caliber lead slug which was removed from defendant's back. The State's ballistics expert testified that in his opinion the bullet was fired from State's Exhibit No. 3, the defendant's gun. The defendant's gun imparted eight lands and grooves with a right twist. These same marks appeared on the bullet removed from defendant's back.

The evidence showed that in a prior trial E. C. Ray denied having a gun the night of the incident. Ray admitted at this trial that he had a .38 Colt in his car the night of the incident. The gun was never tested by the S.B.I. laboratory to determine if it had fired the bullet found in the defendant. The ballistics expert testified that a Colt .38 special has six lands and grooves with a left twist. A Colt Trooper Mark III has six lands and grooves with a right twist. In his opinion State's Exhibit No. 7 could not have been fired from any Colt caliber .38 weapon. The State's Exhibit No. 7 was lost before this trial.

Evidence showed the decedent's right arm had been paralyzed from the elbow down. He could not open his fingers on the right hand and was able to move the whole arm only from the shoulder. The paralysis was the result of an injury which caused the complete loss of the medial and ulna nerves. Also, the main artery serving the arm and fingers was severed, and only ancillary blood supplies from the upper arm prevented the gangrenous process in the arm. The injury to the decedent had occurred in March of 1950.

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

Murdock and Jarvis, by Jerry L. Jarvis, for defendant appellant.

MORRIS, Judge.

The defendant has brought forward three assignments of error. He first contends that the manner of the investigation essen-

tially constituted a suppression of evidence favorable to the defendant and resulted in a denial of due process.

[1] The defendant's first argument is that he was denied due process when E. C. Ray was allowed to testify for the State *at the first trial*, contrary to true facts known to a detective and the district attorney, that he did not have a gun the night of the incident. The defendant argues that such conduct denied the defendant evidence that could have led to the corroboration of his self-defense theory by showing that the defendant was not shot with his own gun but with E. C. Ray's gun.

It is well established that deliberate deception of a court and jurors by the State's presentation of known false evidence violates the "rudimentary demands of justice". *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Furthermore, a conviction secured by false evidence must fall where the State allows false testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972). Nevertheless, the false testimony, regardless of whether corrected, was at a former trial and did not prejudice the defendant since he was afforded a new trial on other grounds. Furthermore, there was overwhelming, uncontradicted testimony that the decedent had no gun and that the defendant had been wounded in an exchange of fire occurring after E. C. Ray struggled with defendant and took away his gun. Finally, as pointed out below, the State cooperated by running all the tests on the bullet found in the defendant as requested by the defense.

[2] The defendant also argues that the loss of State's Exhibit No. 7 (the bullet removed from the defendant's back) before the second trial denied the defendant a fair opportunity to present evidence in his favor. There is no question but that the State has the duty, within limits, fairly to disclose evidence favorable to the defendant upon motion. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed. 2d 30 (1977). *See* G.S. 15A-903 and official commentary. The State clearly performed its duty in the present case. Indeed, at the request of defendant's counsel, the State arranged for the removal of the bullet from the defendant's back. Removal of the bullet was not necessary at the time for recovery from defendant's wound. The bullet was sent to the S.B.I. laboratories for identification of its caliber at the request of

defendant's counsel. No further tests were requested by defense counsel and, because of the State's belief that the Ray weapon was not material to this case, the gun itself was not examined or tested. The ballistics expert, who had examined the bullet before it was lost, testified that (1) the identifying marks left on the bullet were compatible with marks left by the type gun belonging to the defendant, and (2) such marks were incompatible with those left by a Colt .38 caliber weapon. In view of the unequivocal and unimpeached testimony of the ballistics expert and the uncontradicted testimony that the decedent had no gun, the defendant has failed to show how the unavailability of the lost bullet denied him material evidence essential to his defense. There was no suppression of evidence by the State.

[3] By his second assignment of error defendant contends that the trial court committed prejudicial error by allowing the ballistics expert to testify that the lost bullet could not have been fired from any Colt .38 caliber weapon. Defendant urges error in that not only was the lost bullet not identified as being a .38 caliber bullet but that also the ballistics expert was allowed to testify that the lost bullet could not have been fired from a Colt .38 caliber weapon which was never introduced into evidence. Defendant's argument has no support in the record or in the law.

A full reading of the testimony of the State's ballistics expert makes it abundantly clear that the lost bullet had been identified as a .38 caliber bullet and that it had been fired from a .38 caliber weapon with rifling of eight lands and grooves with a right twist. Secondly, defendant now argues that any testimony that the lost bullet could not have been fired from the Colt .38 should have been excluded since the weapon was neither examined by the expert nor produced at trial.

The caliber of the bullet examined by the expert was within his personal knowledge. The fact that E. C. Ray's gun was a Colt .38 is supported by the evidence and was properly included in a hypothetical question submitted to the witness. *See* 1 Stansbury, N.C. Evidence, § 136 (Brandis Revision 1973). In response to a hypothetical question, the witness expressed his opinion that State's Exhibit No. 7 (the lost bullet) was not fired by a Colt .38 caliber weapon. North Carolina has recognized the competency of ballistics experts to express opinions on the caliber and the

source of bullets. *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218 (1947). The expert's testimony clearly demonstrated that he was familiar with the characteristics of Colt .38 caliber weapons. In response to a properly phrased hypothetical question, fairly supported by the evidence, the expert witness expressed an opinion based on knowledge well within his sphere of expertise. There was no error in allowing the opinion into evidence.

[4] Finally, defendant asserts that the trial court erred in allowing Dr. Woodhall's testimony on the condition of the decedent's arm at the time of the incident. The doctor's testimony was based on his treatment of the decedent in 1950 and his prognosis of the extent of permanent disability suffered by O'Neal as a result of the injury suffered in 1950. Dr. Woodhall, a stipulated expert in the field of neurosurgery, testified to the extent of the injuries from his own personal knowledge. The injuries included the complete loss of the nerves which control the grasping of the fingers, the pulling-in of the wrist, and elevating of the hand. There was also the loss of the main blood supply to the arm. Based upon his testimony on the permanent nature of the injury to O'Neal and considering the lay testimony on O'Neal's physical condition at the time of the incident, the medical expert's opinion on O'Neal's ability to open a car door or to strike someone with his right hand was competent. *Cf. Jones v. Shaffer*, 252 N.C. 368, 114 S.E. 2d 105 (1960) (physician diagnosing permanent disability allowed to express opinion on patient's ability to perform certain work); *see e.g.*, 1 Stansbury, N.C. Evidence, § 135 (Brandis Revision 1973), and 6 N.C. Index 3d, Evidence, § 44. The lapse of time from the treatment of O'Neal to the time of the incident goes to the weight to be accorded the expert's opinion, not its admissibility. *See e.g.*, 2 Jones on Evidence, 6th Ed., Opinion Testimony, § 14.31 (1972).

The defendant has abandoned his two remaining assignments of error.

No error.

Judges HEDRICK and WEBB concur.

Russo v. Mountain High, Inc.

EDMUND P. RUSSO, TRUSTEE, TOBIAS SIMON, SUCCESSORS TRUSTEE, FOR E. PETER GOLDRING AND CARLOS URRELLA v. MOUNTAIN HIGH, INC., H. D. BOYLES, EARL E. BOYLES, JOE P. WARREN, TRUSTEE, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

No. 7724SC985

(Filed 3 October 1978)

Fraud § 12— misrepresentation of acreage—summary judgment for defendants

In an action for fraud in misrepresenting the acreage in a tract of land purchased by plaintiffs, the trial court properly granted summary judgment in favor of the trustee and the beneficiary of a deed of trust on the property where all the materials showed that defendants did not make any specific representation as to the acreage but simply responded to questioning that their files indicated the tract contained a certain number of acres, and plaintiffs failed to rebut defendants' showing that any representations on their part as to the acreage were neither made with knowledge of their falsity nor in culpable ignorance of their truth.

Chief Judge BROCK and Judge VAUGHN concur in this opinion for the purpose of clarifying the decision in *Parker v. Bennett*, 32 N.C. App. 46.

APPEAL by plaintiffs from *Gaines, Judge*. Judgment entered 5 July 1977 in Superior Court, MITCHELL County. Heard in the Court of Appeals 31 August 1978.

Plaintiffs purchased certain real property from defendant Mountain High in 1969. Defendants Boyles were the officers and stockholders of Mountain High. There was an outstanding deed of trust on the property in favor of defendant John Hancock, which was assumed at the time of plaintiffs' purchase. Defendant Warren was a Hancock employee and trustee under the deed of trust.

Plaintiffs purchased the property believing it to contain 4,271.4 acres; however, it was later determined that the tract contained only 1,589.49 acres. Plaintiffs' complaint alleged that all defendants were guilty of fraud in misrepresenting the acreage. Defendants filed various answers and motions to dismiss, denying fraud. John Hancock counterclaimed, accusing plaintiffs of fraud in obtaining release of part of the land from the deed of trust without informing John Hancock of the deficiency in total acreage.

Defendants Warren and John Hancock moved for summary judgment. Various answers to interrogatories and depositions

were considered. These tended to show that: Mountain High came to own the property in 1965; one Gus Peterson purported to survey the property in 1965 and prepared a survey dated May 1965 indicating that the tract contained 4,271.4 acres; Peterson in fact made no physical survey of the property, but instead wrote the calls from prior deeds and had a map prepared from these calls; Mountain High applied for a $200,000 loan from John Hancock with the property as security; Warren, the regional loan agent for John Hancock, received the Peterson survey but observed that it was not signed; H. D. and Earl Boyles obtained what purports to be an affidavit from Peterson to the effect that the survey was run by the best known methods and "with extreme care"; title insurance was issued on the basis of the survey and affidavit; the Boyleses obtained the services of one John Gilliam to conduct a timber cruise of the land; and Gilliam suspected an acreage deficiency but nonetheless submitted a report to John Hancock indicating that there were 4,271 acres in the tract.

The answers to interrogatories and depositions further tended to show that: one C. C. Canada, a John Hancock field representative, inspected the land; it was called to Canada's attention that old deeds indicated about 1,700 acres in the tract, but this did not cause him to question the Peterson survey, which he assumed to be accurate; Canada recommended approval of the loan and John Hancock thereafter did loan Mountain High $200,000, secured by a deed of trust; Mountain High sought refinancing in 1967; Canada wrote Warren before the second loan was closed advising that any discrepancy as to acreage between the old deeds and the Peterson survey did not concern him, "as most of our dealings in the mountains, the surveys come out on a plus side of the old deed"; the loan was refinanced in the amount of $296,000 by John Hancock; the Boyleses provided plaintiffs with the Peterson survey, the John Hancock deed of trust, and the title insurance policy and told plaintiffs that the property contained 4,271 acres; plaintiff Goldring and one Robert Fewell, a Florida realtor, visited the property; Goldring and Fewell telephoned Warren on 2 July 1969 to discuss whether John Hancock would make partial releases from the deed of trust should plaintiffs purchase the property; during this phone conversation, Warren indicated that his file reflected about 4,200 acres in the tract; plaintiffs decided

to go ahead with the purchase; Terry Wood, a North Carolina attorney representing plaintiffs, wrote them a letter on 7 October 1969 advising that the Peterson survey was not a physical survey and that the acreage might be off; plaintiffs decided to go ahead with the purchase because they felt they could rely on Peterson's affidavit, John Hancock's acceptance of it, and the title insurance policy, and because there was no time to conduct a survey before the scheduled closing in late October 1969.

Further questions as to the acreage arose in 1970, and plaintiffs had part of the tract surveyed in 1971 in connection with a proposed sale of a portion of the property and learned from this survey that there was substantially less acreage in the entire tract than previously thought. Plaintiffs nonetheless obtained a release of 764.78 acres from the John Hancock deed of trust without revealing the discrepancy. A survey of the entire tract was completed, and it was learned that the entire tract contained only 1,589.49 acres.

The trial court allowed summary judgment for defendants Warren and John Hancock, and plaintiffs appeal.

Holshouser & Lamm, by Charles C. Lamm, Jr., for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by H. Grady Barnhill, Jr. and Jimmy H. Barnhill, for defendant appellees Joe P. Warren, Trustee, and John Hancock Mutual Life Insurance Company.

ERWIN, Judge.

Plaintiffs' sole assignment of error is that the trial court erred in allowing the motion by defendants Warren and John Hancock for summary judgment. We do not agree and accordingly affirm the judgment of the trial court.

In arguing that the trial court committed error, plaintiffs rely heavily on the 2 July 1969 telephone call from Goldring and Fewell to defendant Warren. They assert that in the course of this conversation, Warren misrepresented the acreage when Warren was either aware of the true acreage or "recklessly ignorant" as to the true acreage.

Plaintiffs rely on *Parker v. Bennett*, 32 N.C. App. 46, 231 S.E. 2d 10 (1977), *cert. denied*, 292 N.C. 266, 233 S.E. 2d 393 (1977), in support of their contention that summary judgment herein was improperly granted. In that case, this Court did hold that summary judgment was improperly granted for defendants therein in an action for fraud involving an alleged misrepresentation of the acreage in a farm. First, we do not believe that *Parker* stands for the proposition that summary judgment is never appropriate in an action for fraud. Rather, the case simply held that defendant-movants in that case had failed to carry their burden under G.S. 1A-1, Rule 56(c), of showing the lack of a genuine issue as to a material fact and that they were entitled to judgment as a matter of law. This Court noted:

> "On the motion for summary judgment, if the material offered by defendants in support of their motion fails to affirmatively negate any one or more of the essential elements of fraud they have failed to bear the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court.'" *Parker v. Bennett, supra* at 54, 231 S.E. 2d at 15.

We recognize that the quoted sentence is susceptible to being misunderstood. Clearly, if the defendant moving for summary judgment in a fraud case presents material which effectively negates even one of the essential elements of fraud, summary judgment in defendant's favor should be allowed. It is not necessary that defendant's material negate *all* of the essential elements, and any implication to that effect which may be contained in the language above quoted from *Parker v. Bennett, supra*, is not approved.

While our courts have been hesitant to formulate an all-embracing definition of fraud, the Supreme Court has stated the following elements of actionable fraud in *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974): "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party."

The materials before the trial court upon the motion for summary judgment tend to show that John Hancock believed the tract consisted of 4,271 acres and relied thereon. Such belief was

supported by the Peterson "survey" and Peterson's affidavit. There is no support for any contention that John Hancock or its agents procured the purported "survey" or participated in any way in its completion. In fact, John Hancock loaned a substantial sum of money secured by a deed of trust on 4,271 acres. There is no inference that either defendant directly participated in securing the affidavit from Peterson, in obtaining the "Surveyor's Report," or in having the map recorded. Again, it appears that John Hancock relied thereon. John Hancock's reliance was such that it made two loans on the property.

The record also reveals that plaintiffs developed an interest in the property through their own agents and the Boyleses, not as a result of any efforts by John Hancock or Warren. Plaintiffs possessed copies of the "survey" as well as copies of other pertinent documents prior to the July 1969 telephone conversation, and Goldring and Fewell had visited the property.

As to the 2 July 1969 phone conversation, Goldring and Fewell called Warren to discuss the matter of partial releases from the deed of trust. The assumption was made by all parties to the conversation that they were talking about a 4,200-acre tract. Further, the depositions of Fewell and Goldring, as well as Warren, indicate that what Warren was saying was based upon his file and that he was not making a specific representation:

Fewell: "[I]t is true that Mr. Goldring was asking Mr. Warren as to the acreage in the Mitchell County property, and Mr. Warren was saying that on the basis of his file and the survey and the inspection by his fieldman, that John Hancock Mutual Life Insurance Company was satisfied that there was 4,271 acres in the property and that it was a good piece of land."

Goldring: "It would be right to say that Mr. Warren said in words or effect: 'Our file reflects that there are 4,200 acres in that tract.'

. . .

[I] would say that Mr. Warren's statements to me in each instance related to information which was in his file and was based on information which was

in his file. As to whether he ever told me that he knew of his independent knowledge that there were 4,271 acres on the property, he didn't say a word independent of it on his own knowledge. . . ."

Warren: "[I] told Mr. Goldring that all I could tell him was what was in my file, that I had never seen the property, that the file indicated that it was good security. . . ."

A portion of our Supreme Court's opinion in *Harding v. Insurance Co.*, 218 N.C. 129, 135, 10 S.E. 2d 599, 602 (1940), is relevant here:

> "There is no sufficient evidence that the representation, if made, was made with knowledge of its falsity or in culpable ignorance of its truth. Plaintiff knew that Gaither was speaking 'second-hand' and was relying on information received from others. There is no evidence that the contractor was not reliable or that he, to the knowledge of Gaither, made the statements contained in his letter without a *bona fide* and adequate examination of the building. . . ."

Plaintiffs' attorney wrote plaintiff Russo prior to plaintiffs' purchase of the property that the Peterson "survey" "was apparently not a physical survey." Further, the record shows that John Hancock continued to rely on its belief that the tract contained 4,271 acres by releasing from the deed of trust 764.78 acres, almost one-half the actual acreage. This occurred in September 1971 at a release price of $76,478.

In summary, we conclude that defendants John Hancock and Warren successfully carried the burden of negating an element of fraud by showing that any representations on their part as to acreage in the tract were neither made with knowledge of their falsity nor in culpable ignorance of their truth. Plaintiffs have failed to rebut this showing by setting forth specific facts establishing a genuine issue for trial as required by Rule 56(e). Further, we think that all the materials before the trial court show that Warren was not making any specific representation as to the acreage, but simply responded to questioning that his file indicated there were approximately 4,200 acres in the tract. John Hancock relied upon that figure, but events regrettably revealed

to all parties involved that such reliance was misplaced. Plaintiffs apparently felt that what was sufficient for John Hancock was good enough for them. In so thinking, they erred, but such error has not been shown by this record to be due to any actionable fraud on the part of defendants Warren or John Hancock. The trial court properly allowed the motion for summary judgment by defendants Warren and John Hancock.

The judgment of the trial court is

Affirmed.

Judges PARKER and CLARK concur.

Chief Judge BROCK and Judge VAUGHN concur in this opinion for the purpose of clarifying the decision in *Parker v. Bennett*, 32 N.C. App. 46, 231 S.E. 2d 10 (1977).

NORTH CAROLINA NATIONAL BANK v. CLAUDE ADOLPHUS HOLSHOUSER

No. 7726DC1023

(Filed 3 October 1978)

Uniform Commercial Code § 38— purchase money security agreement—Article 9 governing—10 year statute of limitations

The plain language of Article 2 of the N. C. Uniform Commercial Code and subsequent legislative history indicate that the N. C. Legislature intended Article 9 to govern the security aspects of purchase money security agreements and that, accordingly, the ten-year limitation of G.S. 1-47(2), rather than the four-year limitation of G.S. 25-2-725, is applicable to such agreements executed under seal.

Judge HEDRICK dissents.

APPEAL by plaintiff from *Johnson, Judge*. Judgment entered 20 July 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 20 September 1978.

Plaintiff instituted this civil action on 1 November 1974 to recover a deficiency remaining after repossession and sale of collateral security. Defendant had purchased a motor vehicle on

credit, executing a purchase money security agreement dated 25 June 1970 giving the seller of the vehicle a purchase money security interest in the vehicle, to the extent of the $1,392.12 purchase price financed under the agreement, and retaining title in the seller or its assignees until the purchase price was fully paid. The purchase money security agreement was executed, sealed, and assigned by the seller to the plaintiff bank on the same date.

Defendant immediately defaulted on the security agreement, never making any payments thereunder. Plaintiff, as assignee of the security agreement, repossessed the automobile in compliance with the procedures set out in part 6 of Article 9 of the North Carolina Uniform Commercial Code. The vehicle was sold by public sale 28 September 1970. A deficiency remained after application of the sales proceeds to the amount owed by the defendant as required by G.S. § 25-9-504(1).

Defendant, in his answer, pled the four-year statute of limitations (G.S. § 25-2-725) in bar of plaintiff's claim. The trial court granted judgment on the pleadings in favor of the defendant, and plaintiff appeals.

Clontz and Morton, by James H. Morton, for the plaintiff.

James, McElroy & Diehl, by James H. Abrams, Jr., for the defendant.

MARTIN (Robert M.), Judge.

The only question before us in this appeal is whether plaintiff's cause of action is barred by any statute of limitations. Plaintiff contends that, as the security instrument was executed under seal, G.S. 1-47(2) is the applicable statute and therefore this action would not be barred until after 28 September 1980. Defendant, however, insists that the four-year statute of limitations found in G.S. 25-2-725 is the applicable statute and that, as plaintiff's action was begun more than four years after the cause of action accrued, the action is barred. There is no dispute that if defendant's contentions are correct, plaintiff's action would be barred.

The relevant statutes are set out below in pertinent part, for convenience of reference and discussion:

North Carolina General Statutes, Chapter 25.

ARTICLE 2.

SALES

PART 1.

§ 25-2-102. Scope; certain security and other transactions excluded from this article.—Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. (1965, c. 700, s. 1.)

OFFICIAL COMMENT

Prior uniform statutory provision: Section 75, Uniform Sales Act.

Changes: Section 75 has been rephrased.

Purposes of changes and new matter: To make it clear that:

> The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. "Security transaction" is used in the same sense as in the Article on Secured Transactions (Article 9).

* * *

NORTH CAROLINA COMMENT

This section sets out the scope of the Code, limiting it to transactions in goods (as defined in G.S. 25-2-105) and indicates that the article on sales does not apply to transactions intended as security even though in the form of an unconditional contract of sale or to sell. The section also makes clear that the sales article does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

§ 25-2-106. Definitions: . . . "sale"; "present sale"; . . . A "sale" consists in the passing of title from the seller to the buyer for a price (§ 25-2-401). A "present sale" means a sale which is accomplished by the making of the contract. (1965, c. 700, s. 1.)

§ 25-2-203. Seals inoperative.—The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing of a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer. (1965, c. 700, s. 1.)

§ 25-2-401. Passing of title; reservation for security; limited application of this section.

* * *

(1) . . . Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

§ 25-2-725. Statute of limitations in contracts for sale.—(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.

* * *

§ 1-47. Ten Years.—Within ten years an action—

* * *

(2) Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

We find that the ten-year limitation of G.S. 1-47(2) is the applicable one to this case, and that plaintiff's action is not barred by G.S. 25-2-725. We base our holding upon two grounds.

First, the language of the applicable statutes clearly indicates that the type of transaction in question is *not* covered by Article 2 of the North Carolina Uniform Commercial Code. G.S. § 25-2-102 and the Official Comments thereunder plainly exempt any contract which on its face is in the form of a contract to sell or present sale, *if* such contract is intended to operate only as a security transaction. Although the writing in question purported to retain title in the seller of the vehicle, the definition of "sale," found in G.S. § 25-2-106 and read in the light of G.S. § 25-2-401(1), indicates that a sale of the automobile had taken place. Therefore, the sales article (Article 2) of the North Carolina Uniform Commercial Code would apply to the *sales* aspects of the transaction, as indicated by the Official Comment under G.S. § 25-2-102. We note, however, that G.S. § 25-2-401(1) makes the provisions of Article 9 of the Code controlling on the question of title passing where a security interest is retained by the seller. This deference to Article 9 where a security interest is involved is consistent with the language and Comments of G.S. § 25-2-102 and provides us with guidance for approaching other situations where real or apparent conflicts between Articles 2 and 9 may exist. The four-year limitation of actions found in G.S. § 25-2-725(1) applies on its face only to actions for breach of any contract for sale. Since the purchase money security agreement signed and sealed by the defendant is a creature of Article 9 (G.S. § 25-9-107(a)) and is outside the provisions of Article 2 (although encompassing a sale of a motor vehicle), we hold that the provisions of G.S. § 25-2-725 are inapplicable to this transaction beyond its pure sales aspects, and that Article 9 is paramount in reference to the security aspects of the transaction. G.S. § 25-2-203, which makes seals of no effect on contracts for sale, is similarly limited in its effects to the pure sales aspects of the transaction, and is not relevant to purchase money security agreements as defined by G.S. § 25-9-107(a) and regulated by Article 9 generally. Article 9 contains no statute of limitations applicable to this action, so we look to prior law and determine that G.S. 1-47(2) is applicable.

Secondly, we find that in North Carolina, the ten-year limitation of actions has been applicable to purchase money security

agreements, and that this has been affirmatively acknowledged by the Legislature. G.S. 1-47(2), providing a ten-year limitation for actions accruing upon sealed instruments was amended in 1969 to allow persons sued under such sealed instruments to assert any claims or defenses they might have by joinder of third parties as allowable under the Rules of Civil Procedure (G.S. 1A-1), even though those claims might otherwise be barred by other limiting statutes. This amendment ameliorated the potential for harsh results in the situation where a financial institution could wait to sue for deficiency after repossession and sale of collateral security until *after* the buyer's rights of action against sellers for any breach of warranty were barred. The potential for abuse of the ten-year limitation was apparent in the situation where sellers and lenders were closely or inseparably related; the Legislature chose to remedy this problem, not by reducing the length of time in which a lender or his assignee could sue on a sealed purchase money security agreement, but by increasing the period of time in which a buyer so sued could assert claims against his seller for breach, so that the time available to parties for either type of action is equal and concurrent when the holder of the security interest sues first. Professor Navin discusses this statute (G.S. 1-47(2)) in his article "Waiver of Defense Clauses in Consumer Contracts," 48 N.C.L. Rev. 505, 548 *et seq.* (1970), and his article is substantially in agreement with our interpretation of this statute; it is certainly assumed by him that the ten-year statute of limitations was applicable to security transactions under seal. *C.f., Enterprises, Inc. v. Neal*, 29 N.C. App. 78, 223 S.E. 2d 831 (1976).

Defendant cites authority which he argues is overwhelmingly in his favor. This authority consists of a New Jersey case, *Associates Discount Corp. v. Palmer*, 47 N.J. 183, 219 A. 2d 858 (1966), and two other cases relying upon the *Associates* case (to which we do not address ourselves for reasons to become apparent). We are not persuaded by the reasoning of the majority in the *Associates* case; the logic of the concurring opinion is more compelling, reaching the same (and we think, correct) result on other grounds. We do note, however, that the New Jersey Court took cognizance of the intent of the Pennsylvania Legislature (Pennsylvania law being controlling in that case) as expressed in the Pennsylvania Bar Association's official comments to Pa. Stat. Ann. Tit. 12A, § 2-102:

> Since transactions intended to operate "only" as security transactions are excluded, actual sales are subject to this Article of the Code [Article 2—Sales], although a security interest is retained. *Ibid* at 186, 219 A. 2d 861.

Thus, it is apparent that the New Jersey Court reached its decision largely on the basis of what the Pennsylvania Legislature expressed as its intent in enacting the statute in question. The comments under the analogous section of the Code in North Carolina (G.S. § 25-2-102) express an intent precisely contrary to that of the Pennsylvania Legislature, and we accordingly do not adopt the holding of the *Associates* case, however correct it may be within the context of those statutes before the New Jersey court.

In summary, we find that the plain language of Article 2 of the North Carolina Uniform Commercial Code and subsequent legislative history indicate that the North Carolina Legislature intended Article 9 to govern the security aspects of purchase money security agreements, and that accordingly, the ten-year limitation of G.S. § 1-47(2) is applicable to such agreements executed under seal. No relevant or persuasive authority is before us to argue the contrary, and we accordingly reverse the order of the trial judge granting defendant judgment on the pleadings and remand the action for proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Judge BROCK concurs.

Judge HEDRICK dissents.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. THE HOUSING AUTHORITY OF THE CITY OF RALEIGH

No. 7710SC942

(Filed 3 October 1978)

1. **Municipal Corporations § 4.5— urban redevelopment—costs of relocating telephone lines**

An urban redevelopment commission was not required by G.S. Ch. 160A to reimburse a telephone company for the costs of removing and relocating telephone lines from an area being redeveloped since (1) the forced relocation of the telephone lines was not a taking within the purview of G.S. 160A-512(6), and (2) the relocation expenses were not expenditures which were necessary to carry out redevelopment purposes within the meaning of G.S. 160A-512(11).

2. **Municipal Corporations § 33— closing of city street**

City streets upon which a telephone company's facilities were located were closed for an urban redevelopment project by a lawful exercise of the police power since the redevelopment commission had the power to take streets by eminent domain with the city's consent, G.S. 160A-512(4), G.S. 160A-515, and the streets were in fact closed by the city in the exercise of power the city clearly possessed.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 26 July 1977, in Superior Court, WAKE County. Heard in the Court of Appeals 23 August 1978.

This is a declaratory judgment action to determine whether an urban redevelopment commission under Chapter 160A of the General Statutes must reimburse the telephone company for the costs of removing and relocating telephone lines from an area being redeveloped.

The parties have stipulated the facts: The Housing Authority of the City of Raleigh is an Urban Redevelopment Commission under the provisions of Article 22, Chapter 160A of the General Statutes. In the Spring of 1975 it was engaged in a federally assisted slum clearance and redevelopment program in an area on the south side of Raleigh. Southern Bell had various telephone poles, lines and other facilities within the public streets of that area. The Authority demanded that Southern Bell remove its facilities from the project area; Southern Bell claimed that it was entitled to reimbursement for the reasonable non-betterment relocation costs it would incur. On 9 June 1975 the parties signed

a nonprejudice relocation agreement, by which Southern Bell agreed to accede to the demands while reserving its right to seek compensation and the Authority reserved its right to deny the reimbursement claims. Relying on the agreement, Southern Bell removed and relocated its facilities, incurring reasonable non-betterment costs of $3,971.15. Southern Bell submitted its statement for these expenses and the Authority declined to pay.

The parties now join in seeking a declaratory judgment of their rights and liabilities.

Emanuel & Thompson, by Robert L. Emanuel, for plaintiff appellant.

Hatch, Little, Bunn, Jones, Few & Berry, by Harold W. Berry, Jr., for defendant appellee.

ARNOLD, Judge.

[1] Chapter 160A, Art. 22 of the General Statutes is North Carolina's Urban Redevelopment Law. The Housing Authority of the City of Raleigh is governed by Chapter 160A in its exercise of the powers of a redevelopment commission pursuant to § 160A-505(d). The primary question here is whether the Urban Redevelopment Law mandates reimbursement to privately-owned public utility companies which must relocate their facilities in order to accommodate urban redevelopment projects. Southern Bell argues that the provisions of Chapter 160A require that it be reimbursed; the Housing Authority argues that there is no statutory authority for reimbursement of relocation expenses.

The case is one of first impression in North Carolina. A number of states have decided similar cases, but as the question is invariably one of statutory interpretation the decisions of other jurisdictions are of limited assistance.

At common law, public utilities could be required to remove or relocate their facilities at their own expense from public streets when it was necessary for public use and convenience. 39A C.J.S. § 139c, Highways. This is still the rule in the absence of express statutory provisions to the contrary. *Id.* We must determine whether the pertinent provisions of Chapter 160A amount to such express statutory authority.

Sec. 160A-501 enumerates the policy and purposes of the redevelopment law, then continues: "Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain." Sec. 160A-512 gives a redevelopment commission power "(6) . . . to purchase, . . . acquire by . . . eminent domain or otherwise, any real or personal property or any interest therein, . . . necessary or incidental to a redevelopment project;" and "(11) [t]o make such expenditures as may be necessary to carry out the purposes of this Article; and to make expenditures from funds obtained from the federal government. . . ." From these provisions it appears that reimbursement might be authorized in one of two ways: as compensation for an eminent domain taking under § 160A-512(6), or as an expenditure "necessary to carry out the purposes of this Article" under § 160A-512(11).

The eminent domain power given to a redevelopment commission by §§ 160A-501 and -512(6) applies to the property of "a corporation possessing the power of eminent domain under Chapter 40," N.C. G.S. § 160A-515, and Southern Bell is such a corporation, N.C. G.S. § 40-2(1). In addition, § 160A-515 provides for condemnation of property already devoted to another public use. Thus, it is clear that the legislature has made a policy decision to allow a public utility, such as Southern Bell, to receive compensation for any of its real or personal property taken by eminent domain. However, we do not believe that this forced relocation of Southern Bell's facilities was a compensable taking.

We recognize that the property itself need not be taken in order for there to be a compensable taking. 29A C.J.S. § 110, Eminent Domain. Nevertheless, "taking" means the taking of something, whether it is the actual physical property or merely the right of ownership, use or enjoyment. *Id.* Sec. 160A-512 (6), providing for eminent domain to apply to "any real or personal property or any interest therein," also provides for the taking of at least an interest before compensation is required. We find that no property or interest of Southern Bell's has been "taken." The situation instead is closely analogous to those decided North Carolina cases which hold that where a leasehold is condemned the tenant's cost of moving his business to a new location is not compensable. *See, e.g., Williams v. State Hwy. Commission*, 252

N.C. 141, 113 S.E. 2d 263 (1960); *City of King's Mountain v. Cline*, 19 N.C. App. 9, 198 S.E. 2d 64 (1973). It does not appear in the record what interest Southern Bell had, if any, in the land upon which its facilities were located. But even if it had some compensable interest in the land which was taken for the redevelopment project, the forced relocation of its facilities is no different, in the context of eminent domain, than the forced relocation of the business of a private tenant after condemnation. And "[i]n North Carolina the taking of land does not contemplate compensation for . . . cost in moving a business and its attendant personal property to another location." *City of King's Mountain v. Cline, supra* at 12, 198 S.E. 2d at 66.

Having determined that the cost of relocating Southern Bell's facilities should not be reimbursed as a taking under eminent domain, we now must consider whether § 160A-512(11) is sufficient statutory authority for reimbursement. The wording of the statute, giving a redevelopment commission power "[t]o make such expenditures as may be necessary to carry out the purposes of this Article," is not at all definite. In the absence of North Carolina law on this point, the parties bring to our attention cases from other states. Two of the cases cited, *City of Columbus v. Indiana Bell*, 152 Ind. A. 22, 281 N.E. 2d 510 (1972), and *Mayor & City Council of Baltimore v. Baltimore Gas & Electric Co.*, 221 Md. 94, 156 A. 2d 447 (1959), are not particularly helpful because the statutes being construed there were much more explicit. In the Indiana case, the statute authorized payment to business concerns for moving expenses and losses of property not otherwise reimbursed. In the Maryland case a city ordinance expressly authorized payment of relocation expenses to utilities. Two other cases cited to us, *Vermont Gas System, Inc. v. City of Burlington*, 130 Vt. 75, 286 A. 2d 275 (1971) (rehearing denied 1972), and *City of Center Line v. Michigan Bell*, 387 Mich. 260, 196 N.W. 2d 144 (1972), were based on applications of the eminent domain portions of the respective statutes and findings that the property taken was within the statutory definitions of real property. It is not necessary for us to reach the question of whether Southern Bell's facilities were "structures" within the North Carolina definition of real property, N.C. G.S. § 160A-503(13), since our legislature has given the redevelopment commission eminent domain power over both real and personal property, N.C. G.S. § 160A-512(6), and

we have already decided that such eminent domain power is not the necessary statutory authority for reimbursement here.

The Urban Redevelopment Law contained in Chapter 160A does authorize expenditures which are necessary to carry out redevelopment purposes. We cannot hold Southern Bell's relocation expenses to be "necessary expenditures," however, since at common law no such reimbursement was required. Moreover, we find no expression of legislative intent by the General Assembly that relocation expenses should be compensable. Indeed, the overwhelming probability is that the issue of relocation expenses incurred by a utility never received legislative consideration.

The cases cited from both Vermont and Michigan contain rationale that may be a desirable policy, namely, that the burden of relocation costs to the utility should be borne by the taxpayers. The Michigan Court of Appeals in its opinion in *City of Center Line v. Michigan Bell*, 26 Mich. App. 659, 662, 182 N.W. 2d 769, 771 (1970), felt that "it is inappropriate for the utility's users . . . to alone pay for a socially-oriented program operating under the guise of the police power. Such a burden should be borne by the general taxpaying public." The Michigan Supreme Court, however, in its review of the case, recognized, as we do, that while the reasoning is sound, "its expression may be unfelicitous. Whether it is 'inappropriate' for the rate payers to pay these costs or whether they 'should' be borne by the general taxpaying public are legislative rather than judicial judgments." *City of Center Line v. Michigan Bell*, 387 Mich. 260, 265, 196 N.W. 2d 144, 146 (1972). We find that the North Carolina Urban Redevelopment Law does not require reimbursement to Southern Bell for its relocation expenses. There are cases from other jurisdictions which lend support to our holding. *E.g., Pacific Telephone and Telegraph Co. v. Redevelopment Agency*, 75 Cal. App. 3rd 957, 142 Cal. Rptr. 584 (1977); also, *Appalachian Power Co. v. City of Huntington*, 210 S.E. 2d 471 (W.Va. App. 1974); *Consolidated Edison of New York v. Lindsay*, 24 N.Y. 2d 309, 300 N.Y.S. 2d 321, 248 N.E. 2d 150 (1969); *Bristol Tennessee Housing Authority v. Bristol Gas Corp.*, 219 Tenn. 194, 407 S.W. 2d 681 (1966). We leave it to the General Assembly to express clearly its intent, if it exists, that privately owned public utilities be reimbursed for relocation expenses incurred due to urban redevelopment projects.

[2] In its second assignment of error, Southern Bell argues at length that the trial court erred in its conclusion of law that the City of Raleigh had delegated to the Housing Authority its power to close public streets. We agree that the trial court's finding was in error, but we still do not reach the conclusion Southern Bell would have us reach.

In exercising the powers of a redevelopment commission, the Housing Authority of the City of Raleigh was governed by Chapter 160A. N.C. G.S. § 160A-505(d). By designating its housing authority to deal with urban redevelopment, the City of Raleigh was not delegating its own powers but was merely "filling in the blank," designating which body should exercise the urban redevelopment powers set out by the legislature. However, the fact that Raleigh did not delegate its police power to close public streets does not mean that the Housing Authority lacked that power. Under Chapter 160A, the Housing Authority had power to take public streets by eminent domain with Raleigh's consent, see § 160A-515, and to carry out redevelopment projects, § 160A-512 (4), which included "removal of existing . . . streets, utilities or other improvements." § 160A-503(19)(b). And, in fact, the street closing here was not done by the Housing Authority, but by the City of Raleigh, in an exercise of power the City clearly possessed.

Having found that the streets upon which Southern Bell's facilities were located were closed by a lawful exercise of police power, and that North Carolina's urban redevelopment law does not authorize reimbursement for a utility's relocation expenses in this context, we find it unnecessary to consider whether Southern Bell's billing to the City of Raleigh was appropriately calculated.

The decision of the trial court is

Affirmed.

Chief Judge BROCK and Judge MARTIN (Robert M.) concur.

DOUGLAS J. OLDHAM v. BOYD C. MILLER, JR., COMMISSIONER, N. C. DEPARTMENT OF MOTOR VEHICLES

No. 7715SC895

(Filed 3 October 1978)

Automobiles § 126.3— breathalyzer test—who may ask driver to take

G.S. 20-16.2(c) does not provide that the "arresting officer" is the sole person authorized to request that a driver submit to a breathalyzer test; rather, the phrase "arresting officer" merely distinguishes between the two law enforcement officers present at the administration of the test and makes it clear that the breathalyzer operator who gives the four-part warning set out in G.S. 20-16.2(a) is *not* the officer authorized to request that the driver take the test.

APPEAL by respondent from *Hobgood, Judge*. Judgment entered 14 June 1977 in Superior Court, CHATHAM County. Heard in the Court of Appeals 18 August 1978.

Petitioner sought review in the Superior Court, pursuant to G.S. 20-16.2, of an order of the Department of Motor Vehicles which revoked his driver's license for willful failure to take the breathalyzer test.

At hearing, the evidence tended to show that the petitioner was taken into custody on 13 July 1974 by Chatham County Deputy Sheriff Larry Hipp for driving under the influence of alcohol. Hipp had observed the petitioner making circles in the road and hitting a ditch; he pursued the petitioner for several miles and observed the petitioner turn off the road, miss his driveway and go through a ditch and a garden and stop.

Deputy Hipp placed the petitioner in his squad car and took him to the Siler City Police Department where he was met by State Highway Patrolman W. H. Long. Deputy Hipp informed Long of the manner in which petitioner was driving and of the physical condition of the petitioner. Deputy Hipp then placed the petitioner in Long's custody and left.

Long formally placed petitioner under arrest and obtained a warrant for his arrest for driving under the influence of alcohol. After the arrest, Patrolman Long asked petitioner to take a breathalyzer test to be operated by Mr. Alphonzo Craven, Jr., a licensed breathalyzer operator. Petitioner refused to take the test.

The trial court held that the statute controlling the administration of breathalyzer tests, G.S. 20-16.2(c), required that "the arresting officer" ask the petitioner to submit to the test, and that Patrolman Long was not "the arresting officer" within the meaning of G.S. 20-16.2(c). The court held that the respondent had no authority to revoke the petitioner's driver's license and permanently enjoined and restrained the respondent from revoking the petitioner's license for his refusal to take the breathalyzer test on 13 July 1974.

Attorney General Edmisten by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray for respondent appellant.

Barber, Holmes & McLaurin by Edward S. Holmes for the petitioner appellee.

CLARK, Judge.

The sole question presented on appeal is whether or not Patrolman Long was authorized by G.S. 20-16.2(c) to request the petitioner to submit to a breathalyzer test. The respondent contends that any law-enforcement officer with probable cause to believe the person arrested was driving under the influence of alcohol may ask the arrested person to take the test. The petitioner claims that subsection (c) provides that *only* the arresting officer is authorized to make the request.

Subsection (c), as amended in 1973, provides:

> "The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). . . ."

Prior to the 1973 amendment, subsection (c) did not use the phrase "arresting officer" but referred to a "law-enforcement officer" with reasonable grounds to believe that the arrested person had been driving under the influence of alcohol. The reference to the "law-enforcement officer" in former subsection (c) is the same as that currently appearing in subsections (a) and (d). Those sections provide:

"(a) . . . The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. . . ."

* * * *

(d) . . . The hearing shall be conducted in the county where the arrest was made under the same conditions as hearings are conducted under the provisions of G.S. 20-16(d) except that the scope of such hearing for the purpose of this section shall cover the issues of whether the law-enforcement officer had reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he willfully refused to submit to the test upon the request of the officer. . . ."

Where a statute has two distinct subsections dealing with related matters, an amendment to one of the subsections will not ordinarily be construed to apply to the other also, since it will be presumed that if the Legislature had intended it to apply to both, it would have expressed such intent. *Arrington v. Stone & Webster Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965); 12 Strong's N.C. Index 3d, Statutes, § 7, p. 79. Therefore, it is clear that the Legislature did not intend to modify subsection (a) and (d) when it altered the language in subsection (c).

The request by the law-enforcement officer referred to in subsection (a) has been construed to mean the request by the law-enforcement officer asking the breathalyzer operator to administer the test, rather than the request directed to the arrested person that he submit to the test. *State v. Randolph*, 273 N.C. 120, 159 S.E. 2d 324 (1968) (decided prior to the 1969 amendment.) This implies that the request directed to the suspect is controlled by subsection (c), and therefore only the "arresting officer" may make such request. The last sentence in subsection (d), however, indicates that the law-enforcement officer with reasonable grounds to believe that the suspect was driving under the in-

fluence may make both requests. That sentence provides that the issues before the court are whether the "law-enforcement officer" had reasonable grounds to believe that the suspect was driving under the influence of alcohol and whether the suspect refused to submit to the test upon request of the officer. A reading of this sentence indicates that a "law-enforcement officer" may make both the request directed to the breathalyzer operator and the suspect.

It appears then that the Legislature intended to utilize the phrase "the arresting officer" for a different purpose. The legislative history of G.S. 20-16.2(a),(c) and (d) indicates that the term was inserted as a means of distinguishing between the law-enforcement officer involved in the arrest and the law-enforcement officer who is to administer the test.

In the 1969 version of the statute there is no reference to an "arresting officer"; all the sections refer to a "law-enforcement officer." Nor is the law-enforcement officer who is to be the breathalyzer operator directly mentioned. The 1969 version of the statute, therefore, mentioned only *one* officer.

In 1971, subsection (d) was amended to include what is now the second sentence in G.S. 20-16.2(d). This sentence states: "If at least three days prior to hearing, the licensee shall so request of the hearing officer, the hearing officer shall subpoena the *arresting officer*. . . ." (Emphasis added). At the time this sentence was added to the statute, subsection (c) still provided that if the "person under arrest willfully refuses upon request of a *law-enforcement officer* to submit to a chemical test designated by the *law-enforcement officer* none shall be given." (Emphasis added.) Clearly, in 1971, subsection (c) authorized a law-enforcement officer with reasonable grounds to believe that the arrested person was driving under the influence of alcohol to request that the suspect take the test. The reference to "arresting officer" in the amendment to subsection (d) merely clarified which of the two law-enforcement officers who were present at the administration of the test must be subpoenaed for the hearing.

In 1973, subsection (a) was amended to provide that the breathalyzer operator must give a four-part warning to the suspect prior to administering the chemical test. Subsection (c) was amended at the same time. It was this revision of the sub-

section that changed the phrase "law-enforcement officer" to "arresting officer." Subsection (a), however, retained the old language referring to law-enforcement officer. Considering the amendments to subsection (a) and (c) together it is clear that the modification in subsection (c) was designed to distinguish between the law-enforcement officer with reasonable grounds to believe that the suspect was driving under the influence of alcohol, (i.e. the *arresting officer*) and the law-enforcement officer who is to administer the test and give the four-part warning.

The purpose of the statutory limitations upon who may request the test and who may administer the test is twofold: first, the statute assures the suspect that the test will not be administered unless the officer making the request has reasonable grounds to believe that the suspect was driving under the influence of alcohol, and second, it assures that the test will be administered fairly and impartially by preventing the officer who is involved in the arrest from administering the test himself. *See, State v. Stauffer*, 266 N.C. 358, 145 S.E. 2d 917 (1966).

Construing the phrase "arresting officer" to be a clarification of which officer must request that the test be taken, and which officer must be present at the hearing is consistent and in harmony with the above stated purposes and with the legislative history. Here, Patrolman Long clearly had probable cause to believe that the petitioner was driving while intoxicated, and he obtained a warrant for petitioner's arrest based on that information. In addition, Patrolman Long, who was as likely to be biased as Officer Hipp, did not administer the test himself, but requested a third person to do so.

G.S. 20-16.2(c) does not provide that the "arresting officer" is the sole person authorized to request that the petitioner submit to the test. The phrase "arresting officer" merely distinguishes between the two law-enforcement officers present at the administration of the test and makes it clear that the breathalyzer operator who gives the four-part warning set out in subsection (a) is *not* the officer authorized to request that the petitioner take the test.

The result in this case has been reached by a consideration of legislative history and by construing G.S. 20-16.2(c) contextually and harmoniously with the other subsections of G.S. 20-16.2 for

the purpose of ascertaining legislative intent, the controlling factor in the interpretation of a statute. The result reached by the trial court is understandable in view of the statutory language of G.S. 20-16.2(c) above. Apparently the piecemeal amendment of various sections of this complicated statute has caused conflicting phraseology and has created difficulties in interpretation which the Legislature should correct by clarifying amendments.

Reversed and remanded for proceedings consistent with this opinion.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. LINDA SUTTON WILLIAMS

No. 784SC357

(Filed 3 October 1978)

1. **Criminal Law § 66.9— photographic identification—unnecessary suggestiveness —substantial likelihood of misidentification**

The existence of unnecessary suggestiveness in a photographic identification procedure does not alone require exclusion of evidence of the identification where the court determines from the totality of the circumstances that the procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

2. **Criminal Law § 66.9— suggestive photographic procedure—no substantial likelihood of misidentification**

Although a photographic identification procedure was suggestive since the trial court found that a robbery victim knew that the person who had been arrested for the robbery would appear in the photographic lineup, that defendant's picture was in the center of the seven picture lineup, and that the photographs showed defendant to be the shortest person in the lineup, the trial court did not err in its determination that the photographic identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification where the court also found that the victim saw defendant in the store where the robbery occurred for two or three minutes approximately an hour before the robbery; the victim observed defendant for some five minutes during the robbery; defendant was within a few feet of the victim during the robbery and was at one time beside her behind the counter; immediately after the robbery the victim described defendant and her clothing clearly to the police; the victim similarly described defendant again before the photographic identification; the victim stated she could iden-

tify the robber even if she was wearing different clothes; and the witness identified the picture of defendant because of her slender face and bulging eyes. Therefore, evidence of the photographic identification and the victim's in-court identification of defendant were properly admitted in defendant's robbery trial.

3. **Criminal Law § 29.1— motion for continuance—psychiatric examination—capacity to stand trial—sufficiency of hearing**

The trial court did not err in the denial of defendant's motion for a continuance to allow for a pretrial psychiatric examination to determine her fitness to stand trial where defendant produced no evidence in support of her motion other than counsel's statements that defendant had indicated to him that she was not able to assist in the defense of her case. Furthermore, the hearing on the motion for continuance satisfied the requirements of G.S. 15A-1002(b)(3) for a hearing on defendant's capacity to stand trial.

APPEAL from *Browning, Judge.* Judgment entered 1 December 1977 in the Superior Court, DUPLIN County. Heard in the Court of Appeals 24 August 1978.

The defendant was tried on an indictment for armed robbery, convicted by a jury, and judgment was entered on the verdict sentencing defendant to a term of 40 years in prison. The judgment recommended that defendant be given psychiatric evaluation and treatment.

The evidence presented by the State tended to show that Cynthia Boykin was employed at the Scotchman Store on South Pine Street in Warsaw on the evening of 29 August 1977. Cynthia Boykin saw the defendant twice in the store that evening. The first time the defendant came into the store she bought some potato chips. Cynthia Boykin saw her on that occasion for two or three minutes. The next time the defendant entered the store was about ten minutes before eleven, about an hour later than the first visit. The defendant, Linda Sutton Williams, was described as about five feet tall, 100 pounds in weight, brown complexion, and wearing tinted glasses. She had a large Band-Aid on the right side of her neck near the back of her head. She was wearing a green dress, a flowered scarf, earrings, and a pair of "flip-flops", and was carrying a shotgun. She was wearing the same clothes she wore the first time she was in the store about an hour earlier.

The defendant was in the presence of Cynthia Boykin for approximately five minutes the second time she entered the store.

The defendant pointed a shotgun at Miss Boykin and told her she wanted the money out of the cash register. Defendant went behind the counter to get to the cash register. The defendant stood directly beside Miss Boykin while behind the counter.

The police arrived at the scene at eleven o'clock and were given the above description of the defendant. The following day Miss Boykin went to the Police Department to view a photographic lineup. Prior to looking at the photographs, Miss Boykin was asked to describe the defendant again. Defendant's face was described as "kind of slender, and her eyes were kind of popped". Miss Boykin was shown a lineup of seven photographs. She identified State's Exhibit No. 4 as a photograph of the person who robbed the store. The photograph was one of the defendant without the wig and glasses she wore the night of the robbery.

Miss Boykin apparently knew that the arrested suspect's photograph would be in the lineup. Before she was shown the pictures, the officers had also shown her the shotgun found with the suspect. Also, the officers asked Miss Boykin if she could identify the defendant if she were wearing different clothes. There were seven photographs exhibited to Miss Boykin. The defendant's picture was in the center of the lineup. The defendant was the only person pictured with bulging eyes and the shortest of those pictured in the lineup. All of the other persons pictured in the lineup were considerably over five feet tall.

The witness, Cynthia Boykin, testified that her in-court identification of the defendant was based upon her observation of the defendant on the night of the robbery and not on the pretrial identification procedure.

The trial court concluded that the pretrial photographic lineup was not impermissibly suggestive and that the in-court identification of the defendant was based on an independent observation of the defendant at the time of the robbery. Defendant's motion to suppress the identification evidence was denied.

Defendant's motion for a continuance and a psychiatric examination prior to trial was denied.

On appeal defendant assigns as reversible error the court's refusal to suppress the identification evidence and the denial of the motion for a pretrial psychiatric examination.

Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.

Russell J. Lanier, Jr., for defendant appellant.

MORRIS, Judge.

The defendant's first assignment of error asserts that the trial court erred in failing to suppress evidence relating to the pretrial identification of the defendant. The defendant contends that the pretrial identification procedure was so impermissively suggestive as to deny her due process. Furthermore, the defendant asserts that any in-court identification by the witness Boykin was tainted by improper pretrial procedures and should have been excluded.

The trial court reached the following conclusions after conducting a voir dire examination on defendant's motion to suppress the identification of the defendant:

> "1. That the identification of the defendant Linda Sutton Williams by the witness Cynthia Boykin was based on the observation of the defendant in the store premises on the night in question, the witness having sufficient opportunity and time to view the defendant.
>
> 2. That the photographic lineup was not so impermissibly suggestive as to suggest to the witness Boykin that she should identify one picture; that is to say, the picture of the defendant to the exclusion of the other pictures;
>
> 3. That the procedure used in this case does not violate the Rights of the defendant, Linda Sutton Williams, under the Constitution of the United States or the Constitution of the State of North Carolina."

The problem of possible misidentification of defendants resulting from improper photographic identification procedures has concerned the courts. The concern is that, regardless of how the initial misidentification comes about, the witness is thereafter apt to retain in his memory the image of the photograph rather than that of the person actually seen, reducing the value of any subsequent lineup or in-court identification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968).

[1] The admissibility of testimony concerning pretrial identifications is governed by the due process requirement that, based on the totality of the circumstances, the pretrial procedure must not be so unnecessarily suggestive and conducive to mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969); *Simmons v. United States, supra*; *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). The test for evaluating the likelihood of misidentification takes into account the following factors:

> "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." *State v. Henderson*, 285 N.C. at 12 and 13, 203 S.E. 2d at 18 and 19; *see Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972).

The existence of unnecessary suggestiveness alone does not require exclusion of the evidence. *Neil v. Biggers, supra.* The court must determine from the totality of the circumstances whether the suggestiveness might give rise to very substantial likelihood of misidentification. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972).

[2] The trial court made findings of fact which indicated the suggestiveness of the identification. The trial court found that the witness knew that the person who had been arrested would appear in the photographic lineup; that the picture of the defendant was in the center of the seven picture lineup; and that the photographs showed the defendant was the shortest person in the lineup.

The five factors pointed out in *State v. Henderson, supra*, allow for a finding that the identification procedure, even if suggestive, may be allowed into evidence because of the strength and reliability of the identification. The evidence bearing on these factors is thus balanced against the suggestiveness of the lineup to determine whether there is a very strong likelihood of misidentification. If not, then reversal is not required regardless of the suggestiveness. *State v. Knight, supra.* It should be noted that

"[t]he purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process." *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed. 2d 401, 411 (1972).

The evidence pointing toward reliability and counterbalancing the suggestiveness of the identification found by the trial court was as follows: that the witness observed the defendant at about ten o'clock when she purchased potato chips at the store; that she noticed a Band-Aid on the back of defendant's neck; that defendant was in the store two or three minutes; that defendant returned to the store and on this occasion was observed for five minutes; that defendant was within a few feet of the witness and at one time beside her behind the counter; that the witness immediately after the robbery described the defendant and her clothing clearly to the police; that the witness similarly described the defendant again before identifying the picture; that the witness stated she could identify the person who committed the robbery even if she was wearing different clothes; and that the witness identified the picture of the defendant because of her slender face and "popped" eyes.

Based on the foregoing factual findings which are supported by the evidence, we cannot say that the trial court erred in finding that the photographic identification was not so impermissibly suggestive so as to give rise to a very substantial likelihood of misidentification. Therefore, we hold that the testimony concerning the photographic identification was properly admitted.

From our finding that the pretrial photographic identification did not give rise to a very substantial likelihood of misidentification, it follows that any subsequent in-court identification was properly admitted. *See Neil v. Biggers*, supra; *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976).

[3] The defendant's second assignment of error is based on the court's denial of the defendant's motion for a continuance to allow for a pretrial psychiatric examination to determine her fitness to stand trial.

The established rule in North Carolina, unchanged by recent statutory enactments, is that the decision whether to grant a motion for commitment for psychiatric examination to determine competency to stand trial lies within the sound discretion of the trial judge. *State v. Woods*, 293 N.C. 58, 235 S.E. 2d 47 (1977). The defendant produced no evidence in support of her motion other than counsel's statements that the defendant had indicated to him that she was not able to assist in the defense of her case. It is apparent from the colloquy between defense counsel and the court that defendant had previously been examined by a medical doctor, not a psychiatrist, and found to be fit to stand trial.

It should be noted, however, that effective 1 July 1975, G.S. 15A-1002(b)(3) provides as follows for a hearing on the question of the defendant's capacity to stand trial:

> "(b) When the capacity of the defendant to proceed is questioned, the court:
>
> . . .
>
> (3) Must hold a hearing to determine the defendant's capacity to proceed . . . Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence."

The "hearing" in this case was in the context of a motion for a continuance to allow for a psychiatric examination prior to trial. Defense counsel did not request a full hearing on the matter nor did he tender evidence to support his motion. A similar situation was before the Supreme Court in *State v. Woods, supra.* That Court's discussion is instructive:

> "Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial." *State v. Woods*, 293 N.C. at 64, 235 S.E. 2d at 50.

Similarly, in this case it appears that the defendant presented all the evidence she was prepared to present. It should be noted that she did not request to be heard further on the matter. Under these circumstances we hold that the defendant's hearing satisfied the requirements of G.S. 15A-1002(b)(3).

No error.

Judges HEDRICK and WEBB concur.

NORTH CAROLINA NATIONAL BANK v. RUPERT A. HARWELL, JR.

No. 7718DC859

(Filed 3 October 1978)

1. **Rules of Civil Procedure § 56.3— summary judgment—insufficiency of supporting material—failure to object**

Failure of defendant to make timely objection to the insufficiency of plaintiff's pleadings and affidavits submitted in support of its motion for summary judgment is deemed a waiver of any objections.

2. **Uniform Commercial Code § 36— dishonored check—timeliness of notice—branch banks as separate banks**

In an action to recover an overdraft resulting from a dishonored check where defendant presented the check to plaintiff's Wilmington branch, the bank on which the check was drawn, for deposit to his account with plaintiff's High Point branch, the High Point branch and its bookkeeping department in plaintiff's Western Operations Center were functionally one bank while the Wilmington branch and its bookkeeping department in plaintiff's Eastern Operations Center were functionally a separate bank; therefore, the branches were entitled to separate bank status under G.S. 25-4-106 for the purpose of determining time limits for notifying defendant of the dishonoring of the check in question.

3. **Uniform Commercial Code § 36— dishonored check—right of charge-back—notice of dishonor timely**

Plaintiff's branches, operating as separate banks, sent notice of dishonor of a check within the time requirements of the Uniform Commercial Code so as to preserve the ultimate right of charge-back by the branch at High Point where the payor bank, the branch at Wilmington, returned the check to the transferor, the High Point branch, before midnight on its next banking day following the banking day on which it received the check in question, and the High Point branch, the collecting bank, sent defendant notification of the dishonor on the day it received the dishonored check, thus acting well within its statutory deadline. G.S. 25-4-105; 25-4-301; 25-4-212.

APPEAL by defendant from *Alexander (Elreta M.), Judge.* Judgment entered 19 September 1977 in District Court, GUILFORD County. Heard in the Court of Appeals 15 August 1978.

Plaintiff initiated this action by filing its complaint 26 July 1977 seeking to recover from defendant, its customer, an overdraft created when the plaintiff charged back to defendant's account a check which had been dishonored. The defendant filed no answer. On 17 August 1977, defendant moved for summary judgment without supporting pleadings or affidavits. On 31 August 1977, plaintiff moved for summary judgment supported by its complaint, amended complaint, and affidavits.

There exists no material question of fact as to the occurrence and sequence of the following events: Carolina Forest Products, Inc., (CFP) drew a $3,356.32 check in favor of the defendant written on CFP's account with the Wilmington branch of North Carolina National Bank (NCNB-W) on Friday, 18 March 1977. On that same day, but after NCNB-W's cutoff hour, defendant presented the check at NCNB-W for deposit to his account with NCNB-High Point (NCNB-HP). Therefore, the check was, in legal effect, presented on the banking day of Monday, 21 March 1977.

On 21 March 1977 the check was processed through NCNB's Eastern Operations Center (Raleigh). This operations center works essentially as the central bookkeeping operations for NCNB branches in Eastern North Carolina. This processing included wiring the deposit to NCNB's Western Operations Center (Charlotte) for provisional credit to the depositor's account with NCNB-HP. The process of debiting the drawer's account for the amount of the check took place in the Eastern Operations Center.

On 22 March 1977 the bank's "Transactions Not Posted Report" indicated the deposited check nonposted due to insufficient funds. That same day the check was returned to the Western Operations Center for charge-back to the defendant's account.

On 23 March 1977 the Western Operations Center received the dishonored check, charged it back to the defendant's account, and mailed the check along with a notice of dishonor to the defendant. In the interim, defendant had written a $3,300 check on his NCNB-HP account. The subsequent charge-back resulted in an overdraft in the defendant's account of $3,282.98. The defendant has refused to reimburse the plaintiff for the amount of the overdraft.

From the District Court's granting of plaintiff's motion for summary judgment, the defendant appeals. Defendant also appeals the denial of his motion for summary judgment.

Hugh C. Bennett, Jr., for plaintiff appellee.

Bencini, Wyatt, Early & Harris, by William E. Wheeler, for defendant appellant.

MORRIS, Judge.

The defendant has challenged the District Court's order granting summary judgment for plaintiff on two grounds. First, he asserts, for the first time on appeal, that summary judgment was improper because the pleadings and affidavits in support of the motion did not satisfy the requirements of G.S. 1A-1, Rule 56(e). Second, the defendant argues that as a matter of law, he, not the plaintiff, is entitled to summary judgment in his favor.

[1] Defendant made no objection in the trial court to the insufficiency of plaintiff's pleadings and affidavits submitted in support of the motion for summary judgment. Failure to make a timely objection to the form of affidavits supporting a motion for summary judgment is deemed a waiver of any objections. *Noblett v. General Electric Credit Corp.*, 400 F. 2d 442 (10th Cir. 1968), *cert. den.*, 393 U.S. 935, 89 S.Ct. 295, 21 L.Ed. 2d 271 (1968); *Auto Drive-Away Company of Hialeah, Inc. v. I.C.C.*, 360 F. 2d 446 (5th Cir. 1966), *see e.g.*, Wright and Miller, Federal Practice and Procedure: Civil, § 2738, p. 706-707. Technical objections based on G.S. 1A-1, Rule 56(e), are not timely made when they are first raised on appeal. This is especially so when there was no attempt to contradict facts and thus no question of material fact before the court. *Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., supra.*

The ultimate issue properly before this Court, therefore, is whether NCNB preserved its right of charge-back against the defendant's account. *See* G.S. 25-4-212. The resolution of this question requires a determination of whether the bank sent notice of dishonor within the time constraints imposed by G.S. Chapter 25, Art. 4. (North Carolina version of the Uniform Commercial Code, Article 4, Bank Deposits and Collections.)

Defendant argues that plaintiff's right to charge-back is governed by his status as both "payor bank" and "depositary bank" and that plaintiff failed to notify the defendant of dishonor within the time limits for such notice. *See* G.S. 25-4-105; 25-4-212(3); 25-4-301; 25-4-213(1)(d); 25-4-104(h).

[2] Plaintiff, on the other hand, urges this Court to consider the effects of G.S. 25-4-106, as amended in 1967, on the obligations of the plaintiff.

> "§ 25-4-106. *Separate office of a bank.*—A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this article and under article 3."

Plaintiff brings to this Court for the first time since adoption of the Uniform Commercial Code the question of the applicability and effect of G.S. 25-4-106.

The few reported cases which could have applied that section, as it appears in the statutes of the respective states, have either ignored the section or found it unnecessary for decision. *See Kirby v. First and Merchants National Bank*, 210 Va. 88, 168 S.E. 2d 273 (1969) (discussed in White and Summers, Uniform Commercial Code 531-532, n. 29 (1972)), and *Manufacturers Hanover Trust Co. v. Akpan*, 398 N.Y.S. 2d 477, 91 Misc. 2d 622, 22 U.C.C. Rep. Serv. 1009 (1977).

The application of G.S. 25-4-106 is not mandatory. The comments indicate that a branch or separate office may be treated as a separate bank for certain purposes while maintaining the single legal entity for other reasons. The comments also correctly note that, as a practical matter, many branches function as separate banks in the handling and payment of certain items and require time for doing so. This is especially true in states where branch banking is permitted throughout a state. G.S. 25-4-106, Comment 2; *Cf.* G.S. 53-62 (permitting branch banking in North Carolina). The comment specifically suggests that, where Article 4 imposes time limits (such as the notice of dishonor in this case), the branch which functions as a separate bank should be entitled to the time limits available to a separate bank. *Id.*, Comment 4.

Prior to the 1967 amendment, G.S. 25-4-106 required that a bank maintain its own deposit ledgers before it was entitled to separate bank treatment. 1965 N.C. Sess. Laws, Chapter 700, Sec. 1. Such a requirement was left optional to the states in the official draft of the Uniform Commercial Code. Clarks, Bailey, and Young, *Bank Deposits and Collections*, ALI/ABA Joint Committee on Continuing Legal Education 33 (4th Ed. 1972). The draftsmen's intent was that a bank and its branch which maintained a central bookkeeping facility would be treated as only one bank. Since collection items would generally only be handled through the central processing, it would not be proper to treat them separately. *Id.*

Our legislature deleted the provisions requiring the maintenance of separate deposit ledgers. *See* 1967 N.C. Sess. Laws, Chapter 562, Sec. 1. The legislature's intent was obviously to lessen the requirements for a branch to attain separate bank status. This amendment is consistent with the legislature's encouragement of statewide branch banking to serve the "needs and convenience" of the public. *See* G.S. 53-62. Since the official comments make it clear that G.S. 25-4-106 should be given a practical application depending on the particular banking practices established and followed in this State, it is necessary to look to the operations of the plaintiff's branches.

The plaintiff's pleadings and affidavits outline the basic structure of NCNB's operations. The bank apparently has divided the State into an eastern and western operations district. The Eastern Operations Center (Raleigh) and the Western Operations Center (Charlotte) function as the bookkeeping centers for all of the branches located in their respective districts. Therefore, when NCNB-HP in the western operations district deals with NCNB-W in the Eastern Operations Center for collection purposes, the banks are in many practical respects operating as separate banks. The accounts of customers in the eastern and western districts are maintained separately in the respective operations centers.

Under the facts in this case, G.S. 25-4-106 as amended is particularly applicable. NCNB-HP and its bookkeeping department in the Western Operations Center are functionally one bank while NCNB-W and its bookkeeping department in the Eastern Operations Center are functionally a separate bank. *See generally Farmers and Merchants Bank v. Bank of America*, 20 Cal. App. 3d

939, 98 Cal. Reptr. 381 (1971). For the foregoing reasons, we hold that NCNB-HP and NCNB-W are entitled to separate bank status under G.S. 25-4-106.

Since each branch operates through a different operations center, it is not necessary to determine whether two branches operating through the same operations center should be entitled to separate bank status.

[3] We must now turn to the statute to determine if the plaintiff's branches, operating as separate banks, sent notice of dishonor within the requirements of the statute so as to preserve the ultimate right of charge-back by NCNB-HP. Since there are now two "separate banks" involved in the transaction, it is necessary to determine whether each "separate bank" acted within its respective time limit. *See* 3 Anderson: Uniform Commercial Code, § 4-106:7, p. 187 (2d Ed. 1971).

I.

NCNB-W is clearly the "payor bank" in this transaction. G.S. 25-4-105(b). Therefore, before NCNB-W may revoke any settlement it must satisfy the requirements of G.S. 25-4-301 which provides as follows:

> "(1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of § 25-4-213) and before *its* midnight deadline it
>
> (a) returns the item; or
>
> (b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return.
>
> (2) If a demand item is received by a payor bank for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in the preceding subsection.

(3) Unless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(4) An item is returned:

(a) as to an item received through a clearing house, when it is delivered to the presenting or last collecting bank or to the clearing house or is sent or delivered in accordance with its rules; or

(b) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to his instructions." (Emphasis added.)

The recognition of separate bank status requires a determination of to whom the payor bank must return the item. That return must then comply with the time limitations imposed by the statute.

Under the facts in this case, the item is returned when it is sent or delivered to the "transferor". G.S. 25-4-301(4)(b). Since each branch of NCNB is receiving separate bank status, the payor bank need not send notice directly to Harwell. Defendant is not NCNB-W's "customer" since NCNB-W is a "separate bank". Although Harwell physically presented the check for deposit in Wilmington, the deposit was to his NCNB-HP account. Therefore, in all practical respects, NCNB-HP is the "collecting bank" and, since it is a "separate bank", it is the "transferor" of the check for collection and entitled to return or notice of the dishonored item.

Under G.S. 25-4-301, the payor bank (NCNB-W) must return the item before it has made final payment and before its midnight deadline. Under these facts, the item is finally paid by the payor bank (NCNB-W) only if it has failed to revoke the provisional settlement in the time and manner permitted by statute. G.S. 25-4-213(1)(d). There is nothing in the record to suggest the existence of any applicable agreement which would lengthen the statutory time limit. In the absence of contrary agreement, the "midnight deadline" is the cutoff for notification by the payor bank. G.S. 25-4-301. The "[m]idnight deadline with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from

which the time for taking action commences to run, whichever is later." G.S. 25-4-104(h).

The record shows that NCNB-W, operating through its Eastern Operations Center, returned the deposited check to NCNB-HP operating through the Western Operations Center before midnight, 22 March 1977. Since the deposit was made on the banking day of 21 March 1977, the payor bank, NCNB-W, acted within its midnight deadline. Therefore, the payor bank preserved its right to revoke settlement.

II.

Though North Carolina National Bank is a single legal entity for purposes of ultimate loss in this case and although NCNB-W acted within its midnight deadline, the defendant will nevertheless ultimately prevail unless NCNB-HP also gave proper notice of the dishonor of the deposited check.

Since NCNB-HP is in practical effect the "collecting bank" in this transaction as pointed out above, its right of charge-back against the defendant differs from that of the payor bank. NCNB-HP is entitled to its charge-back if it has acted in conformity with the following statutory provisions:

> "§ 25-4-212. *Right of charge-back or refund.*—(1) If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge-back the amount of any credit given for the item to its customer's account or obtain refund from its customer whether or not it is able to return the item if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final (subsection (3) of § 25-4-211 and subsections (2) and (3) of § 25-4-213).
>
> (2) Within the time and manner prescribed by this section and § 25-4-301, an intermediary or payor bank, as the case may be, may return an unpaid item directly to the depositary bank and may send for collection a draft on the depositary

bank and obtain reimbursement. In such case, if the depositary bank has received provisional settlement for the item, it must reimburse the bank drawing the draft and any provisional credits for the item between banks shall become and remain final.

(3) A depositary bank which is also the payor may charge-back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (§ 25-4-301).

(4) The right to charge-back is not affected by

(a) prior use of the credit given for the item; or

(b) failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable.

(5) A failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party.

(6) If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course."

NCNB-HP, acting through its Western Operations Center, received the returned check for charge-back on 23 March 1977. Furthermore, NCNB-HP mailed the returned check and notice of dishonor to defendant on 23 March 1977. When NCNB-HP sent notification of the dishonor on the day it received the dishonored item, it acted well within its midnight deadline. Therefore, it is unnecessary to decide if under the statute NCNB-HP could have taken more time to send notice of dishonor and still have acted within the "reasonable time" limits of the applicable statute. Finally, since NCNB-W acted within its deadline. NCNB-HP received no final settlement on the item to deny its right of charge-back. *See* G.S. 25-4-212(1) (last sentence).

For the foregoing reasons, we find that the plaintiff's NCNB-HP branch was properly entitled to a charge-back against the defendant's account to cover the amount of the overdraft. Therefore, the District Court properly granted plaintiff's motion for summary judgment and properly denied defendant's cross motion for summary judgment.

The judgment of the District Court is

Affirmed.

Judges HEDRICK and WEBB concur.

HENDERSON COUNTY AND LINCOLN K. ANDREWS v. FRANK OSTEEN (NOW DECEASED), HARLEY OSTEEN (IN HIS CAPACITY OF ADMINISTRATOR OF THE ESTATE OF FRANK OSTEEN), AND ELLIE O. CHEATWOOD, UFAULA O. STEPP, HAZEL O. STEVENSON, BLANCHE O. KING, HARLEY OSTEEN, SYLVENE O. SPICKERMAN, GRETA O. ALLEN, JEAN O. HOLDEN, MITCHELL M. OSTEEN, CARL M. OSTEEN, MARTHA SUE O. BROWN, JAMES D. OSTEEN AND THELMA O. TAYLOR AS ALL THE HEIRS AT LAW OF FRANK OSTEEN, DECEASED

No. 7729SC937

(Filed 3 October 1978)

1. **Public Officers § 8.1; Taxation § 41.2— presumption of regularity of official acts—inapplicability to mailing of tax sale notice**

The presumption of the validity and regularity of acts of public officers in the performance of their duties does not apply to the mailing of notice to a taxpayer of a foreclosure sale of his property as required by G.S. 105-392 (now G.S. 105-375).

2. **Taxation § 41.2— notice of tax sale—recitals in sheriff's deed**

Recitals in a sheriff's deed to the purchaser at a tax foreclosure sale were at best only secondary evidence that the notice required by former G.S. 105-392 had been mailed to the taxpayer and did not serve to supplant actual direct evidence of the purported mailing.

3. **Taxation § 41.2— tax foreclosure sale—finding that notice not mailed**

A finding by the trial court in a nonjury trial that notice of a tax foreclosure sale was not mailed to the listing taxpayer as required by former G.S. 105-392 was binding on appeal where it was supported by competent evidence, although there was also evidence from which the court could have inferred that the notice was mailed.

Judge ARNOLD dissents.

APPEAL by plaintiff from *Smith (David), Judge*. Judgment entered 26 July 1977 in Superior Court, HENDERSON County. Heard in the Court of Appeals 25 August 1978.

The facts in this case are as set out in *Henderson County v. Osteen*, 28 N.C. App. 542, 221 S.E. 2d 903 (1976); review allowed, 289 N.C. 614 (1976), reversed and remanded by the North Carolina Supreme Court in 292 N.C. 692, 235 S.E. 2d 166 (1977); we therefore do not set them out again here.

Prince, Youngblood & Massagee, by James E. Creekman, for the plaintiffs.

James C. Coleman, for the defendants.

MARTIN (Robert M.), Judge.

On remand, hearing was before Judge David Smith who, after presentation of evidence by movants and plaintiff Lincoln K. Andrews, found as a fact that notice was not mailed in the prescribed manner by the Sheriff of Henderson County and entered an order setting aside the sale of the property. From this order plaintiff Lincoln K. Andrews appealed.

The only question presented to us by this appeal is the sufficiency of the evidence to support the findings of fact by the trial judge. Movants' evidence at trial tended to show two things: 1) that the notice of sale was never received by the decedent or his administrator, and 2) that no record of any such mailing existed in the office of the Sheriff of Henderson County.

Plaintiff's evidence tended to show: 1) that notices and executions on tax judgments were customarily prepared in the office of the Clerk of Superior Court for Henderson County by an assistant clerk who had a reputation for being meticulous in the performance of her duties; 2) that the name of Frank Osteen appeared on a list dated 22 July 1970 from which the notices were prepared by the assistant clerk; 3) that the assistant clerk customarily delivered the envelopes containing notices to the Sheriff's office as a group; 4) that either a deputy sheriff or the Sheriff customarily mailed the notices by certified mail as a group; 5) that at least two notices out of the approximately 130 purportedly

mailed at this time were received by the persons to whom they were addressed; 6) that, although a record of certified mailings was, at this time, kept in the Sheriff's office, and the assistant clerk who prepared the notices used this record to verify that they had been mailed, that record has disappeared without explanation; and 7) that, because of the time and manner of notice given to the United States Post Office for Hendersonville by Harley Osteen, administrator for the estate of Frank Osteen, and because of the post office procedure in the handling of certified mail, the notice of sale would have been returned to the sender (the Sheriff of Henderson County) before Harley Osteen was allowed access to the mail of the decedent.

Movants' proof concerning non-receipt of the notice is competent as some evidence that the letter was never mailed. The absence of any evidence that the letter actually was returned to the Sheriff's office further supports the inference that it was never mailed.

[1] Plaintiff contends that because of the presumption of validity and regularity accorded the acts of public officers in the performance of their duties, the notice should be presumed to have been mailed. If this presumption applies, movants clearly do not have sufficient evidence to rebut it. However, there is one class of cases where this presumption of validity and regularity has consistently been denied with reference to the acts of public officers: to wit, those situations where it is sought to take away personal rights of a citizen or deprive him of his property. 29 Am. Jur. 2d *Evidence*, § 174 (1967); 31A C.J.S. *Evidence* § 146 (1964). This principle was succinctly stated in *Tree v. White*, 110 Utah 233, 238, 171 P 2d 398, 401 (1946):

> The law does not presume that an official has taken those affirmative steps essential to divest a citizen of title to property, to dispense with the proof of the record of such acts. (Citation omitted.)

An earlier statement of the rule was set out by the U.S. Supreme Court in *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349, 7 L.Ed. 882 (1830):

> To devest an individual of his property against his consent, every substantial requisite of the law must be shown to have

been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding, and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale.

See also *Wildman v. Enfield*, 174 Ark. 1005, 298 S.W. 196 (1927).

In *Price v. Slagle*, 189 N.C. 757, 128 S.E. 161 (1925), the Court stated:

> The Legislature has the power to prescribe the details for statutory foreclosure of the taxpayer's equity of redemption in other ways than by judicial process, and may regulate and declare directory, and not vital, the administrative duties therein, which are to be performed by public officers. It has the power to change or abolish these duties, in so far as they are not basic or jurisdictional. The requirement of notice to the defaulting taxpayer, who is the landowner, may be prescribed and regulated within reasonable limits by the Legislature, but cannot be dispensed with. *Such a requirement is subject to the test of "due process of law."* (Emphasis ours.)
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> * * *
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> Ministerial officers who conduct proceedings in tax sales, and especially purchasers thereat, are required to comply with these provisions which bring notice to the citizen that his land is about to be lost; and if the title to the citizen's land is divested from him, it must be upon a strict and clear compliance with the express limitations and provisions fixed by the law itself. (Citations omitted.)

Fundamental due process compels us to hold in the instant case that no presumption of validity or regularity will suffice in the stead of clear and convincing evidence that notice was actually mailed in accordance with statutory requirements.

[2] Plaintiff appellant contends that the recitals contained in the Sheriff's deed to Lincoln K. Andrews supply the missing physical evidence of compliance with the statutory formalities of G.S. 105-392 (now G.S. 105-375). He cites *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918) and *Board of Education v. Gallop*, 227 N.C.

599, 44 S.E. 2d 44 (1947) in support of his contentions. *Jenkins* dealt with a private sale under a power of sale in a mortgage, and the due process considerations discussed above do not, therefore, come into play and the citation is not apposite. *Gallop* dealt with the sufficiency of a tax deed's recitals to validate a sale where the original execution had disappeared and a "second execution" without benefit of return of sheriff or issuance by the clerk was brought forward as evidence. The recitals in the deed were held to be *at best* secondary evidence of the proper execution. Similarly, the recitals in the various instruments contained as exhibits in the record before us are at best only secondary evidence of the mailing of the prescribed notice, and will not serve to supplant actual direct evidence of the purported mailing.

[3] If the burden of proof is upon plaintiff Lincoln K. Andrews to show the validity and compliance with the statute of the proceeding upon which he claims title (as is stated in *Ronkendorff v. Taylor's Lessee, supra*, quoted above), his case clearly must fail, as the evidence does not show by a preponderance that the notice was mailed, but only that it might have been so mailed.

Even if the plaintiff does not carry the burden of persuasion, a finding for the movants is proper. In the absence of any presumptions concerning official acts, plaintiff's evidence establishes facts from which the trier of fact could infer that the notice was mailed. On the other hand, movants' evidence, coupled with that evidence of the plaintiff which shows the present nonexistence of the Sheriff's record of certified mailings and the absence in the records of the tax proceeding of any *returned* letter addressed to Frank Osteen, will support an inference that the letter was not mailed. Unlike the presumption, which is conclusive upon the trier of fact until rebutted by sufficient evidence, the inference will permit but does not compel the finding based upon it. 2 Stansbury N.C. Evidence (Brandis Rev.) § 215 (1973). "An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." *Cogdell v. R.R.*, 132 N.C. 852, 44 S.E. 618 (1903). No objection to the competency of movants' evidence has been brought forward on appeal; therefore, any objection is deemed waived. The findings of fact by a trial court in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on appeal if supported by competent evidence, even

though the evidence might sustain findings to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The trial judge in the instant matter was faced with a choice of competing inferences, and he chose to believe the evidence supporting the movants' contentions. We will not now disturb his findings of fact or the order based thereon.

For the reasons stated above, plaintiff's assignments of error are overruled, and the order of Judge Smith is affirmed.

Affirmed.

Chief Judge BROCK concurs.

Judge ARNOLD dissents.

THOMAS D. EARLS AND WIFE, MARY ANN EARLS v. LINK, INCORPORATED

No. 7722DC1001

(Filed 3 October 1978)

1. **Evidence § 48.2— builder with 20 years experience—expertise established—testimony about chimney construction proper**

In an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs from defendant, the trial court did not err in permitting a county building inspector to testify as an expert concerning the proper construction of chimneys and flues, though the witness was not an expert in combustion and related matters, since the witness had been in the construction business for 20 years, and the issue before the court was the defective construction of the chimney in question; however, the witness's testimony concerning the N.C. Building Code would not be competent as evidence of defective construction by the defendant corporation *per se*, as it was not in effect in the county at the time the chimney and flue were constructed, but it can be assumed that the judge disregarded such incompetent evidence since there was other competent evidence upon which he could conclude that the construction was defective.

2. **Limitation of Actions § 4; Vendor and Purchaser § 6.1— defective chimney—accrual of cause of action from discovery of defect**

In an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs on 16 June 1971 from defendant, plaintiffs could not reasonably have discovered the defect in the chimney until they first used the fireplace early in 1974, at which time the defect was discovered; therefore,

G.S. 1-15(b) applied to make plaintiffs' cause of action accrue in 1974, and, having been instituted 19 November 1976, the action was timely and was not barred by G.S. 1-52(5), the three year statute of limitations.

3. Sales § 6.4; Vendor and Purchaser § 6.1 — builder's sale of house — implied warranty as to construction of chimney

A builder-vendor warrants that a fireplace and attached chimney will adequately remove to the exterior smoke from a fire constructed therein when such fire is within the normal and contemplated use of the fireplace; therefore, in an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs from defendant builder, the trial court did not err in awarding judgment to plaintiffs on a theory of breach of implied warranty.

APPEAL by defendant from *Martin (Lester), Judge*. Judgment entered 4 August 1977 in District Court, DAVIDSON County. Heard in the Court of Appeals 18 September 1978.

Plaintiffs filed this civil action on 19 November 1976 to recover the costs of repairing a defective chimney in the home which they had purchased from the defendant corporation, the builder of the home. Defendant denied that the chimney was defective and asserted the three-year statute of limitations (G.S. 1-52(5)) as a bar to plaintiffs' action.

At trial before the judge and without a jury, plaintiffs testified that they first tried to build a fire in the fireplace in January or February of 1974, and that when they did so, the smoke backed up into the living areas of the house; on subsequent occasions, they again tried to build fires in the fireplace and the same thing happened. After checking the chimney for obstructions and finding none, plaintiffs informed the defendant corporation of the problem, but Link, Incorporated, declined to do anything about it. Plaintiffs' evidence tended to show that the chimney would have to be torn down and rebuilt to correct the problem, and that this would cost $1,397.50. The Building Inspector for Davidson County testified that the chimney did not conform to present standards of the Building Code of North Carolina, in that one flue liner instead of two was used in a portion of the chimney, causing a constriction of the area to which smoke from the fireplace could be drawn. He further testified that in his opinion the defect could not be remedied without tearing down the present chimney and rebuilding it with the proper number of flue liners. The trial judge ruled that, on the basis of the witness's twenty (20) years of experience in the construction business and

because of his experience as Building Inspector for Davidson County, the witness could give his expert opinion as to whether the present construction of the chimney would cause it not to draw properly. It was his opinion that the present construction of the chimney *would* cause it not to draw properly. On cross-examination, the witness stated that the Building Code of North Carolina was not enforced in Davidson County in 1972, and that he was not an expert on matters of heat and combustion.

At the close of plaintiffs' evidence, defendant moved to dismiss the action. This motion was denied by the trial court. Dewey Link, president of the defendant corporation, then testified that there was only one flue liner at the second level of flue liners in the plaintiffs' chimney and that the chimney was not constructed as it should have been, but denied that the defect would keep the chimney from operating properly.

The trial court found a breach of implied warranty by the defendant and that the plaintiffs' claim was not barred by any statute of limitations. He awarded the plaintiffs $1,397.50 plus accrued interest. From this judgment, defendant appeals.

Wilson, Biesecker, Tripp & Wall, by Joe E. Biesecker and Roger Tripp, for defendant appellant.

Stokes, Bowers and Gray, by Carl W. Gray, for plaintiff appellees.

MARTIN (Robert M.), Judge.

[1] Defendant appellant's first question on appeal pertains to the trial court's admission of certain testimony by plaintiffs' witness Graham Sowers, a Building Inspector for Davidson County. It is contended that it was error for the witness to be qualified as an expert and for his testimony concerning the North Carolina Building Code to be admitted since the Code was not enforced in Davidson County at the time the chimney in question was constructed.

The trial court found that the witness Graham Sowers had been in the construction business for twenty (20) years, that he was a Building Inspector for Davidson County, and as such was competent to testify as an expert concerning the proper construction of chimneys and flues. Defendant asserts that because

Sowers was not an expert in combustion and related matters he could not be competent to testify as an expert in regard to the chimney in question and its alleged defects. This assertion is without merit. The issue presented to the trial court was the defective construction of the chimney flue. The record is devoid of any evidence that the type of fire or methods of combustion occurring in the fireplace attached to the instant chimney and flue were in any way relevant to the failure of the chimney to draw properly. All that was in contention was the *construction* of the chimney and flue, and Graham Sowers was amply qualified to testify as an expert in that area.

While Sowers' testimony concerning the North Carolina Building Code would not be competent as evidence of defective construction by the defendant corporation *per se*, as it was not in effect in Davidson County at the time the chimney and flue were constructed, it is arguably competent as evidence of good construction practice generally. Even if the evidence is taken to be incompetent, there is other competent evidence upon which the trial judge could conclude that the construction was defective: specifically, the testimony of the plaintiffs and the admissions of the president of the defendant corporation. In a trial before a judge without a jury where there is competent evidence to support the judge's findings of fact, it will be assumed that he disregarded any incompetent evidence also before him. *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971). These assignments of error are accordingly overruled.

Defendant next assigns error to the failure of the trial judge to grant his motion to dismiss at the close of plaintiffs' evidence. This assignment of error is without merit, on the face of the record and under applicable North Carolina precedent. *See, Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973); Phillips, 1970 Supplement to 1 McIntosh, *North Carolina Practice and Procedure* § 1375. This assignment of error is overruled.

[2] Defendant further contends that the plaintiffs' action is barred by G.S. 1-52(5), the three-year statute of limitations. In the absence of any other applicable statute of limitations, this would be true, and the action would have to be dismissed. Plaintiffs have suggested that the six-year statute of limitations (G.S. 1-50(5), dealing with improvements to real property) is applicable.

However, this statute indicates on its face that it does not apply "to any person in actual control as owner . . . of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." G.S. 1-50(5); *Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973). G.S. 1-15(b), however, provides that, except where otherwise provided a cause of action (other than for wrongful death, malpractice, or failure to perform professional services) which originated under circumstances making the defect complained of not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time it was discovered by the claimant or ought reasonably to have been discovered by him, whichever event occurs first, provided that in such cases the period shall not exceed ten (10) years from the last act of the defendant giving rise to the claim for relief. In the instant case, the evidence shows that the property in question was acquired by the plaintiffs 16 June 1971 and that the first time the plaintiffs used the fireplace was early in 1974, at which time the defect was discovered. Plaintiff was not a construction expert, and could not reasonably have discovered the defect in the chimney until he sought to build a fire in the fireplace attached to it. We find, therefore, that G.S. 1-15(b) is applicable, that plaintiffs' cause of action accrued in 1974, and that having been instituted 19 November 1976, the action was timely and not barred by the applicable statute. Defendant's assignment of error is accordingly overruled.

[3] Defendant lastly contends that the trial court erred in awarding judgment to the plaintiffs on a theory of breach of implied warranty, as there was no competent evidence to support such a judgment. This contention is without merit. *See, Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974), discussing a builder-vendor's implied warranties, generally. In *Lyon v. Ward*, 28 N.C. app. 446, 221 S.E. 2d 727 (1976), this Court interpreted *Hartley v. Ballou* to stand for the proposition that the builder-vendor of a house impliedly warrants to the initial purchaser that it and *all its fixtures* (emphasis ours) will provide the service or protection for which it was intended under normal use and conditions. Thus, in *Lyon* it was held that the builder-vendor of a house impliedly warranted to his vendee at the time of taking of possession or passing of the deed that a well constructed on the premises by

such builder-vendor would provide an adequate and useable water supply for the house. In the instant case, we hold that a builder-vendor similarly warrants that a fireplace and attached chimney will adequately remove to the exterior smoke from a fire constructed therein, when such fire is within the normal and contemplated use of the fireplace.

As the findings of fact of the trial court are supported by competent evidence, and the findings of fact support the conclusions of law, the judgment of the trial court is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. BILL SLATE AND ROMNEY LEE CARSON

No. 7817SC280

(Filed 3 October 1978)

1. **Criminal Law § 74.2— confession implicating codefendant—failure to give limiting instruction—error**

Though defendant Carson's extrajudicial statement was admissible in his joint trial with defendant Slate, it was admissible only as evidence against Carson, and the trial court erred in failing to instruct the jury that Carson's statement was admitted only into evidence against him and could not be considered against Slate.

2. **Receiving Stolen Goods § 6— goods stolen by one other than defendant—instructions conflicting—new trial**

In a prosecution for receiving stolen goods, the trial court's instructions with respect to the goods having been stolen by someone other than the accused, an essential element of the crime with which defendant was charged, were so conflicting as to be prejudicial error requiring a new trial.

APPEAL by defendants from *Crissman, Judge.* Judgments entered 31 October 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 15 August 1978.

The defendant Slate was indicted for felonious breaking and entering and felonious larceny in Case No. 76CR9012. Upon his plea of not guilty, the jury returned a verdict of guilty as charged

on all counts. The defendant Carson was indicted for the felony of receiving stolen goods in Case No. 76CR8903. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. Each defendant was sentenced to a term of imprisonment of not less than four nor more than six years. Both appealed.

The defendants' cases were consolidated for trial. At trial the State's evidence tended to show that a storage building used by Michael Hall for the storage of chain saws from his chain saw sales and service business was broken into on 8 December 1976. After the break-in, seven chain saws were missing. A few days later, one of the chain saws was recovered from the defendant Carson's van. Gary Goad, a State's witness, testifying pursuant to a plea bargaining arrangement, testified that he and the two defendants broke into the storage building and stole the chain saws.

The defendant Carson testified in his own behalf that he drove Goad to a place near the storage building at 11:00 p.m. on 8 December 1976. He was under the impression that Goad was to meet someone there who owed him money. Goad got out of the van and returned five minutes later carrying five chain saws. Goad stated the man had given him the saws in payment of the debt and wanted Goad to sell them. Carson testified that he drove Goad around on two occasions attempting to help him sell the saws, and Goad gave him one of the saws as payment for this service. Throughout his testimony, Carson denied having anything to do with stealing the saws or any knowledge that they were being stolen.

The defendant Slate also took the stand and testified in his own behalf. He testified that he was at home sick on the night of 8 December 1976 and specifically denied having anything to do with the crimes charged.

The State offered rebuttal evidence through the testimony of Captain Larry Scott. Captain Scott testified that, following the arrest of the defendant Carson, Carson signed a written statement indicating that, on the night of 7 December 1976, he had heard Goad and Slate discuss breaking into the storage building in question. Carson also stated that Slate knew about the chain saws inside the building, and that Goad subsequently sold Carson five chain saws to sell on consignment. Carson further indicated in his

statement that he sold four of the saws the next day and kept one for himself.

Other pertinent facts are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney R. W. Newsome III, for the State.

Neaves, Everett & Peoples, by Charles M. Neaves, for the defendant appellants.

MITCHELL, Judge.

APPEAL OF BILL SLATE

[1] The defendant, Bill Slate, assigns as error the trial court's admission into evidence of the extrajudicial statement of his codefendant Carson and the trial court's failure to instruct the jury that Carson's extrajudicial statement could only be considered against him and was not admitted as evidence against Slate. This assignment of error is meritorious.

In *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), the Supreme Court of the United States held that the extrajudicial confession of a defendant implicating his codefendant could not be admitted into evidence, where the defendant making the confession did not testify at their joint trial. The court held that to admit such evidence would constitute a denial of the codefendant's rights under the confrontation clause of the Sixth Amendment to the Constitution of the United States, which could not be remedied by a limiting instruction directing the jury to consider such evidence only against the confessing defendant. Here, however, the defendant whose extrajudicial confession was admitted testified in his own defense and denied making the statement. Further, he gave testimony during the joint trial favorable to his codefendant Slate. The defendant Slate could not have hoped for a more effective exercise of his right to confront and cross-examine this witness. Therefore, the extrajudicial confession of Carson implicating Slate was admissible at their joint trial. *Nelson v. O'Neil*, 402 U.S. 622, 29 L.Ed. 2d 222, 91 S.Ct. 1723 (1971).

Although the extrajudicial confession of Carson was admissible at the joint trial of the defendants, we hold it was admissible

only as evidence against him and not as evidence against his codefendant Slate. After Carson took the stand and testified at the joint trial of the two defendants, the admission of his extrajudicial confession was no longer violative of the Sixth Amendment. Its admission against Slate, however, remained a violation of long established principles of law controlling in this jurisdiction. As to Slate, the extrajudicial statement of Carson was inadmissible hearsay. The extrajudicial statement of Carson did not become exceptionally admissible as corroborative evidence solely by virtue of the fact that Carson took the stand and testified. Instead of corroborating Carson's testimony, the testimony of Captain Scott as to Carson's extrajudicial statement tended to destroy his credibility and greatly reduce the weight of his testimony and was not admissible as corroborative evidence. *State v. Lassiter*, 191 N.C. 210, 131 S.E. 577 (1926). Although the extrajudicial statement of Carson tending to implicate Slate was admissible at their joint trial, it was admissible only as evidence against Carson. Therefore, the trial court erred in failing to instruct the jury that Carson's statement was admitted into evidence only against him and could not be considered against Slate. When two defendants are jointly tried, the extrajudicial confession of one may be received in evidence over the objection of the other *only when* the trial court instructs the jury that the confession is admitted as evidence against the defendant who made it but is not evidence and may not be considered by the jury in any way in determining the charges against his codefendant. *State v. Lynch*, 266 N.C. 584, 146 S.E. 2d 677 (1966); *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953); 2 Stansbury's N. C. Evidence, § 188 (Brandis Rev. 1973). Failure to give the required instruction will necessitate a new trial in Slate's case (76CR9012).

APPEAL OF ROMNEY LEE CARSON

[2] The defendant, Romney Lee Carson, assigns as error that portion of the trial court's final instructions to the jury setting forth the elements of the offense of receiving stolen goods. The defendant contends that the trial court failed to properly instruct the jury that, before they could return a verdict of guilty of receiving stolen goods in violation of G.S. 14-71, they must find from the evidence that the goods were stolen by someone other

than the accused. The defendant asserts that this constituted a failure to charge on an essential element of the offense of receiving stolen goods and requires he be granted a new trial.

When a trial court judge undertakes to define the law as required by G.S. 1-180, he must state it correctly, and failure to do so constitutes prejudicial error sufficient to warrant a new trial. The trial court must properly instruct the jury as to all essential elements of the offense charged. *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956). An essential element of the crime of receiving stolen goods in violation of G.S. 14-71 is the stealing of the goods by someone other than the accused. *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 32 L.Ed. 2d 674, 92 S.Ct. 2409 (1972). Therefore, failure to properly instruct the jury with regard to this element would constitute reversible error requiring a new trial.

Here the trial court first stated as an element of the offense of receiving stolen property the requirement "that the property was stolen" and failed to indicate that the property must have been stolen by someone other than the defendant. Later the trial court stated that the jury could convict if they found that "someone else had stolen them or that they were stolen." This statement would tend to indicate to the jury that they could convict either if the goods were stolen by the defendant or by someone else. Finally, the trial court properly stated that, before returning a verdict of guilty, the jury must find that the defendant knew or had reasonable grounds to believe that "someone else had stolen." No instruction was ever given the jury indicating it should ignore the first two incorrect statements as to this element of the offense.

Such conflicting instructions upon a material aspect of a case must be held to constitute prejudicial error, as the jury may have acted upon the incorrect portion of the instructions. *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976). It must be assumed on appeal that, of two conflicting instructions, the jury was influenced by that portion of the charge which is incorrect. *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976). It will not be supposed that the jury is able to distinguish between a correct and an incorrect charge. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974). Even though the trial court's instructions must be read in

their entirety and are not reversible for inadvertent omissions or inconsequential misstatements, the instructions of the trial court in this case were so conflicting as to require that they be held prejudicial error necessitating a new trial of the case against Carson (76CR8903).

For errors previously discussed herein, both the defendant Bill Slate (76CR9012) and Romney Lee Carson (76CR8903) are entitled to new trials, and we order

New trials.

Chief Judge BROCK and Judge MARTIN (Robert) concur.

STATE OF NORTH CAROLINA v. JOHN EXCELL McCOMBS, JR.

No. 779SC1017

(Filed 3 October 1978)

Homicide § 28.1 – shooting of police officer – right to defend home from invasion by intruder

The trial court in a prosecution for the homicide of a police officer erred in failing to instruct the jury on defendant's right to kill an intruder if he had a reasonable belief that it was necessary to kill in order to prevent the violent, forceful and unlawful entry of the intruder into his home where the uncontradicted evidence showed that six police officers, dressed in blue denim type clothing, went to defendant's home to execute a search warrant, decedent knocked on the door of the apartment, defendant looked out the window, decedent kicked in the door and entered defendant's apartment with a gun in his hand, and decedent was shot by defendant upon entering a hall in front of defendant's bedroom; there was a conflict in the evidence as to whether decedent identified himself before kicking in the door and as to whether defendant heard decedent identify himself; and defendant testified that he did not know that the supposed intruders were police officers.

APPEAL by defendant from *Baley, Judge.* Judgment entered 12 November 1976 in Superior Court, PERSON County. Heard in the Court of Appeals 5 April 1978.

Defendant was charged in four separate bills of indictment with murder; possession with intent to sell and deliver more than one ounce of marijuana; possession with intent to sell lysergic acid diethylamide; and, feloniously manufacturing marijuana. The

indictments were consolidated for trial and to each charge the defendant pled not guilty.

State's evidence tended to show that on 29 April 1976 a contingent of the vice division of the City of Durham Police Department procured a search warrant for the premises occupied by defendant and described as Apartment L-5 at 410 Pilot Street in Durham. The contingent consisting of six officers dressed in blue denim type clothing, went to the above address in two unmarked cars. Upon their arrival at the apartment, an unknown figure spotted the officers and was then seen running up the steps in the direction of defendant's apartment; his whereabouts thereafter are unknown.

Officer Larry Bullock went to the entry door of the apartment and knocked upon it. The defendant came to the window adjacent to the door and looked out at the person at the door, said nothing and dropped the curtain. Twelve to fifteen seconds later, the door was kicked open by Officer Bullock and he and the other officers entered the apartment. Officer Bullock was shot by defendant upon entering a hall in front of defendant's bedroom and died as a result of the wound.

Subsequently, the apartment was searched and various items were seized as evidence including scales, a quantity of marijuana and marijuana stems, and a vial containing lysergic acid diethylamide. Defendant later consented to a search of his automobile. Various items were seized therefrom and introduced as evidence against defendant.

Defendant's evidence tended to show that, on the night in question, after doing several errands and eating dinner, he had seated himself at his desk in his bedroom to study when, at 9:25 p.m., he heard a knock at the door of his apartment. He went to a window of the living room of the apartment, lifted the sheet on the window and looked out. He saw a black man there in a blue jeans suit; he did not recognize the man. After determining that he, defendant, did not know the stranger at the door, he was on his way to ask his roommate to see if he knew the man, when he heard banging on the door, as if whoever was on the outside was trying to break down the door. Defendant testified that he thought the man was trying to break the door to rob the apartment. As the door crashed open, defendant went quickly to his bedroom, got his gun, and went back towards the living room. As defendant reached his bedroom door, he saw the unidentified in-

dividual, whom he had seen previously knocking at the door, running down the hall with a gun. At this point, defendant raised his gun and shot. Defendant testified that he did not know that the man he shot was a police officer; that he heard no verbal expressions from anyone until he fired his gun; and that the first time he heard the word "police" was at the time immediately before he threw his gun out. Defendant further introduced evidence of his good character and reputation.

Defendant was found guilty by the jury of second degree murder, possession of marijuana with intent to distribute, possession of L.S.D. and manufacture of marijuana. From judgments imposing prison sentences, defendant appealed.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Malone, Johnson, DeJarmon & Spaulding, by C. C. Malone, Jr., for the defendant.

MARTIN (Robert M.), Judge

Defendant contends that, while the law arising upon the evidence in the case insofar as it relates to his plea of self-defense was declared and explained in the charge, the court failed to declare and explain the law arising upon the evidence given in the case as it relates to defendant's right to defend his home from invasion by an intruder. We are compelled to agree.

The trial judge intimated in one portion of his charge that he would instruct the jury upon the defense of home, stating:

> ". . . even though such officers be unlawfully upon the premises, if you should so find them to be, the occupants of the premises would have no right to injure or kill such officers except in self-defense *or in the protection of their home* (emphasis ours), and the court will hereafter instruct you as to what constitutes such self-defense in law."

However, the following portion of the trial judge's charge contains his only attempt to instruct the jury on the defense of home as an excuse for homicide:

> "A killing would be excused entirely on the ground of self-defense, if, first, it appeared to the defendant and he believed it to be necessary to shoot Larry Bullock in order to save himself from death or great bodily harm, and second,

the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. If defendant reasonably believed that a murderous assault was being made upon him in his own home, he was not required to retreat but could stand his ground and use whatever force he reasonably believed to be necessary to save himself from death or great bodily harm."

While the instruction adequately sets out the law applicable to the defense by the defendant of his person, it does not adequately instruct as to the right of the defendant to protect his home from a forcible entry.

The decided cases in North Carolina have consistently distinguished between the right of a person to defend himself or other persons, and the right of a person to defend his home. The right of a person to defend his home from attack is a substantive right. *State v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142 (1945). One may kill when necessary in defense of himself, his family, or his home, and he has the same right when not actually necessary, if he believes it to be so, and has a reasonable ground for the belief. *State v. Gray,* 162 N.C. 608, 77 S.E. 833 (1913).

"An attack on the house or its inmates may be resisted by taking life. The occupant of a house has a right to resist even to the death the entrance of persons attempting to force themselves into it against his will, when no action less than killing is sufficient to defend the house from entrance. A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion . . ." *State v. Gray, supra* at 613; Wharton Criminal Law, 9 Ed., Vol. 1, § 503.

"The guilt or innocence of the defendant does not depend upon the presence of a pistol in the hands of the deceased, . . . but in the existence of a reasonable apprehension that he or some member of his family was about to suffer great bodily harm, *or of the reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home.*" (Emphasis ours.) *State v. Gray, supra* at page 612.

The evidence shows that the police officers had deliberately clothed themselves in such a manner as to conceal their true identity from observers. There is controversy indicated by the record as to whether the defendant heard Officer Bullock identify him-

self, or whether Officer Bullock did in fact identify himself before kicking in the door to the defendant's apartment. That the door was forcibly opened and that the deceased entered the defendant's apartment with a gun in his hand is not contested. The defendant testified that he did not know that the supposed intruders were police officers. The credibility of the evidence is not for us. From this evidence it may be inferred that the force used by defendant was not only in self-defense, but in defending his home from attack by another. Whether the defendant would prevail upon this defense would depend upon the reasonableness of his belief that it was necessary to kill to prevent a violent, forceful and unlawful entry of an intruder into his home. The reasonableness of the defendant's belief is for the jury to decide. In making their determination, the jury would consider the circumstances as they are found from the evidence to have appeared to the defendant at the time of the shooting, including such relevant factors as the possession of a valid search warrant by the officers, whether the officers properly identified themselves and were refused admittance before forcing their entry, and whether the defendant knew that the intruders were police officers. Defendant was therefore entitled to have the evidence considered in the light of applicable principles of law even without a request by him. *See*, e.g., *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1965); *State v. Edwards*, 28 N.C. App. 196, 220 S.E. 2d 158 (1975).

We do not deal here with the defendant's other assignments of error as they are not likely to recur at retrial. For error in the trial court's instructions to the jury, defendant is entitled to a new trial on the homicide charge.

Defendant's brief states "[a]t the outset the defendant-appellant states unto the Court that by this appeal he appeals *solely* his conviction on second-degree murder." Thus, defendant specifically abandoned his appeal as to the judgments entered in 10710, 10948, 10711, and 10947.

In 10716 (the homicide case), new trial.

In cases 10710, 10948, 10711, and 10947, no error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. BENNIE "TOOTIE" ALSTON

No. 7815SC413

(Filed 3 October 1978)

Criminal Law §§ 114.2, 117.1 — charge on contentions, evidence, credibility of witnesses — no expression of opinion

The trial court did not express an opinion in violation of G.S. 1-180 in questioning witnesses for the purpose of clarifying their testimony, in recapitulating the evidence when his recapitulation was preceded by the phrase, "I believe the evidence tends to show," in instructing the jury that the credibility of the witnesses was for them to determine, or in instructing on the parties' contentions, though more time was spent on the State's contentions than on those of defendant.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 5 January 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 30 August 1978.

Defendant was charged in a bill of indictment proper in form with receiving stolen property, to wit: two stereo speakers, "knowing and having reasonable grounds to believe the property to have been feloniously stolen, taken and carried away." Upon the defendant's plea of not guilty, the State presented evidence tending to show the following:

James Kelly Thompson, his wife Pat Thompson, and Danny Oakley broke and entered the trailer of Robert Doswell and stole, among other things, two stereo speakers. Subsequently they took the speakers to the defendant Bennie Alston, told him they were stolen and asked if he wanted to buy them. The defendant then bought the speakers.

The defendant presented evidence tending to show the following: Danny Oakley could not recall whether Bennie Alston was told that the speakers were stolen. Kelly Thompson and Danny Oakley were permitted to make favorable plea bargains. Pat Thompson had not been tried for the theft of the speakers at the time of defendant's trial.

The jury found the defendant guilty as charged. From a judgment entered on the verdict imposing a sentence of ten years, defendant appealed.

Attorney General Edmisten, by Associate Attorney General Sarah L. Fuerst, for the State.

Malone, Johnson, DeJarmon & Spaulding, by C. C. Malone, Jr., for the defendant appellant.

HEDRICK, Judge.

Based on numerous exceptions duly noted in the record, defendant argues that the trial judge committed prejudicial error by making statements in the presence of the jury which implied that the judge had an opinion as to the guilt of the defendant. Defendant relies on the well-established rule that every person charged with a crime has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977). Numerous cases have held that G.S. § 1-180 (now G.S. § 15A-1222, 1232, effective 1 July 1978), while referring explicitly only to the charge, forbids the trial judge from expressing or implying, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of a witness at any time during the course of the trial. *See, e.g., State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977); *State v. Lewis*, 32 N.C. App. 471, 232 S.E. 2d 472 (1977). It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence, or in any other manner. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972).

Defendant assigns as error certain questions put to witnesses by the trial judge during the trial. The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Freeman, supra.* Such questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780 (1969); *State v. Allen*, 14 N.C. App. 485, 188 S.E. 2d 568 (1972). We have carefully examined the questions by the judge to which exceptions were taken, and in our opinion no prejudice resulted from them. The questions served only to clarify the witnesses' testimony and did not convey any "impression of judicial leaning" or an expression of opinion by the judge.

Defendant also assigns as error certain comments of the court in its charge to the jury as expressing an opinion as to whether certain facts had been fully or sufficiently proven and as to the credibility of the witnesses. More specifically, the defendant contends that the portion of the judge's charge dealing with the breaking and entering of the trailer goes beyond a "mere explanation of the legal principle involved" and states an opinion that the fact of the breaking and entering has been "fully proven." We disagree. The judge correctly summarized the evidence presented which was necessary to explain the application of the law arising thereon. *State v. Pittman*, 12 N.C. App. 401, 183 S.E. 2d 307 (1971). The judge's recapitulation of the evidence was preceded by the phrase, "I believe the evidence tends to show. . . ." This phrase does not constitute an expression of opinion that any particular facts had been fully proven but rather is a statement of the trial judge's recollection as to what the evidence tended to show. *See State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683 (1972), *cert. denied*, 409 U.S. 948, 93 S.Ct. 293, 34 L.Ed. 2d 218 (1972); *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948).

Defendant's exception to the judge's instructions with respect to the credibility of the witnesses is likewise without merit. It is well settled that the charge must be considered contextually as a whole and not in detached fragments. *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Reese*, 31 N.C. App. 575, 230 S.E. 2d 213 (1976). The charge included the statement: "[T]he credibility of the witness is a matter entirely for you to determine. You are the sole judges of what you will believe and what you will not believe." We have carefully examined all of the statements in the charge to which the defendant has made exception and find none of them to be an expression of opinion violative of G.S. § 1-180 or to be in any way prejudicial to the defendant. These assignments of error are without merit.

Defendant's final assignment of error concerns the court's charge with respect to its statement of the contentions of the parties. Defendant argues that the court failed to state any of its contentions after having fully stated the contentions of the State.

G.S. § 1-180 does not require the trial court to state the contentions of the litigants at all. However, once the court under-

takes to state the contentions of one party, it is required to give equal pertinent contentions of the opposing party. *State v. Vail*, 26 N.C. App. 73, 214 S.E. 2d 796, *cert. denied*, 288 N.C. 251, 217 S.E. 2d 676 (1975); *State v. Billinger*, 9 N.C. App. 573, 176 S.E. 2d 901 (1970).

The State presented voluminous testimony from several witnesses against the defendant. The crux of the defendant's case was attacking the credibility of the State's witnesses. The evidence presented by defendant tended to show that two witnesses received favorable plea bargains, that one witness had not yet been tried, and that one witness was unable to recall whether the defendant was told he was buying stolen goods. All of these contentions were included by the trial judge in his charge.

"The court is not required to give equal time to each side; nothing more is required than a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case." *State v. Reisch*, 20 N.C. App. 481, 482-83, 201 S.E. 2d 577, 579, *cert. denied*, 285 N.C. 88, 203 S.E. 2d 61 (1974). We hold that the judge's charge adequately stated the contentions of both parties and accordingly find no merit in this assignment of error.

Defendant received a fair trial free from prejudicial error.

No error.

Judges MORRIS and WEBB concur.

IN THE MATTER OF: CHARLES E. FAULKNER v. NORTH CAROLINA STATE HEARING AID DEALERS AND FITTERS BOARD

No. 7710SC946

(Filed 3 October 1978)

1. Professions and Occupations § 1— hearing aid dealer license—revocation for gross incompetence—failure to make promised refunds

The license of a hearing aid dealer and fitter could not properly be revoked under G.S. 93D-13(a)(2) for "gross incompetence" because of his failure

to make promised refunds if hearing aids failed to improve the hearing of the purchasers thereof, since the term "gross incompetence" as used in the statute means a failure on the part of the individual hearing aid dealer to possess the minimum degree of technical expertise or ability required adequately to fit and service hearing aids, and the dealer's failure to make the promised refunds failed to demonstrate any lack of competence in selling and fitting hearing aids.

2. **Administrative Law § 8; Professions and Occupations § 1— review of administrative decision—reasons for reversing decision—sufficiency of order**

The superior court adequately set out in writing its reasons for reversing a decision of the State Hearing Aid Dealers and Fitters Board as required by G.S. 150A-51 where the court's order stated that the facts found by the Board failed "to support its Conclusion of Law that the Petitioner was grossly incompetent within the purview of G.S. 93D-13(a)(2)."

APPEAL by respondent from *Godwin, Judge*. Judgment entered 10 October 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1978.

Petitioner is a salesman of hearing aids. On 1 February 1977 petitioner was notified to appear for a hearing before the North Carolina State Hearing Aid Dealers and Fitters Board (hereinafter "Board") to show cause why his license should not be revoked or suspended for "gross incompetence" in his dealings as a hearing aid dealer and fitter in violation of G.S. § 93D-13(a)(2). Pursuant to said notice a hearing was held on 3 May 1977. After hearing evidence from both sides, the Board made findings of fact summarized as follows:

Petitioner sold hearing aids to three individuals and made guarantees to each buyer that if the hearing aid did not improve his hearing within ninety days the purchase price would be refunded. Each buyer notified Faulkner within the ninety day period that his hearing aid was not performing properly and demanded a refund of the purchase price. Although each purchaser was entitled to a return of his purchase price, none of the individuals ever received a refund.

From its findings of fact the Board concluded that by failing to make refunds to the purchasers Faulkner "committed gross incompetence in his dealings as a hearing aid dealer and fitter in violation of G.S. 93D-13(a)(2)" and revoked Faulkner's license.

Pursuant to G.S. § 150A-43, Faulkner petitioned the Superior Court of Wake County for judicial review of the Board's order re-

voking his license. Judge Godwin reversed the order of the Board stating: "8. The Respondent's Board, [sic] Findings of Fact fail to support its Conclusion of Law that the Petitioner was grossly incompetent within the purview of 93D-13(a)(2)." From this order, the North Carolina State Hearing Aid Dealers and Fitters Board appealed.

Attorney General Edmisten, by Associate Attorney General Lucien Capone III, for the appellant, North Carolina State Hearing Aid Dealers and Fitters Board.

Yates & Talford, by Robert M. Talford, for the appellee, Charles E. Faulkner.

HEDRICK, Judge.

[1] By assignment of error number one, the Board questions the correctness of the holding of the superior court that the Board's findings of fact failed to support its conclusion that Faulkner "was grossly incompetent within the purview of G.S. 93D-13(a)(2)." The question thus presented is whether Faulkner committed "gross incompetence" by failing to make promised refunds to three clients.

G.S. § 93D-13(a) provides in pertinent part as follows:

> The Board may in its discretion administer the punishment of private reprimand, suspension of license or apprentice license for a fixed period or revocation of license or apprentice license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:
>
> . . .
>
> (2) Gross incompetence

In the construction of a statute it is the function of the court to discover the intent of the Legislature and to give to the words of the statute the meaning which the Legislature intended. *Lafayette Transportation Service, Inc. v. The County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). Where the words of a statute have not acquired a technical or special meaning, they are to be construed according to their common and ordinary meaning. *Parnell-Martin Supply Co., Inc. v. High Point Motor Lodge, Inc.*, 277 N.C. 312, 177 S.E. 2d 392 (1970). There is nothing in the

record to indicate that the Legislature intended that the words "gross incompetence" should be given anything other than their common and ordinary meaning. Webster's Third New International Dictionary (unabr. 1968) defines "incompetence" as a "lack of physical, intellectual, or moral ability" and "gross" as "out-and-out, complete, utter, unmitigated."

Applying the above principles, we think that the term "gross incompetence" was intended by the Legislature to mean a failure on the part of the individual hearing aid dealer to possess the minimum degree of technical expertise or ability required to adequately fit and service hearing aids. Faulkner's failure to make the promised refunds, while reprehensible, fails to demonstrate any lack of competence on his part in selling and fitting hearing aids. The Board's first assignment of error is overruled.

[2] The Board, by its second assignment of error, argues that the superior court failed to make findings set out in writing giving his reasons for reversing the agency's decision as required by G.S. § 150A-51, which provides in pertinent part: "If the Court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, *the reasons for such reversal* or modification." (Emphasis added.)

Under G.S. § 150A-51 the reviewing judge may reverse the agency's decision "if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions" are defective for one or more of the six reasons enumerated in the statute. *See* Daye, North Carolina's New Administrative Procedure Act: An Interpretative Analysis, 53 N.C.L. Rev. 833 (1975). If the court reverses the agency's ruling, it must set out in writing the reasons for the reversal.

Although the trial judge mislabeled its reasons for reversing the agency's decision as a "finding of fact" and although this "finding" is terse, we think it is a sufficient statement of the court's reasons and satisfies the requirements of G.S. § 150A-51. When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. § 150A-51, the judge is not required to make findings of fact. Indeed, the findings of fact made by the administrative agency, if supported by competent, material and substantial evidence when

viewed on the record as a whole, are conclusive upon the reviewing court. *In re Berman*, 245 N.C. 612, 97 S.E. 2d 232 (1957); *In re Hawkins*, 17 N.C. App. 378, 194 S.E. 2d 540, *appeal dismissed*, 283 N.C. 393, 196 S.E. 2d 275, *cert. denied*, 414 U.S. 1001, 94 S.Ct. 355, 38 L.Ed. 2d 237 (1973). The authority of the judge when reviewing the actions of administrative agencies is limited to affirming, modifying, reversing or remanding the decision of the agency. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E. 2d 920, *appeal dismissed*, 290 N.C. 309, 225 S.E. 2d 829, *cert. denied*, 429 U.S. 940, 97 S.Ct. 356, 50 L.Ed. 2d 310 (1976).

Judge Godwin, in reversing the agency's conclusion, simply stated that the facts found by the agency failed "to support its Conclusion of Law that the Petitioner was grossly incompetent within the purview of G.S. 93D-13(a)(2)." The superior court's conclusion constituted a succinct and adequate statement of its reasons for reversing the agency's decision.

Affirmed.

Judges MORRIS and WEBB concur.

MARGARET WALKER v. THOMAS J. WALKER

No. 7715DC1009

(Filed 3 October 1978)

1. **Evidence § 28.1— affidavits—affiant present at hearing—right to cross-examination not denied**

Plaintiff's affidavit was not inadmissible on the ground that defendant was deprived of his right to cross-examine the affiant, since plaintiff was present at the hearing and defendant could have called her for cross-examination.

2. **Trial § 57— hearing by court—elimination of incompetent material**

Defendant's contention that plaintiff's affidavit contained irrelevant material which was prejudicial to defendant is without merit, since it is presumed that the court, sitting without a jury, eliminated immaterial and incompetent testimony and was not influenced by it.

3. **Divorce and Alimony § 24.1— child support—determining amount**

In determining the amount of child support, the trial court properly complied with G.S. 50-13.4(c) by considering the estate, earnings, conditions and accustomed standard of living of the defendant.

4. Divorce and Alimony § 27— child custody and support—counsel fees awarded without findings of fact

In an action for child custody and support, findings of fact are not required to sustain an award for counsel fees.

APPEAL by defendant from *Cooper, Judge*. Judgment entered 20 September 1977 in District Court, ALAMANCE County. Heard in the Court of Appeals 19 September 1978.

Plaintiff brought this action for alimony without divorce, custody, child support, and counsel fees. Plaintiff contends defendant has offered indignities to the plaintiff as to render her condition intolerable and her life burdensome. Defendant's answer denies plaintiff's allegations but asks the court to determine custody and child support.

Plaintiff and defendant stipulated that plaintiff was a fit and proper person to have care, custody and control of their child, Tonya Beth Walker, thirteen years of age. Plaintiff and defendant announced they were ready to proceed, and agreed that the matters and things before the court would not include the relief sought by the plaintiff for alimony or alimony pendente lite.

Plaintiff was present in court but did not testify in person. An affidavit by the plaintiff was admitted into evidence over defendant's objection. Plaintiff also called defendant as a witness. Plaintiff's evidence tended to show the financial condition of plaintiff and defendant and the requirements of their child for support.

The court entered judgment finding facts and conclusions of law requiring defendant to pay $250.00 monthly as child support and $500.00 to plaintiff's attorneys as partial allowance on counsel fees. The cause was retained for further orders of the court.

Latham, Wood and Balog, by James F. Latham, for plaintiff appellee.

Ross and Dodge, by Barton M. Menser, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant objected to the admission of plaintiff's affidavit. Defendant's first and second assignments of error depend upon

the correctness of this ruling. The first assignment of error is based upon the court's ruling in admitting the affidavit. The second challenges the findings of fact and conclusions of law in the court's judgment for the reason there is no evidence to support them other than plaintiff's affidavit. On this question, counsel for plaintiff and defendant rely upon *In re Custody of Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969). In *Griffin*, twenty-one affidavits were offered and the record does not disclose that these affiants were present in court. This Court held affidavits should not be received where there was a timely objection and the objecting party will be deprived of his right of cross-examination of the affiant. The Court further stated that upon objection affidavits should not be received without affording an opportunity for cross-examination.

Defendant in his brief states that plaintiff affiant was present for the hearing. He further states she was not made available to him for cross-examination. We do not conclude from *Griffin, supra*, that upon such objection the offering party must tender the affiant for cross-examination when the affiant is present in open court to the knowledge of the objecting party. By his failure to call affiant for cross-examination, defendant waived this right.

[2] Defendant further contends the affidavit contains material irrelevant to the question of child support and prejudicial to defendant. Where it sits without a jury, the trial court is able to eliminate immaterial and incompetent testimony. It is presumed the court did so. 1 Stansbury's N.C. Evidence (Brandis Revision, 1973), § 4a. There is nothing in the record before us to indicate the experienced trial judge was influenced by incompetent evidence in his judgment. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668 (1958).

Defendant's first and second assignments of error are overruled.

[3] Defendant next contends error in determining the amount of child support. He asserts the court abused its discretion in applying G.S. 50-13.4(c) by failing to consider the estate, earnings, conditions and accustomed standard of living of the defendant. The determination of child support must be done in such way to result in fairness to all parties. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). The trial court found defendant earned salary of ap-

proximately $16,335.00 per year and also received reimbursement for lodging, food, telephone, and other expenses when travelling for his employer. His employer also provided an automobile and reimbursement for expenses in the use of it for business purposes. The court required defendant to pay mortgage payments of $243.00 per month, including taxes and insurance, and $250.00 monthly child support, and hospitalization insurance, medical and dental expenses of his minor child. The court allowed defendant possession of certain personal and household property and reviewed the financial requirements of the defendant. We find that the court complied with G.S. 50-13.4(c) and *Beall*. The assignment of error is overruled.

[4] Defendant assigns as error the order of the court requiring defendant to pay partial attorney fees to plaintiff's counsel. Defendant contends the court failed to find facts as required by G.S. 50-13.6. This statute requires in a *child support* action a finding that defendant refused to provide support. Here, plaintiff sues for alimony, custody, and support. Plaintiff did not abandon her claim for custody of Tonya, and although plaintiff and defendant agreed plaintiff was a fit person to have custody, this was a matter for the court to decide. The court adjudicated the question of custody. In an action for custody *and* support, findings of fact are not required to sustain an award for counsel fees. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). There is ample evidence to support the trial court's order for counsel fees. The assignment is overruled.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. IRVING SNEED, JR.

No. 785SC479

(Filed 3 October 1978)

1. **Burglary and Unlawful Breakings § 5.7— unlawful entry—only part of body in vehicle**

The State's evidence supported a finding that defendant made an entry into a van within the meaning of G.S. 14-56 where it tended to show that defendant was standing on the street at the open door of the van with the upper part of his body in the van.

2. **Criminal Law § 34.2— testimony showing prior crime—absence of prejudice**

Defendant was not prejudiced by a witness's testimony that defendant stated he didn't want to go back to court because he just got out of prison where the court sustained defendant's objection to the testimony, and defendant testified on direct examination that he had been convicted of common law robbery and was out on parole.

APPEAL by defendant from *Peel, Judge.* Judgment entered 26 January 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 19 September 1978.

Defendant was indicted and tried on charges of breaking or entering a motor vehicle and felonious larceny.

The State offered evidence tending to show Anthony Ray Dorsey owned a 1972 Volkswagen van which contained a CB radio, tapes, and other personal property. About 4:00 p.m., 30 October 1977, he parked the van, locked it, and went into the house of Freda Hall. Curtis Hall, also called Chum Chum, wanted to talk on Dorsey's CB radio, and Dorsey loaned him the keys and let him sit inside the van. Chum Chum came back inside the house in a few minutes and got Dorsey. When Dorsey went outside, he saw two people sitting in the van and four or five others standing near the van. Dorsey saw the defendant on the driver's side of the van, "laying into" the van. The door was open, and the defendant was standing on the street with his upper body inside the van looking into the console box between the two front seats. The console contained personal property of Dorsey. Another person was seated in the driver's seat. Dorsey identified defendant in court as being the person he saw leaning into the van. Certain personal property of Dorsey was missing. Neither Dorsey nor Chum Chum gave anyone permission to enter the van.

Defendant's evidence tended to show that he came to the general area of the van that afternoon. He saw Chum Chum in the van. When Chum Chum went into the Hall house, two other guys went to the motor vehicle and one snatched out the CB radio and ran. Another guy was leaning into the van getting something out of it when Dorsey came out. The defendant was standing back of the van in the street when Dorsey came out. Defendant stated he did not get inside the van.

The jury returned a verdict of guilty of breaking or entering a motor vehicle and not guilty as to larceny. From a judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

William G. Hussmann, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant assigns as error the ruling by the trial court that the State's evidence supported a finding that an entry had been committed within the meaning of the applicable statute, N.C. Gen. Stat. 14-56. On this question, the State's evidence indicated defendant was standing on the street at the open door of the van with the upper part of his body inside the van. We do not find, nor have counsel referred us to, any North Carolina case defining "entry" as used in the offenses of breaking or entering, or burglary.

Black's Law Dictionary 627 (4th ed. rev. 1968) states: "In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense." Statements to the same effect are found in 13 Am. Jur. 2d Burglary § 10, 35 N.C. L. Rev. 101 (1956). It is not necessary that the party get his whole body into the house, and the least entry of any part of the body is sufficient. 12 C.J.S. Burglary § 10 (1972). In defining entry at the common law, Blackstone states:

> As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is suffi-

> cient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.

IV W. Blackstone, Commentaries 227. So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this state. N.C. Gen. Stat. 4-1; *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936). We hold that the State's evidence was sufficient for submission of the question to the jury as to whether an entry had been committed by the defendant. Defendant's other arguments concerning his motion for nonsuit are without merit. Defendant's second assignment of error is overruled.

Defendant objected to the following jury instruction by the court: "Leaning through an open door with the upper part of his body actually in the vehicle after the door has been opened by someone who did not have the authority or permission from the owner, or from Curtis Hall, to open the door, would be an entry." In applying the law as above stated concerning the meaning of entry to this instruction, we find no error. This assignment of error is overruled.

[2] Defendant objected to the answer of the witness Dorsey to the question, "Did he [the defendant] say anything else to you?" Dorsey answered, "I don't want to have to go back to court because I just got out of prison." The trial judge immediately sustained the objection. Defendant's objection was general, it did not refer to N.C. Gen. Stat. 15A-910 which sets out remedies where State has failed to comply with discovery statutes. Defendant did not call this statute to the attention of the court, nor did he request any relief provided by the statute. Defendant, in answering his own lawyer's questions, testified he had been convicted of common law robbery and was on parole. There was no prejudicial error. *State v. Johnson*, 22 N.C. App. 183, 205 S.E. 2d 761 (1974).

We have examined defendant's remaining assignments of error and have found in them no merit. Both the State's evidence and the defendant's evidence support a finding that Dorsey's motor vehicle was broken or entered and his property stolen. Defendant contends he did not participate in the offenses. By its verdict the jury reconciled this question of credibility against the defendant.

No error.

Chief Judge BROCK and Judge CLARK concur.

IN THE MATTER OF: BERTHA J. DOTY

No. 7821DC407

(Filed 3 October 1978)

Insane Persons § 1.2— involuntary commitment—imminent danger—need for constant care

The trial court in an involuntary commitment proceeding erred in finding that respondent was imminently dangerous to herself or others where the evidence showed only that respondent was completely unable to care for herself and needed nursing home or similar care. G.S. 122-58.1, -58.7, -58.8(b).

APPEAL by respondent from *Allen (Claude W.), Judge.* Involuntary commitment order entered 5 January 1978 in District Court, GRANVILLE County. Transferred to Forsyth County following hearing in accordance with directions from the Administrative Office of the Courts. Heard in the Court of Appeals 30 August 1978.

Bertha Doty, the respondent, has been hospitalized at John Umstead Hospital since 1966. At the request of the Acting Chief of Medical Services a rehearing for involuntary commitment was held on 5 January 1978 to determine whether Ms. Doty should be committed to Umstead Hospital for an additional 365 days.

Dr. Barker testified for the State that Ms. Doty suffered from a progressive neurological deterioration which could be labeled an organic brain syndrome. This condition is irremediable, and because of it Ms. Doty is "completely unable to care for herself" and needs nursing home or similar care. Dr. Barker testified that Ms. Doty receives no psychiatric treatment, but does receive treatment for her medical problems.

Ms. Doty testified in her own behalf only to say that she wanted to leave.

An order of involuntary commitment for 365 days was entered on 5 January 1978, and from this order respondent appeals.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

Susan Freya Olive, counsel for respondent appellant.

ARNOLD, Judge.

The North Carolina involuntary commitment statute requires two findings before a person may be committed against his will: (1) that the person is mentally ill or inebriate, and (2) that he is imminently dangerous to himself or others. N.C.G.S. §§ 122-58.1, -58.7(i), and -58.8(b). The statutory definition of mental illness, N.C.G.S. §§ 122-58.2(2) and -36(d), is broadly written and may well encompass Bertha Doty's condition, even though the record shows no specific evidence of her symptoms. The doctor testified only that Ms. Doty was unable to care for herself, and that she was a complete nursing care problem.

It is the second finding, however, that requires us to reverse the court's ruling. By requiring that the person be found *imminently* dangerous to himself or others, the legislature has made it clear that involuntary commitment is not for all those who are mentally ill, or even for those whose mental illness may make it necessary for them to have custodial care. Although Bertha Doty may come within the statutory definition of "dangerous to himself," N.C.G.S. 122-58.2(1), two recent decisions from this Court make clear that there has been no showing here of imminent danger.

In *In re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975), the trial court had found the respondent mentally ill and unable to take care of her personal needs for food, clothing and shelter. This Court held:

> There is . . . no finding sufficient to satisfy the [requirement of imminent danger]. If [the trial court's finding] be considered sufficient to show a determination by the court that respondent was dangerous to herself as defined in G.S. 122-58.2(1), yet there was no finding that the danger was imminent.

Id. at 445, 213 S.E. 2d at 411. And although the trial court had found as fact that the respondent suffered from violent temper, serious lack of insight, insufficient appreciation of the needs of others, and suspiciousness, this Court held that the evidence would not have supported a finding of imminent danger.

Again in *In re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976), this Court has indicated that the requirement of imminent danger will be taken seriously.

> The words 'imminently dangerous' simply mean that a person poses a danger to himself or others in the immediate future.
>
> * * * *
>
> In the case of [the first respondent] the only evidence tending to show dangerousness was provided by a doctor who indicated that [respondent] 'appears mentally unable [to] care for self & *probably* of imminent danger to self.' . . . Such evidence is not clear, cogent and convincing.
>
> In the case of [the second respondent] the doctor's affidavit stated that [respondent] 'appears unable to cope with daily living.' Again the evidence fails to present clear, cogent and convincing evidence of imminent danger.

Id. at 61, 228 S.E. 2d at 652.

There is less evidence in this case than in either of those cited that Bertha Doty is of imminent danger to herself. The requirements for involuntary commitment are not met. Even if they were met at some time during Ms. Doty's hospitalization, the statute makes clear the legislature's intent in such a situation: "[C]ommitted persons will be discharged as soon as a less restrictive mode of treatment is appropriate." N.C.G.S. § 122-58.1. The uncontroverted testimony of the doctor for the State is that Ms. Doty "needs nursing home or similar care."

The United States Supreme Court has recognized that "the mere presence of mental illness does not disqualify a person from perferring his home to the comforts of an institution. . . . [I]ncarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends."

O'Connor v. Donaldson, 422 U.S. 563, 575, 45 L.Ed. 2d 396, 407, 95 S.Ct. 2486, 2493-94 (1975). There are two humanitarian purposes for involuntary commitment: temporary withdrawal from society of those who may be dangerous, and treatment. *French v. Blackburn,* 428 F. Supp. 1351 (M.D.N.C. 1977). Neither of those is being served here.

The judgment of the trial court is

Reversed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. LEE ODIS ALFORD

No. 7811SC706

(Filed 3 October 1978)

Searches and Seizures § 15— outbuilding not owned or rented by defendant—no standing to contest search

The trial court in a homicide prosecution erred in suppressing certain shotgun shells seized during the search of an outbuilding approximately 50 feet behind defendant's rented house, since the uncontradicted evidence showed that defendant neither owned nor rented the outbuilding in question, and defendant therefore had no standing to contest the search of the building and the seizure of shells therefrom.

APPEAL by the State from *Canaday, Judge.* Order entered 8 May 1978 in Superior Court, HARNETT County. Heard in the Court of Appeals 22 September 1978.

Defendant is under indictment and awaiting trial for the murder of Eula Mae McArthur. He moved to suppress certain shotgun shells seized during the search of an outbuilding approximately 50 feet behind his rented house in Sanford.

A hearing was held at which the State presented the testimony of SBI Agent Stewart and Harnett County Deputy Sheriff Gregory. Their testimony tended to show that: defendant was questioned about a shotgun after his arrest on 21 December 1977; defendant gave the officers written consent to search his

residence and to seize the shotgun, which defendant admitted he had; the two officers went to defendant's residence and also obtained a written consent from defendant's wife; neither written consent mentioned shotgun shells or any outbuildings; Stewart found the shotgun in a closet in the house, but found no shotgun shells; Gregory then went to the outbuilding, the door to which was fastened with a latch but unlocked; and Gregory found a box of shotgun shells therein.

The State also presented Ruby McSwain who testified that she owned the house in which defendant and his wife lived and rented it to them. She also testified that the lease did not include the outbuilding, that defendant never obtained permission to use it, and that she and her late husband had been using the outbuilding for storage.

Judge Canaday entered an order allowing the motion to suppress, and the State appeals pursuant to G.S. 15A-979(c).

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

W. A. Johnson, for defendant appellee.

ERWIN, Judge.

The State first contends that the trial court erred in allowing the motion to suppress in that the evidence shows that defendant had no standing to contest the search of the outbuilding and the seizure of the shells therefrom. We agree and accordingly reverse the order of the trial court.

G.S. 15A-972 provides:

> "When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant *who is aggrieved* may move to suppress evidence in accordance with the terms of this Article." (Emphasis added.)

The "Official Commentary" to G.S. 15A-972 aptly notes that the statute utilizes the word "aggrieved" to describe who has standing, as does Fed. R. Crim. P. 41(e) and adds: "This would give North Carolina the benefit of case law as to standing developed in the federal courts and in the courts of many other states which

also use the same terminology." Rule 41(e) does not constitute a statutory expansion of the exclusionary rule. *United States v. Calandra*, 414 U.S. 338, 38 L.Ed. 2d 561, 94 S.Ct. 613 (1974).

Mrs. McSwain testified for the State as follows:

> "Mr. Alford had been living in my house on Third Street . . . I had a storage type building behind that house. The building was used for the storage of things that my husband had. I had not included the storage building in the rental agreement with Mr. Alford. I continued to use the building for my own use. . . .
>
> [A]t no time did Lee Odis Alford obtain permission for him to use the storage building . . . for his own personal use."

The United States Supreme Court held as follows in *Brown v. United States*, 411 U.S. 223, 229, 36 L.Ed. 2d 208, 214, 93 S.Ct. 1565, 1569 (1973):

> "[I]t is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

Brown has been followed by our Supreme Court in *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976), *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975), and *State v. Gordon*, 287 N.C. 118, 213 S.E. 2d 708 (1975), *modified on other grounds*, 428 U.S. 903 (1976). As *Brown* and decisions thereunder note, rights against unreasonable searches and seizures under the Fourth Amendment are personal and may not be vicariously asserted.

Defendant was not on the premises at the time of the search and seizure about which he complains. The uncontradicted testimony of Mrs. McSwain shows that defendant neither owned nor rented the shed in question. Clearly, possession of the shells is not an essential element of the offense charged. Counsel for defendant has very ably articulated his contention that he has standing; however, we are unable to conclude that defendant is "aggrieved" under G.S. 15A-972.

The exclusionary rule is justified as a deterrent to police conduct violating Fourth Amendment rights. *Stone v. Powell*, 428 U.S. 465, 49 L.Ed. 2d 1067, 96 S.Ct. 3037 (1976). The Supreme Court observed therein:

> "[T]he standing requirement is premised on the view that the 'additional benefits of extending the . . . rule' to defendants other than the victim of the search or seizure are outweighed by the 'further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.' " (Citation omitted.) *Stone v. Powell, supra*, at 488-9, 49 L.Ed. 2d at 1084-5, 96 S.Ct. at 3049-50.

We note that G.S. 15A-977 details the procedures for motions to suppress evidence in Superior Court and that 15A-977(f) provides: "The judge *must* set forth in the record his findings of facts and conclusions of law." (Emphasis added.) Here the trial court should have made more extensive findings of fact and conclusions of law as required by statute and as called for by better practice.

Therefore, the order of the trial court is reversed, and the case is remanded.

Reversed and remanded.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. WILLIAM ARTHUR MOORE

No. 7810SC308

(Filed 3 October 1978)

False Pretense § 2.2— intent to defraud not alleged—indictment fatally defective

An indictment which charged defendant with obtaining a suit from a store by false pretense was fatally defective where it failed to allege that defendant acted with the intent to defraud.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 15 November 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 17 August 1978.

Defendant was charged in a bill of indictment with obtaining a men's suit from J. J. Morley, Inc., by false pretense. The defendant entered a plea of not guilty. The jury found the defendant guilty as charged. From a judgment imposing a prison sentence of 8-10 years, the defendant appealed.

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

Shabica, Shyllon & Shyllon, by Mohamed M. Shyllon for the defendant appellant.

HEDRICK, Judge.

The defendant contends that the bill of indictment is defective for failure to charge that the defendant acted with intent to defraud. The record reveals that none of the defendant's assignments of error are addressed to the sufficiency of the indictment. Furthermore, our examination of the record reveals that at no time did the defendant move to quash the indictment. Nevertheless, we treat his contention as a motion in arrest of judgment filed in this Court. *State v. Doughtie*, 238 N.C. 228, 77 S.E. 2d 642 (1953); *State v. Hadlock*, 34 N.C. App. 226, 237 S.E. 2d 748 (1977).

It has long been held in this State that an indictment must allege all essential elements of the crime charged. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977). The defendant is charged with obtaining property by false pretense which is described in G.S. 14-100 as follows:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be imprisoned in the State's

> prison not less than four months nor more than 10 years, and fined, in the discretion of the court: . . . Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act *with intent to defraud*, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud. (Emphasis added.)

The indictment upon which the defendant was charged fails to allege that the defendant acted with the intent to defraud. This omission of an essential element of G.S. 14-100 is fatal to the indictment. *State v. Phillips*, 228 N.C. 446, 45 S.E. 2d 535 (1947) (indictment defective for failure to allege intent to defraud in similar offense under G.S. 14-104). *See also State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975); *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947); *State v. Rogers*, 30 N.C. App. 298, 226 S.E. 2d 829 (1976).

"The legal effect of arrest of judgment is to vacate the verdict and judgment entered in the Superior Court in this case." *State v. Hadlock, supra* at 228, 237 S.E. 2d at 749. If the district attorney is so advised, he may prosecute the defendant on a new bill of indictment.

Judgment arrested.

Judges MORRIS and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 OCTOBER 1978

DEPT. OF SOCIAL SERVICES v. MALONE No. 7721DC896	Forsyth (77JO76)	Affirmed
HUBBARD v. HUBBARD No. 7712DC994	Cumberland (76CVD583) (77CVD340)	New Trial
IN RE CLODFELTER No. 7722DC974	Davidson (77SP229)	Affirmed
IN RE HENDERSON No. 7714DC1003	Durham (77J96)	Affirmed
MAY v. TOWN OF CONOVER No. 7725SC969	Catawba (75CVS1574)	Affirmed
STATE v. BURCH No. 7822SC443	Iredell (76CR9694)	No Error
STATE v. DEVARD No. 7813SC321	Columbus (77CRS5238)	No Error
STATE v. DOBBINS No. 787SC324	Wilson (77CRS5044)	No Error
STATE v. DORSEY No. 7812SC459	Cumberland (77CRS23426)	No Error
STATE v. FIDDLER No. 7822SC405	Iredell (77CR9750)	No Error
STATE v. FLUID No. 7827SC427	Gaston (77CRS22034) (77CRS22445)	No Error
STATE v. FREEDLE No. 7722DC998	Davidson (76CVC1)	Dismissed
STATE v. GRAHAM No. 7821SC385	Forsyth (77CR50147)	No Error
STATE v. HOWELL No. 7827SC440	Gaston (77CRS8577)	No Error
STATE v. INGRAM No. 7821SC434	Forsyth (71CR12943)	Affirmed
STATE v. LOCKLEAR No. 7818SC359	Guilford (77CRS45583)	No Error
STATE v. MISHER No. 7827SC468	Lincoln (77CRS5062)	No Error

STATE v. PUCKETT No. 7818SC388	Guilford (77CRS3582)	No Error
STATE v. ROBERTSON No. 7821SC382	Forsyth (77CR46135)	No Error
STATE v. SAMUELS No. 7826SC435	Mecklenburg (77CR55563)	No Error
STATE v. SEYMOUR No. 7826SC350	Mecklenburg (76CR51073)	No Error
STATE v. SMART No. 7817SC408	Rockingham (77CR1577) (77CR1578) (77CR1579)	No Error
STATE v. SPICER No. 7823SC498	Yadkin (77CR624)	Appeal Dismissed
STATE v. STEPTOE No. 785SC507	New Hanover (77CRS10567)	No Error
STATE v. WELLS No. 7810SC484	Wake (77CRS51565)	No Error
STATE v. WILLIAMS No. 783SC410	Pitt (77CR13393)	No Error

STATE OF NORTH CAROLINA v. TERRY WAYNE McDOUGALD

No. 7812SC378

(Filed 17 October 1978)

1. **Criminal Law § 31— radio and television publicity of case—failure to take judicial notice—no error**

The trial court did not abuse its discretion in failing to take judicial notice of radio and television broadcasts concerning the case, and defendant was not denied the opportunity to prove the occurrence of such broadcasts or their contents.

2. **Criminal Law § 15.1— exposure of jury to publicity—burden of proving prejudice on defendant**

A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure; rather, the defendant must additionally show that it is reasonably likely that prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed. Defendant in this case failed to show that jurors would base their conclusions and verdict upon pretrial publicity and preconceived impressions and therefore failed to show a reasonable likelihood that pretrial publicity would prevent a fair trial.

3. **Criminal Law § 101.2— news coverage—warning instruction to jury**

Where the trial court, prior to commencement of jury selection, thoroughly cautioned the prospective jurors that they should not read, watch or listen to any type of news coverage of the trial and fully explained the importance of this instruction to the jury, and defendant was permitted to ask each juror what he or she had read or heard concerning the case and was given full opportunity to challenge any jurors he believed might have been prejudiced, the trial court did not abuse its discretion in declining to instruct the jurors to avoid listening to or reading news coverage concerning the trial, when it appeared that one of the prospective jurors had listened to the radio on the morning of her examination on voir dire.

4. **Jury § 6.3— examination of prospective juror—limitation proper**

The trial court did not err in refusing to allow the defendant to ask a prospective juror whether he could determine guilt or innocence in the case without the defense presenting evidence, since defendant had already determined by prior questioning that the juror would return a verdict of not guilty if he were not convinced of the defendant's guilt beyond a reasonable doubt, that the juror understood the presumption of innocence and that he did not believe it was necessary for the defendant to take the stand.

5. Jury § 7.6— challenge of juror for cause denied—defendant not prejudiced

The trial court did not err in failing to allow defendant's challenge for cause of a juror who stated that he would not require the State to carry its burden of proof, since the record on appeal indicated that the juror simply misunderstood the question; moreover, defendant failed to seek to exercise an additional peremptory challenge after exhausting his permitted peremptory challenges, and he therefore cannot benefit from this exception and assignment of error.

6. Constitutional Law § 30— production of all written statements requested—denial proper

The trial court did not err in denying defendant's motion to compel production of any written statements or reports made by witnesses for the State, since defendant was not entitled to such information pursuant to G.S. 15A-904(a); nor did due process require the production of such evidence since the defendant had received summaries of statements made by the State's witnesses which were sufficient to provide defendant with all of the material testimony which might be drawn from each witness and to alert defendant to any prior statements by the witnesses tending to be inconsistent with their testimony at trial.

7. Constitutional Law § 30— production of all typed statements requested—denial as fishing expedition

The trial court did not err in denying defendant's motion to require the State to disclose all typed statements of any witnesses interviewed by the State in order that the defendant might determine whether they contained any exculpatory information, since such motion was clearly a fishing expedition so broad in its nature as to constitute a motion for the production of memoranda and other internal documents prepared by law enforcement officers, and the court was not required to order the production of such materials to defendant.

8. Criminal Law § 73.4— statement not part of res gestae

Defendant's contention that statements made by him after the crime charged were admissible as part of the res gestae is without merit, since the statements in question were made at a time and place remote from the occurrence of the crime charged.

9. Constitutional Law § 30— failure to comply with discovery order—sanctions

When a party to a criminal proceeding fails to comply with discovery requirements, the trial court may impose sanctions upon that party which include holding the party in contempt, ordering discovery, granting a continuance or recess, prohibiting the party from introducing the evidence or entering other appropriate orders. G.S. 15A-910.

10. Constitutional Law § 30— failure to disclose statement pursuant to discovery order—defendant allowed a recess—statement properly admitted

The trial court did not err in allowing testimony by a State's witness concerning a statement made by defendant to the witness after the alleged crime, though the statement was not disclosed to defendant pursuant to his earlier discovery motion, since the State was unaware of the statement prior to trial;

defendant was provided with a copy of the statement at the time of the objection; and the court granted defendant a recess in order to allow him to prepare for cross-examination of the witness concerning the statement.

11. Criminal Law § 88— no signed statements of witnesses provided defendant—right to cross-examine not denied

Defendant was not denied his right to cross-examine witnesses because he was not provided with signed prior statements of the witnesses since defendant was not entitled as a matter of right to have prior statements reduced to writing and signed and since defendant did, in fact, cross-examine each and every witness called by the State.

12. Criminal Law § 101.2— conference in chambers—presence of newspaper reporters—no misconduct affecting jury

When the presence of reporters will not work to the prejudice of either party, the trial court may in its discretion allow the presence of reporters during conferences in chambers; defendant in this case introduced no evidence whatsoever tending to show that the presence of newspaper reporters prejudiced him in any way.

13. Criminal Law § 134.2— sentencing—delay to obtain character witnesses denied—no error

The trial court did not err in denying defendant's motion to delay sentencing to give him an opportunity to call various character witnesses to testify in his behalf, since the court's charge to the jury began during the morning and the jury did not return a verdict until 4:30 p.m.; this should have given defendant an adequate opportunity to secure the presence of his character witnesses; and the court indicated that it would wait a reasonable time for any witness to appear in court and did in fact delay the proceedings until two witnesses arrived.

14. Criminal Law § 134.4— regular youthful offender—no benefit finding made—sentence proper

The trial court did not abuse its discretion in sentencing defendant as a regular youthful offender where the court found that defendant would derive no benefit from treatment and supervision as a committed youthful offender, and the court was not required to set forth reasons for this finding.

APPEAL by defendant from *Clark, Judge.* Judgment entered 2 September 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 August 1978.

The defendant was indicted for the felony of second degree murder and entered a plea of not guilty. The jury returned a verdict of guilty as charged and, from judgment sentencing him to imprisonment for a term of not less than thirty nor more than forty years, the defendant appealed.

The State offered evidence tending to show that on 6 January 1977 the defendant and Bobby Miller were engaged in a basketball game as part of a physicial education class at Terry Sanford Senior High School. During the game, the defendant grabbed Bobby Miller in an attempt to get the basketball, and Bobby reacted by swinging his elbows which resulted in the defendant being struck in the mouth. The two students scuffled briefly in the locker room after the game and were separated by other students. Later in the day, Bobby Miller told his brother Ricky about the incident. Ricky Miller indicated that, if the fight started again, he would be there to help. Ricky went to the locker room after school that day and inquired as to where he could find the defendant. He located the defendant and asked him about the incident with his brother. A struggle then ensued.

The State offered several witnesses who testified that they observed the struggle between Ricky Miller and the defendant, Terry McDougald. One of these witnesses testified that he saw what he thought was either a knife or a comb in the defendant's hand prior to the fight. Another of the eyewitnesses testified to seeing what appeared to be an afro-pick in the defendant's hand during the fight and that, at that time, he saw something fall to the floor where the two were fighting. A third State's witness testified that he saw something in the defendant's hand and later saw something fall to the floor. He then picked up the object and identified it as a knife about six to seven inches long.

The fight continued up and down the aisles of the locker room and into a hallway. Ricky Miller then stepped back from the defendant and blood was observed on Miller's shirt. He said something to the defendant and ran outside. He was then taken to the hospital and died shortly after his arrival. Shortly after the fight, the defendant gave a knife to John Gainey and told Gainey to keep it for him.

The defendant did not elect to present evidence.

Other pertinent facts are hereinafter set forth.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Mary Ann Tally, Public Defender, Twelfth Judicial District, for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to take judicial notice of radio and television broadcasts concerning this case. This assignment is without merit.

Courts may take judicial notice of facts generally known from radio, television and press coverage. Courts may also take notice of the fact that news media broadcasts have occurred. *State v. Williams*, 263 N.C. 800, 140 S.E. 2d 529 (1965). However, the decision as to whether judicial notice of facts should be taken is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion.

The failure of the trial court to take judicial notice of news broadcasts in the present case did not deny the defendant the opportunity to prove the occurrence of such broadcasts or their contents. Such facts could have been easily proven by witnesses ordinarily available. There was no showing of abuse of discretion by the trial court. Therefore, the trial court did not err in failing to take judicial notice that the case was the subject of radio and television broadcasts.

The defendant next assigns as error the trial court's denial of his motion for a change of venue on the ground that prejudicial pretrial publicity would prevent his receiving a fair trial in Cumberland County. In support of this assignment, the defendant contends that the denial of the motion by the trial court was an abuse of discretion.

The burden of proof in a hearing on a motion for change of venue is upon the defendant. *State v. Brown*, 13 N.C. App. 261, 185 S.E. 2d 471 (1971), *cert. denied*, 280 N.C. 723, 186 S.E. 2d 925 (1972). In order to prevail, the defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507 (1966); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). The determination of whether the defendant has met this burden rests within the sound discretion of the trial court. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971).

We recognize that, in *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed. 2d 663, 83 S.Ct. 1417 (1963), the Supreme Court of the United States engaged in what amounted to a presumption that jurors who actually sat on a jury and participated in the rendering of a verdict could not have rendered a fair and impartial verdict. That case, however, involved a factual situation in which the defendant's televised confession was participated in by law enforcement authorities and was shown repeatedly to the local viewing audience. The Supreme Court of the United States held that, as three members of the jury which rendered the verdict against the defendant resulting in his being sentenced to death had been exposed repeatedly and in depth to his personal and detailed confession, the failure of the trial court to grant his motion for change of venue, even though the defendant made no further showing, constituted a denial of due process of law.

We feel that *Rideau* is an aberration which should be confined to its facts and not brought into play here. Instead, we apply what we believe to be the correct rule and hold that the defendant in the present case was required to go forward with evidence tending to affirmatively show that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in open court. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507 (1966); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). In addition to being constitutionally correct, we feel that the application of this standard will have the salutary effect of avoiding the potential for needless friction between the rights of a free press guaranteed by the First Amendment to the Constitution of the United States and the defendant's right to trial by an impartial jury guaranteed by the Sixth Amendment.

Having set forth the general standard by which we are guided, it is necessary to turn to a consideration of the facts presented by this case. The defendant's evidence in support of his motion for change of venue consisted of seventeen newspaper articles from the "Fayetteville Observer" and the "Fayetteville Times." Additionally, the defendant introduced the testimony of Dr. Paul Brandes who qualified as an expert in the field of content analysis and communicology. Dr. Brandes testified that, in his opinion, the articles introduced would be in certain respects

biased against both the defendant and the State. He further testified, however, that there were more statements in the articles which would result in bias against the defendant than those which would result in bias in his favor. Dr. Brandes also testified that he conducted a poll of students at the University of North Carolina and found that the articles would arouse more bias and prejudice in students from Cumberland County than in students from Hoke or Bladen Counties. Dr. Brandes also concluded from the poll that students from Cumberland County had heard more rumors about the case than the other students.

On the basis of this evidence, the trial court entered findings of fact and conclusions of law. The trial court determined that the defendant's evidence did not constitute a showing that reasonable likelihood existed that prejudicial newspaper publicity prior to trial would prevent a fair trial in Cumberland County. Therefore, the trial court denied the defendant's motion for a change of venue.

We fail to see how the testimony of Dr. Brandes could have been of significant assistance to the court. It would seem apparent that publicity indicating the defendant had been charged with murder would tend, with regard to him, to be more unfavorable than favorable. Nor can we say that the quite predictable fact, that students from the county in which the crime charged was alleged to have occurred had heard more rumors about the case than students from elsewhere, may be taken as determinative of the issue raised. We cannot say that the testimony of Dr. Brandes tended to show that potential jurors would base their conclusions in this case on prior news coverage or would otherwise be unable to give the defendant a fair trial. We may not conclude solely upon a review of the pretrial publicity that prejudiced resulted. *United States v. Haldeman,* 559 F. 2d 31, 61 n. 32 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933, 53 L.Ed. 2d 250, 97 S.Ct. 2641, *reh'g denied,* 433 U.S. 916, 53 L.Ed. 2d 1103, 97 S.Ct. 2992 (1977).

Upon questioning of prospective jurors, several indicated they had been exposed to publicity surrounding this case. Most of the prospective jurors stated specifically that the publicity would have no effect upon them and that they would base their verdict upon the evidence and give the defendant a fair trial. At least

one, however, indicated he had formed a preliminary opinion concerning the case. Upon further questioning, he specifically stated that he could put all such opinions or predispositions from his mind and give the defendant a fair trial upon the evidence presented in open court. We cannot say on these facts that the trial court erred in denying the motion for change of venue. As the Supreme Court of the United States has specifically stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. . . .

Irvin v. Dowd, 366 U.S. 717, 723, 6 L.Ed. 2d 751, 756, 81 S.Ct. 1639, 1642 (1961).

[2] Inevitably cases of great public interest will receive thorough coverage by the press and electronic news media, and potential jurors will often be aware of such cases due to this news coverage. A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure. The defendant must additionally show that it is reasonably likely that prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed. Where, as here, the defendant fails to show that potential jurors would base their conclusions and verdict upon pretrial publicity and preconceived impressions, he has failed to show a reasonable likelihood that pretrial publicity will prevent a fair trial even though the case has received widespread publicity and some prospective jurors have formed or expressed opinions about the case. *Irvin v. Dowd,* 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961); *United States v. Haldeman,* 559 F. 2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933, 53 L.Ed. 2d 250, 97 S.Ct. 2641, *reh'g denied,* 433 U.S. 916, 53 L.Ed. 2d 1103, 97 S.Ct. 2992 (1977). *See Calley v. Callaway,* 519 F. 2d 184 (5th Cir.

1975) (*en banc*), *cert. denied*, 425 U.S. 911, 47 L.Ed. 2d 760, 96 S.Ct. 1505 (1976). *But see Rideau v. Louisiana*, 373 U.S. 723, 10 L. Ed. 2d 663, 83 S.Ct. 1417 (1963).

The defendant has failed to show that the trial court abused its discretion by denying his motion for a change of venue. The record on appeal does not indicate that the trial court seated anyone as a juror who could not render a verdict based upon the evidence introduced at trial. Additionally, after exercising his peremptory challenges, the defendant did not attempt to challenge peremptorily an additional juror. Therefore, under long established rules of this jurisdiction, he may not be heard to properly complain of the composition of the jury. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). We hold the trial court committed no error in denying the defendant's motion for change of venue, and this assignment of error is overruled.

[3] The defendant next contends that the trial court erred by not properly instructing jurors to avoid listening to or reading news coverage concerning the trial, when it appeared that one of the prospective jurors had listened to the radio on the morning of her examination on voir dire. This contention is without merit.

Trial courts necessarily possess great discretion in determining the impact or potential impact of news accounts of a trial upon jurors. The problem arises in such a variety of situations that each case must be decided in light of its own unique facts. *Marshall v. United States*, 360 U.S. 310, 3 L.Ed. 2d 1250, 79 S.Ct. 1171 (1959); *State v. Moye*, 12 N.C. App. 178, 182 S.E. 2d 814 (1971). In the present case, the trial court, prior to commencement of jury selection, thoroughly cautioned the prospective jurors that they should not read, watch or listen to any type of news coverage of the trial. The trial court also fully explained the importance of this instruction to the jury. In addition, the defendant was permitted to ask each juror what he or she had read or heard concerning the case and given full opportunity to challenge any jurors he believed might have been prejudiced. The trial court did not abuse its discretion in declining to give the additional instruction requested.

[4] The defendant next assigns as error the refusal of the trial court to allow the defendant to ask a prospective juror whether he could determine guilt or innocence in the case without the de-

fense presenting evidence. The right of the defendant to inquire into the fitness of jurors is subject to the close supervision of the trial court, and the extent of the inquiry lies within the court's discretion. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432 (1973), *cert. denied*, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973). Prior to disallowing the defendant's question, the trial court had permitted him to determine by prior questioning that the juror would return a verdict of not guilty if he were not convinced of the defendant's guilt beyond a reasonable doubt, that the juror understood the presumption of innocence and that he did not believe it was necessary for the defendant to take the stand. This gave the defendant sufficient information to ascertain whether grounds existed upon which to base a challenge for cause and to determine whether he wished to exercise a peremptory challenge. Therefore, the trial court did not abuse its discretion, and its refusal to permit the additional question was without error.

[5] The defendant also assigns as error the trial court's failure to allow his challenge for cause of a juror who stated that he would not require the State to carry its burden of proof. As the defendant failed to seek to exercise an additional peremptory challenge after exhausting his permitted peremptory challenges, he cannot now benefit from this exception and assignment of error. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969); 8 Strong, N.C. Index 3d, Jury, § 7.14, p. 193. Additionally, upon reviewing the question and answer complained of, we think the record on appeal indicates the juror simply misunderstood the question. Immediately following the question and answer giving rise to the exception and assignment of error, the trial court thoroughly questioned the juror and determined that he would, in fact, require the State to carry its full burden. No more is required, and this assignment of error is overruled.

The defendant additionally assigns as error the failure of the trial court to allow his challenge for cause of a prospective juror who stated he would require the defense to put on some evidence. For the reasons set forth in our discussion of the previous assignment of error, this assignment is without merit. Further, this challenge was made of an alternate juror. As both alternates were dismissed at the conclusion of the evidence and did not par-

ticipate in the jury's deliberations, their ideas, opinions or interpretations of law could not possibly have had any effect upon the outcome of this case. Any error in their selection, therefore, was harmless beyond all doubt. This assignment is overruled.

[6] The defendant next assigns as error the trial court's denial of his motion to compel production of any written statements or reports made by witnesses for the State. Questions concerning discovery must be resolved by reference to statutes and due process principles, as no right to pretrial discovery existed at common law. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972).

The General Statutes of North Carolina relating to discovery provide that the State must disclose statements by the defendant, statements by a codefendant, the defendant's prior criminal record, documents and tangible objects and reports of examinations and tests. G.S. 15A-903. However, G.S. 15A-904(a) specifically indicates that, absent circumstances not presented by this case, the State is not required to produce:

> reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

Thus, the defendant did not have any statutory right to the material requested. We must, therefore, examine the requirements of due process in order to determine the defendant's entitlement *vel non* to these materials.

Due process requires that the prosecution not suppress information favorable to an accused upon his request for its production, where the evidence is material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). That is to say that due process concerns center around the issue of whether the suppressed information might have affected the outcome of the trial. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). During the hearing before the trial court on the defendant's motion, counsel for the defendant

acknowledged that she had received summaries of statements made by the State's witnesses. The defendant contends, however, that these written statements were not adequate as they were neither signed nor initialed by the witnesses. We do not agree.

The summarized statements were sufficient to provide the defendant with all of the material testimony which might be drawn from each witness and to alert the defendant to any prior statements by the witnesses tending to be inconsistent with their testimony at trial. In addition, there has been no showing by the defendant that there is a reasonable likelihood that the addition of signatures to the statement would have in any way influenced the outcome of the trial. The trial court did not err in denying the defendant's motion.

[7] The defendant additionally assigns as error the trial court's denial of his motion to require the State to disclose all typed statements of any witnesses interviewed by the State in order that the defendant might determine whether they contained any exculpatory information. When a defendant makes such a general request for exculpatory statements from unspecified witnesses, the determination of whether any of the statements are material and favorable to him is left by him to the prosecution. To require the trial court to assume the role of defense attorney and to analyze every statement of every person interviewed in the course of modern criminal investigations would frequently require days or even weeks of the court's time be spent upon mere fishing expeditions and frequently result in frivolous wastes of limited judicial resources. *See* Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437 (1972).

Here, the defendant moved that the State be required to disclose all typed statements of witnesses, apparently without regard to whether they gave testimony in the case. This motion was withdrawn before being ruled upon by the court. The trial court then allowed the defendant's motion in the alternative that the State be required to disclose those typed statements to the court for examination and review and that they be sealed and retained as part of the record of the court. The defendant further moved that the State furnish statements of all witnesses who had been interviewed by it in connection with its investigation of the

case. This motion was withdrawn, and the defendant made an alternate motion that these statements be placed in a sealed envelope and retained in the custody of the court. Upon inquiry by the trial court, the defendant made it clear that this motion was intended to include all statements without regard to whether the persons giving the statements were called as witnesses and without regard to whether the statements contained any exculpatory information. Upon further inquiry by the court into the matter, the prosecutor indicated this would involve materials concerning the interviews of approximately two hundred people in addition to those witnesses whose statements had already been provided the defendant. The prosecutor also stated that many of these interviews had not been reduced to written statements but were merely contained in sketchy notes kept by the officers, if available at all. The trial court then denied the defendant's motion that all such evidence be sealed and retained by the court.

We find this motion was clearly a fishing expedition so broad in its nature as to constitute a motion for the production of memoranda and other internal documents prepared by law enforcement officers. We do not feel the trial court was required to order the production of such materials to the defendant, to the court *in camera* or in order that they could be sealed and placed in the record for appellate review. *See State v. Hardy,* 293 N.C. 105, 235 S.E. 2d 828 (1977), *and* Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations,* 50 N.C.L. Rev. 437 (1972). To hold that such was required of the trial court would be tantamount to a holding that the defendant in a criminal case is entitled to have all relevant and irrelevant materials of every type gathered during any criminal investigation provided to him upon his demand at trial or provided to the court for appellate review. We find no constitutional principle or statute which required the trial court to allow this defendant's demand for all statements gathered by law enforcement officers in the case without regard to whether they contained exculpatory information and without regard to whether they had been reduced to written form. This assignment of error is overruled.

The defendant next assigns as error the trial court's denial of his motion to sequester the State's witnesses. The defendant contends that due to the age of the witnesses, the relationship of the

witnesses to the deceased and the lapse of eight months from the time of the victim's death until trial, the trial court abused its discretion by denying the motion to sequester. We do not agree. The decision as to whether to sequester witnesses rests in the sound discretion of the trial court. Absent a showing of abuse, the decision of the trial court will not be disturbed on appeal. *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). We find nothing in the record on appeal to indicate that the trial court abused its discretion by denying the defendant's motion to sequester the State's witnesses. The denial of the motion was without error.

[8] The defendant also assigns as error the trial court's refusal to permit him to cross-examine witnesses with regard to statements made by the defendant immediately after the crime charged. Although the defendant recognizes that such statements are hearsay, he contends that they were admissible under the res gestae exception to the hearsay rule. The statements by the defendant sought to be introduced were made well after the incident leading to the death of the deceased. The defendant had been apprehended by school officials, and his statements were made in response to questions posed by them. The statements, being made at a time and place remote from the occurrence of the crime charged, were not admissible as part of the res gestae. *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757 (1944); *State v. Stubbs*, 108 N.C. 774, 13 S.E. 90 (1891).

The defendant next contends that the trial court erred by allowing into evidence the testimony of the State's witness, Percy Warren, an assistant principle of the high school, as to what the State's witness, William McFadyen, said immediately after the alleged crime. McFadyen had testified that he was present when the fight between the defendant and the deceased began and that he saw most of the fight. The defendant sought to impeach this witness by showing that he had made a prior inconsistent statement. During the testimony of Warren, the State asked Warren what McFadyen had told him immediately after the fight. Over the objection of the defendant, Warren replied that McFadyen had told him "Terry Mac cut Ricky Miller." Such prior consistent statements of a witness may be admitted to strengthen his credibility. *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); 1 Stansbury, N.C. Evidence, §§ 51 and 52 (Brandis Rev. 1973).

[9, 10] The defendant also contends that the trial court erred in overruling his objection to the testimony of one of the State's witnesses concerning a statement made by the defendant to the witness after the alleged crime. The statement was not disclosed to the defendant pursuant to his earlier discovery motion, with which the State had indicated it would comply. When a party to a criminal proceeding fails to comply with discovery requirements, the trial court may impose sanctions upon that party. These sanctions include holding the party in contempt, ordering discovery, granting a continuance or recess, prohibiting the party from introducing the evidence or entering other appropriate orders. G.S. 15A-910. The particular sanction to be imposed rests within the sound discretion of the trial court. *State v. Kessack*, 32 N.C. App. 536, 232 S.E. 2d 859 (1977); *State v. Morrow*, 31 N.C. App. 654, 230 S.E. 2d 568 (1976).

The record on appeal does not indicate that the trial court abused its discretion. The State indicated that it was unaware of the statement prior to trial, and the defendant was provided with a copy of the statement at the time of the objection. The trial court granted the defendant a recess in order to allow him to prepare for cross-examination of the witness concerning the statement. The witness was then permitted to testify that when the defendant handed him a knife immediately after the crime charged, the defendant asked the witness to keep it for him. The defendant was permitted to fully cross-examine the witness concerning this matter. We perceive no error on the trial court's part by allowing this testimony into evidence. Further, the witness having testified without objection that the defendant handed him the knife shortly after the crime charged, this testimony as to the defendant's asking the witness to keep the knife added little or nothing to the State's case. Even had it been error, it would have been harmless error beyond a reasonable doubt.

[11] The defendant also assigns as error the denial of his motion to strike the testimony of the State's witnesses on the ground that his right to cross-examine such witnesses had been denied. The defendant contends that, as he was not provided with signed prior statements of the witnesses, he could not meaningfully cross-examine them. The Sixth Amendment guarantees a defendant the right to confront and cross-examine witnesses against him. In this case, the defendant was given that right and did, in

fact, cross-examine each and every witness called by the State. The defendant was free to cross-examine any witness about any prior inconsistent statement. He was not, however, entitled as a matter of right to have prior statement of all witnesses reduced to writing and signed. Therefore, the trial court properly denied the defendant's motion to strike the testimony of all of the State's witnesses.

The defendant additionally contends that the trial court erred by refusing to exclude newspaper reporters from a conference in chambers. The defendant argues that this denied him the opportunity to enter into plea negotiations without the knowledge of the jury. We do not agree.

[12] When the presence of reporters will not work to the prejudice of either party, the trial court may in its discretion allow the presence of reporters during conference in chambers. The defendant introduced no evidence whatsoever tending to show that the presence of newspaper reporters prejudiced him in any way. As the conference in chambers was held immediately prior to the court's final instructions to the jury, it is highly unlikely that any news concerning the conference could have reached the jury. In any event, the jurors had been previously instructed not to read or listen to anything pertaining to the case.

We recognize that, in this last quarter of the twentieth century, the general public no longer attends sessions of superior court as often as in past years when few other events of public interest were carried on during the weeks in which court was held in a particular county. Although our courts remain open, the average citizen has tended to rely more and more upon newspapers and electronic news media for information concerning matters before the courts. The action of the trial court in allowing newspaper reporters to attend the conference in chambers represented a practical accommodation of the public's interest in knowing of the workings of its court system and the interests of the press under the First Amendment. When such practical accommodations of these interests may be achieved without sacrificing the rights of the parties to a fair trial, they do not constitute error and are to be commended. Just such situation was presented by the facts in this case. The defendant failed to make a showing that the trial court's action in any way worked to his detriment, and this assignment is overruled.

[13] The defendant further contends that the trial court erred in denying his motion to delay sentencing. He argues that this denied him the opportunity to call various character witnesses to testify on his behalf. The trial court's charge to the jury began during the morning, and the jury did not return a verdict until approximately 4:30 p.m. This should have provided an adequate opportunity for the defendant to secure the presence of his character witnesses. In addition, the trial court indicated it would wait a reasonable time for any witness to appear in court and did, in fact, delay the proceedings until two witnesses arrived. The trial court did not, therefore, commit prejudicial error in denying the defendant's motion to delay sentencing further.

[14] The defendant's final assignment of error is to the order of the trial court finding that the defendant would derive no benefit from treatment and supervision as a committed youthful offender and sentencing him as a regular youthful offender. Under the law in effect at the time of sentencing, the trial court was required to sentence the defendant as a committed youthful offender, unless it found that he would receive no benefit from such sentence. G.S. 148-49.4. In its judgment and commitment, the trial court found as a fact that the defendant would not derive any benefit from treatment and supervision as a committed youthful offender. There was no requirement that the trial court set forth reasons for this finding. *State v. Jones*, 26 N.C. App. 63, 214 S.E. 2d 779 (1975). The status of committed youthful offender is to be imposed in the trial court's discretion. G.S. 148-49.1. As there was no showing that the trial court abused its discretion in finding that the defendant would benefit from such sentence, the sentence imposed was without error.

The defendant has also made assignments of error relating to the trial court's charge to the jury. We have reviewed the charge in its entirety and find these assignments without merit. Other assignments by the defendant have been specifically abandoned.

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

No error.

Judges VAUGHN and MARTIN (Robert M.) concur in the result.

STATE OF NORTH CAROLINA v. ROGER ERVIN AND EMMETTE RONNIE PRICE, DEFENDANTS AND EMMETTE ROMAINE PRICE, PETITIONER-INTERVENOR

No. 7826SC439

(Filed 17 October 1978)

1. **Searches and Seizures § 15— search of automobile—no standing by passenger to contest**

An automobile passenger had no standing to contest the search of an automobile driven by its owner.

2. **Searches and Seizures §§ 33, 36— seizures of narcotics—incident to arrest—plain view**

Marijuana taken from an automobile passenger's sock was seized in a proper search incident to a lawful arrest, and a packet of cocaine seized after the passenger had thrown it to the ground was lawfully seized as incident to a lawful arrest or as being in plain view without the necessity of a search.

3. **Criminal Law § 92— joint trial of two defendants—charges not identical—evidence admissible against only one defendant**

Charges against an automobile driver and a passenger for possession of cocaine with intent to sell and carrying a concealed weapon, a charge against the driver for possession of marijuana, and a charge against the passenger for possession of tuinal were properly consolidated for trial where all of the charges arose from one short incident. Furthermore, joinder of the charges for trial did not deprive the passenger of a fair trial because a large sum of money found in the trunk of the car was admissible only against the driver where the court limited the jury's consideration of such evidence to the driver. G.S. 15A-926(b)(2)b.3; G.S. 15A-927(c)(2).

4. **Criminal Law § 95.2— evidence competent against one defendant—overruling of general objection—subsequent limiting instruction**

Where the court overruled defendant's general objection to evidence competent only against a codefendant and not competent against defendant for any purpose, and the court subsequently instructed the jury that such evidence could be considered only as against the codefendant, but the court's limiting instruction was not included in the record on appeal, it will be assumed that the limiting instruction specifically reversed the earlier overruling of the general objection to the evidence.

5. **Criminal Law § 128.2— jaywalking arrest of defendant by State's witnesses during trial—motion for mistrial**

Defendant was not entitled to a mistrial because of his arrest for jaywalking in front of the courthouse at the end of the first day of the trial by two officers who were prosecution witnesses where, in response to questioning by the trial judge, only one juror answered that he had seen the incident and he stated that he did not recognize the man involved.

6. Criminal Law § 150.1— withdrawal of appeal—subsequent written notice of appeal—no waiver

Where defendant gave notice of appeal in open court on the date judgment was entered, withdrew the notice later that same day, and four days later gave written notice of appeal, the trial court erred in ruling that defendant then had no right to appeal. However such error was harmless where the appellate court heard defendant's appeal on the merits. G.S. 15A-1448(a)(1) and (a)(5).

7. Narcotics § 6— disposition of seized money—intervention in criminal case

The trial court did not err in permitting petitioner to intervene in defendant's trial for unlawful possession of cocaine with intent to sell for the purpose of contesting the disposition of money found in the trunk of the car defendant was driving, rather than requiring petitioner to institute a separate civil action, where the major question was whether the money was being used for criminal purposes, and that question would be answered by the same evidence which would show defendant's guilt or innocence of the crime charged.

8. Narcotics § 6— forfeiture of seized money

In a prosecution for unlawful possession of cocaine with intent to sell, the trial court did not err in ordering the forfeiture of money found in a briefcase in the trunk of the car defendant was driving where papers belonging to defendant were found in the briefcase along with the money, notwithstanding petitioner-intervenor testified the money belonged to him.

APPEAL by defendants from *H. Martin, J.*, and by petitioner from *H. Martin, J.*, and *Griffin, J.* Judgments entered 16 December 1977 and 12 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 September 1978.

Defendants were charged with unlawful possession of cocaine with intent to sell and deliver, and with carrying a concealed weapon. In addition, defendant Ervin was charged with possession of marijuana and defendant Price was charged with possession of tuinal. Prior to trial the court overruled defendant Ervin's objection to the consolidation of the defendants' cases for trial and, after a lengthy *voir dire* hearing, denied both defendants' motions to suppress evidence taken from their persons and their vehicle, supporting its conclusion with detailed findings of fact. Defendant Ervin sought a continuance on the ground that one of his counsel, who had done a portion of the work on his case, was unavailable because he was undergoing surgery. The motion to continue the case until that attorney's return was denied.

After court recessed on the first day of trial, defendant Price was arrested by Officers Rock and Hancock, prosecution

witnesses, for jaywalking in front of the courthouse. On the morning of the second day, defendant Price moved for a mistrial and defendant Ervin renewed his motion for severance of the defendants' cases because of this incident. The court conducted an extensive *voir dire* hearing about the arrest, and then questioned the jury as to whether they had seen anything unusual outside the courthouse the previous afternoon. Only one juror had seen the incident, and he stated that he did not recognize the man involved and that the incident would not influence his verdict in the case. The court then made findings of fact and denied both defendants' motions.

The State presented evidence that at 2:30 a.m. on 5 August 1977 Officer Rock stopped a 1975 Lincoln Continental because the right headlight was not operating. Defendant Price was driving and defendant Ervin was in the right front passenger seat. Officer Hancock, who was in the vicinity separately, stopped to assist Rock. Hancock and Price stepped to the front of the car to talk about the headlight. Rock, on the passenger's side of the car, shined his flashlight in through the window and saw an inch and a half of an object sticking out from under the armrests in the middle of the bench seat. Rock testified he was pretty sure what it was. He went around to the driver's side and removed from under the armrests a pistol case containing a nine millimeter automatic pistol. Rock then told Ervin to get out of the car, and as Ervin did so he reached to the front of his trousers and threw a clear packet containing white powder on the ground. Rock arrested Price and searched him and found a capsule of tuinal and a bag of white powder in Price's pockets. Hancock arrested Ervin, searched him, and found a bag of marijuana in his sock. Another bag containing white powder lay on the floor of the car. After the arrests the officers inventoried the vehicle and found in the trunk a tin of marijuana and a brief case containing $3,713.03 in cash and some of defendant Price's personal papers.

Analysis showed the white powder to be cocaine. Four hundred twenty-two milligrams were in the packet removed from Price's pocket, 4,134 milligrams in the large bag found on the floor of the car, and 26.50 grams in the packet taken from the ground beside the car.

Price offered no evidence. Ervin testified that Price was taking him to his girl friend's home when they were arrested. He did

not know that the pistol or the cocaine was in the car; he did not take any cocaine from his pants and throw it on the ground. He admitted that the marijuana in his sock was his.

Ervin was found guilty of unlawful possession with intent to sell and deliver cocaine and unlawful possession of marijuana. Price was found guilty of unlawful possession with intent to sell and deliver cocaine, unlawfully carrying a concealed weapon, and unlawful possession of tuinal. The court denied Ervin's motions to set aside the verdict and for nonsuit, and Price's motion for a new trial. Ervin was sentenced to four years. Price was sentenced to five years on the drug charges and 6 months for carrying a concealed weapon, the sentences to run consecutively.

Price gave notice in open court on 16 December of his intent to appeal, then withdrew the notice. Four days later Price gave written notice of appeal. The court ordered that he could not appeal, but could seek review by certiorari.

After trial the court ordered confiscation and forfeiture of the money found in the trunk of the Lincoln. Emmette Romaine Price, father of defendant Price, entered a petition and interpleader and motion to intervene, alleging the money was his and asking that it be returned to him. Petitioner testified before Judge Griffin that he owned the Lincoln and had loaned it to his son on 5 August. The money in the briefcase belonged to petitioner and his wife and they had it with them that day because they were house hunting and they intended to use it as a downpayment on a house if they found one. Papers in the briefcase belonged not to him but to his son, the defendant. The State presented no evidence. The court denied petitioner's motion.

Defendants and petitioner appeal.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

John H. Cutter III for defendant appellant Ervin.

Barry M. Storick for defendant appellant Price.

Kenneth R. Downs for petitioner-intervenor appellant.

ARNOLD, Judge.

I.

[1, 2] We first consider defendant Ervin's contention that the trial court erred in denying his motion to suppress the evidence taken from him and from the vehicle by the officers. Ervin had no standing to contest the search of the automobile. He was in the position of defendant Campbell in *State v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501 (1955), where the court said: "The Oldsmobile belonged to McPeak [who was driving]: Campbell was a passenger or guest therein. Campbell's rights were not invaded by the search of McPeak's car, and he had no legal right to object thereto." *Id.* at 246, 90 S.E. 2d at 504. See also 29 Am. Jur. 2d Evidence § 418. As for the marijuana taken from Ervin's sock, it was seized in a proper search incident to a lawful arrest, and so it was admissible. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), *reh. den.* 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed. 2d 124 (1969); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). The packet of cocaine seized from the ground on the passenger side of the car is admissible evidence either as seized incident to a lawful arrest, cases cited above, or as seized in plain view without necessity of search, *State v. Allen, supra; State v. Powell*, 11 N.C. App. 465, 181 S.E. 2d 754 (1971). Ervin's motion to suppress was properly denied.

II.

[3] Ervin also argues that the two defendants should have been tried separately because the charges against the defendants were not identical, and some evidence was admissible against one but not both defendants.

N.C.G.S. § 15A-926(b)(2)b.3. allows joinder of two or more defendants for trial at the prosecutor's request when "even [though] all of the defendants are not charged with accountability for each offense, the several offenses charged . . . [w]ere so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." That is clearly the case here; all of the charges arise from the one short incident in the morning of 5 August. Joinder must nevertheless be denied if separate trials are necessary to give each defendant a fair trial. N.C.G.S. § 15A-927(c)(2). Whether the trials should be

joint or separate is within the trial court's discretion, and absent a showing that joinder deprived the defendant of a fair trial the court's exercise of its discretion will not be disturbed on appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

Defendant Ervin asserts that such unfairness came about in connection with the admission of testimony about the contents of the briefcase found in the trunk of the car; that the court improperly allowed the jury to consider this evidence against both defendants for a large portion of the trial before giving a limiting instruction that it was admissible only against Price. During direct examination of Officer Rock, the following occurred:

Q. What did you find in the briefcase?

DEFENDANT ERVIN: Objection.

COURT: Overruled.

DEFENDANT ERVIN'S EXCEPTION NO. 6

A. A large amount of money.

Defendant Ervin also objected when State's Exhibit 4, the envelope in which Officer Rock put the money from the briefcase for police storage, and State's Exhibit 5, the briefcase and its contents, were offered into evidence. The objections were overruled except to the contents of the briefcase, upon which the court reserved its ruling. Later on the State again offered the contents of the briefcase into evidence, and the record states:

> The Court ruled that the contents of State's Exhibit 5, including the money which is another State's Exhibit are only competent against defendant Price and not defendant Ervin. The Court further stated that if any member of the jury had any questions to raise their hands.
>
> Defendants Price and Ervin objected to the Court's ruling and their objections were overruled.
>
> * * * *
>
> . . . At defendant Ervin's request the Court further instructed the jury not to consider any other contents of the trunk of the automobile as to the Defendant Ervin.

[4] The contents of the briefcase were not admissible as evidence against defendant Ervin, since he had no possession or joint control of the car where the briefcase was found. Defendant Ervin properly objected to the admission of this evidence, and was entitled to a limiting instruction. Where evidence is admissible against one party and not for any purpose against another, the latter need not request a limiting instruction at the time of admission; a general objection is sufficient. *State v. Franklin*, 248 N.C. 695, 104 S.E. 2d 837 (1958); *State v. Kelly*, 19 N.C. App. 60, 197 S.E. 2d 906 (1973); 4 Strong's N.C. Index 3d, Criminal Law § 95.1. Here the limiting instruction did not immediately follow the overruling of Ervin's objection, but that is not necessary. See *State v. Kelly, supra.* It is necessary, however, that the later instruction, in order to obviate prejudice, specifically reverse the earlier overruling of the objection. *State v. Franklin, supra.* The words of the limiting instruction here do not appear in the record, so we cannot tell if this was done, but as counsel prepared the record on appeal we assume that he omitted nothing that would support his client's assignments of error. Therefore we assume that the limiting instruction met the standards of *State v. Franklin* and was sufficient to avoid prejudice to Ervin.

III.

[5] Defendant Price contends that he should have been granted a mistrial as a result of his arrest for jaywalking in front of the courthouse. He argues that his arrest by Officers Rock and Hancock, two prosecution witnesses, necessarily influenced the jury against him, but we do not agree. In response to the judge's questioning, only one juror answered that he had seen the incident, and he said that he did not recognize the man involved. It seems clear that jurors who did not see the incident, or who saw it but did not realize that the defendant was involved, were not prejudiced by it.

IV.

[6] Price also assigns as error the court's order of 20 December denying him the right to appeal his conviction. N.C.G.S. § 15A-1444(a) gives the defendant an appeal as a matter of right. The procedures for appeal appear in N.C.G.S. § 15A-1448. Controlling here are (a)(1): "A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the

entry of judgment," and (a)(5): "The right to appeal is not waived by withdrawal of an appeal if the appeal is re-entered within the time specified . . . ." Judgment was entered on 16 December, and on that date defendant Price gave notice of appeal in open court and later that day withdrew the notice. On 20 December Price gave written notice of appeal. The trial judge was clearly in error in denying this appeal, since defendant had complied with the statute. However, we find that this is harmless error since his appeal of that order has been heard in conjunction with his appeal on the merits.

No error is found in defendants' remaining assignments of error.

V.

[7] Petitioner-intervenor seeks on appeal to overturn the forfeiture order signed by the trial judge on 16 December and the denial of his petition. Before reaching the merits of petitioner's claim, we consider the State's contention that the matter is improperly before us. The State argues that the disposition of this money is a civil matter which should not be consolidated with criminal proceedings. In support of its position the State cites three cases, none of which are on point. In *State v. Ayers*, 220 N.C. 161, 16 S.E. 2d 689 (1941), the petitioner brought a civil proceeding to reclaim her automobile which had been seized by the sheriff while it was being used in the unlawful transportation of liquor, so the question of whether a civil action or an intervention in the criminal trial was the proper way of proceeding was not before the court. In *State v. Earley*, 24 N.C. App. 387, 210 S.E. 2d 541 (1975), the court was asked to adjudicate conflicting claims of title to allegedly stolen property which had been used as evidence in the completed criminal trial. In *State v. McIntyre*, 33 N.C. App. 557, 235 S.E. 2d 920 (1977), the question was the disbursement to competing claimants of restitution funds which the defendant in the criminal proceeding had paid into court as the result of a plea bargain. In both cases this Court found no jurisdiction in the lower court to make such a determination in a criminal proceeding. "After the final disposition of the criminal case, a civil action among the various claimants to the property is the proper action in which title or right to possession can be adjudicated." *State v. Earley, supra* at 389, 210 S.E. 2d at 543.

The present case, however, is a different situation. In the intervention here the petitioner's "title or right" in the property is an incidental issue. The major question is whether the money was being used for criminal purposes. If so, the money was appropriately confiscated. In both *Earley* and *McIntyre* the questions of title to the property had no common issues of fact with the criminal proceedings; whether or not the defendant charged was found to have been the one who stole the property would not affect the petitioners' claims. Here the question of fact—whether the money was being used for a criminal purpose—would be answered by the same evidence which would show defendants' guilt or innocence of the charges at trial. We do not hold that a separate civil action, if petitioner had chosen that way to proceed, would have been inappropriate, but neither do we find it necessary, considering the congestion of court calendars and the expense of sequential trials, to insist that the court erred in allowing petitioner's intervention in the criminal proceeding. A separate civil action would have required the State to present again almost its entire case against defendants. The matter is appropriately before this Court.

[8] We now turn to petitioner's contention that the forfeiture of the money was error. On 20 December the court in the criminal proceeding entered an order of forfeiture as follows:

> [T]he Court makes the following Findings of Fact:
>
> That on August 5, 1977, the Defendant was operating a 1975 Continental automobile which was owned by himself or his father or his father and mother, that he had the keys to this automobile; that during the trial of the cases State's Exhibit #5 was introduced into evidence, being a briefcase, that within that briefcase was State's Exhibit #4, being a quantity of United States currency and money in the amount of $3,713.03. Also, contained within the briefcase were numerous papers bearing the name of the Defendant Price.
>
> Upon the foregoing Findings of Fact the Court concludes that the $3,713.03 found in the trunk of the automobile is subject to confiscation and forfeiture, it being used for criminal purposes by the Defendant.

At the hearing on petitioner's motion it was stipulated that petitioner and his wife were the owners of the Lincoln, and petitioner and his wife both testified that the money found in the briefcase in the trunk of the Lincoln belonged to them. The State presented no evidence. At the close of the hearing that judge also entered a forfeiture order, with findings of fact and conclusions of law identical to those of the 20 December order. Findings of fact by the trial court are conclusive when supported by competent evidence. The trial court's conclusions drawn from its findings of fact are reviewable on appeal. *Highfill v. Williamson*, 19 N.C. App. 523, 199 S.E. 2d 469 (1973); 1 Strong's N.C. Index 3d, Appeal and Error § 57.3.

In *State v. McKinney*, 36 N.C. App. 614, 244 S.E. 2d 455 (1978), this Court held that forfeiture could not be based solely on the fact that the money to be forfeited was found in "close proximity" to the controlled substance. It was further noted in *McKinney* that the jury's determination of 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 . . . ." *supra* at p. 617, 244 S.E. 2d at 457.

We affirmed the order of forfeiture in the appeal before us, however. The evidence showed more than a close proximity of the currency to the controlled substance. Papers belonging to defendant Price were found inside the briefcase along with the money. Moreover, the trial court obviously was not bound to believe petitioner's testimony that the money belonged to him.

As to defendants, no error.

As to petitioner-intervenor, affirmed.

Judges VAUGHN and WEBB concur.

A-S-P ASSOCIATES v. CITY OF RALEIGH

No. 7710SC972

(Filed 17 October 1978)

1. **Rules of Civil Procedure § 56.5— summary judgment—findings of fact**

Upon entry of summary judgment, the trial court should not make findings of fact, which are decisions upon conflicting evidence, but may list the undisputed material facts which are the basis of its conclusions of law and judgment.

2. **Municipal Corporations § 30.4— zoning ordinance—determination of validity**

Where the most that can be said against a zoning ordinance is that whether it is unreasonable, arbitrary or discriminatory is fairly debatable, the courts will not interfere and will not substitute their judgment for that of the legislative body possessed of the primary responsibility for determining whether an act is in the interest of the public health, safety, morals or general welfare.

3. **Municipal Corporations § 30.9— spot zoning**

A zoning ordinance or amendment which singles out and reclassifies a single lot or a few lots adjacent to a larger area uniformly zoned, so as to impose upon such lots greater restrictions than those imposed upon the larger area, or so as to relieve them from restrictions to which the rest of the area is subjected, constitutes "spot zoning" and is beyond the authority of a municipality in the absence of a clear showing of a reasonable basis for such distinction.

4. **Municipal Corporations § 8; Statutes § 5.1— legislative intent—statements of member of legislative body**

Although courts may consider the circumstances surrounding the adoption of a statute or ordinance in determining the evil sought to be remedied, it is not permissible to prove the intent of a legislative body by statements of one of its members.

5. **Municipal Corporations § 30.9— ordinance creating historic district—spot zoning—issue of material fact**

In a declaratory judgment action contesting the validity of an ordinance of the City of Raleigh creating the "Oakwood Historic District," a genuine issue of material fact was presented as to whether the ordinance constituted unlawful "spot zoning" where plaintiff made a prima facie showing of spot zoning by introducing evidence that its lot and two others zoned office and institutional were included within the historic district while other similar lots in the area were not so included, and where defendant city failed to make a clear showing of a reasonable basis for such distinction.

6. **Municipal Corporations § 30.9— ordinance creating historic district—comprehensive zoning plan—issue of fact**

In a declaratory judgment action contesting the validity of a city ordinance creating a historic district, the trial court erred in entering summary

judgment for defendant city where the city's evidence was self-contradictory as to whether the city had at all times maintained a comprehensive plan for zoning and whether the inclusion of plaintiff's property in the historic district was in accordance with such plan.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 30 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 29 August 1978.

This is an action by which the plaintiff, A-S-P Associates, seeks a declaratory judgment holding unlawful two ordinances of the City of Raleigh creating the "Oakwood Historic District" and establishing certain guidelines and regulations relative thereto. The ordinances creating the historic district and guidelines [hereinafter the "Oakwood Ordinances"] affects plaintiff's property consisting of a vacant lot at 210 North Person Street opposite the Governor's Mansion and within an area previously zoned as an office and institutional district. The Oakwood Ordinances included a large area composed primarily of a residential district, but included a portion of the office and institutional district in which the plaintiff's property is located.

The Oakwood Ordinances did not remove the plaintiff's property from the office and institutional district but, instead, created a district which overlapped with existing zoning districts and "contains and may in the future contain several different residential and commercial zoning district classifications, and all uses permitted in any such district . . . shall be permitted in the Historic District." The Oakwood Ordinances further provide, however, that "if the proposed use involves the construction of or alteration of the exterior portion of any building or structure or appurtenant features thereof, a Certificate of Appropriateness must first be issued as hereinafter set forth." The intent of the Oakwood Ordinances, as stated therein, is "to insure insofar as possible that the exterior portion of buildings, structures and their appurtenant features within an Historic District shall be in harmony with other buildings or structures located therein." The Oakwood Ordinances incorporate by reference various architectural and design requirements to be applied by a Historic District Commission in determining whether to grant applications for such certificates of appropriateness.

The plaintiff contends that the Oakwood Ordinances and the various guidelines and standards pursuant thereto are unlawful. The plaintiff specifically contends *inter alia* that the Oakwood Ordinances are unconstitutional, both facially and as applied to the plaintiff's property. The plaintiff further contends that these ordinances constitute unlawful "spot zoning" and deny it the equal protection of the laws. Additionally, the plaintiff contends the ordinances are based solely on aesthetic considerations and create impermissibly vague guidelines for compliance with their terms and are otherwise unconstitutional or unlawful.

The plaintiff's property, together with three other pieces of property fronting on North Person Street opposite the grounds of the Governor's Mansion, has been included in an office and institutional district since 1961. The four lots within the office and institutional district opposite the grounds of the Governor's Mansion are: (1) a yellow brick veneer building at 204 North Person Street used for office space; (2) the plaintiff's vacant lot at 210 North Person Street; (3) the Mansion Square Inn, a tourist home at 216 North Person Street, built in the nineteenth century; and (4) The State Medical Society Building at 222 North Person Street, a four-story office building of "contemporary architectural design."

The State Medical Society requested that its property, consisting of its building and lot at 222 North Person Street and two other lots, be excluded from the requirements of the Oakwood Ordinances which created the overlapping historic district. The majority of the overlapping historic district created by the Oakwood Ordinances consisted of a large area zoned for residential uses. The City Council excluded The State Medical Society properties from the historic district created by the Oakwood Ordinances. The plaintiff was denied exclusion of its property and instituted this action.

The plaintiff undertook discovery through inspection of documents, the filing of certain interrogatories and taking the depositions of the City Planning Director and the individual responsible for drafting the "Architectural Guidelines for Historic Oakwood." Additionally, the plaintiff moved for summary judgment on its contentions that the Oakwood Ordinances and Article 19, Part 3A, Chapter 160A of the General Statutes, granting the

defendant, the City of Raleigh, the authority to pass such ordinances, are facially unconstitutional and unconstitutional as applied to the plaintiff's property. By its motion, the plaintiff alternatively sought, pursuant to G.S. 1A-1, Rule 16 and Rule 56(d), an order specifying the facts which were without substantial controversy, directing trial on other issues and for an order on final pretrial conference. The day prior to the hearing of the plaintiff's motion, the defendant filed and served affidavits opposing the motion. The trial court denied the plaintiff's motion and granted summary judgment for the defendant on all issues. From this judgment, the plaintiff appealed.

Allen, Steed & Allen, P.A., by Arch T. Allen III, and Noah H. Huffstetler III, for the plaintiff appellant.

Raleigh City Attorney's Office, by Ira J. Botvinick, for the defendant appellant.

MITCHELL, Judge.

The plaintiff assigns as error the action of the trial court in granting summary judgment in favor of the defendant. In support of this assignment, the plaintiff contends that substantial controversies as to material facts exist which precluded the trial court from granting summary judgment in favor of the defendant. We find this assignment meritorious and must, therefore, reverse the summary judgment and remanded the case for further proceedings.

Upon hearing the plaintiff's motion for summary judgment, the trial court entered summary judgment in favor of the defendant. Summary judgment may be granted in favor of a nonmoving party in proper cases. Before entry of summary judgment, however, it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). Any doubt as to the existence of such an issue must be resolved in favor of the party against whom summary judgment is contemplated. *See Miller v. Snipes,* 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied,* 279 N.C. 619, 184 S.E. 2d 883 (1971). To this end, papers of the party against whom summary judgment is contemplated are indulgently regarded while those of the party to benefit from summary judgment are carefully scrutinized. *Page v. Sloan,* 281 N.C. 697, 190

S.E. 2d 189 (1972); *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975).

[1] In the present case the trial court made numerous "findings of fact" and conclusions of law. Upon entry of summary judgment, the trial court should not make findings of fact, which are decisions upon conflicting evidence, but may list the undisputed material facts which are the basis of its conclusions of law and judgment. *Rodgerson v. Davis*, 27 N.C. App. 173, 218 S.E. 2d 471, *rev. denied*, 288 N.C. 731, 220 S.E. 2d 351 (1975). We assume the trial court here engaged in an unsuccessful effort to list the undisputed material facts and inadvertently referred to "findings of fact."

Having listed the facts it deemed undisputed, the trial court concluded *inter alia* that the defendant did not act arbitrarily or capriciously or deny equal protection of the laws either in adopting the ordinances in question or in their application to the plaintiff's property. The trial court further concluded that the ordinances "do not constitute spot or contract zoning." We think that the pleadings and other papers before the trial court, as set forth in the record on appeal, raise substantial issues of material fact concerning these conclusions making summary judgment for the defendant inappropriate.

[2, 3] Where the most that can be said against a zoning ordinance is that whether it is unreasonable, arbitrary or discriminatory is fairly debatable, the courts will not interfere. Courts will not substitute their judgment for that of the legislative body possessed of the primary responsibility for determining whether an act is in the interest of the public health, safety, morals or general welfare. *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817, 96 A.L.R. 2d 439 (1961). However, a zoning ordinance or amendment which singles out and reclassifies a single lot or a few lots adjacent to a larger area uniformly zoned, so as to impose upon such lots greater restrictions than those imposed upon the larger area, or so as to relieve them from restrictions to which the rest of the area is subjected, constitutes "spot zoning." *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968); 82 Am. Jur. 2d, Zoning and Planning, §§ 76, 77 and 78, pp. 514-20; Annot., 37 A.L.R. 2d 1143 (1954). Such "spot zoning" is beyond the authority of a municipality in the absence of a clear

showing of a reasonable basis for such distinction. *Blades v. City of Raleigh,* 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972).

Here, the plaintiff's vacant lot at 210 North Person Street, existing structures located in the same block at 204 and 216 North Person Street and The State Medical Society Building at 222 North Person Street were included within an office and institutional zone. The plaintiff's property and the lots at 204 and 216 North Person Street were also included in the overlapping historic district created by the Oakwood Ordinances. Property owned by the State Medical Society, consisting of its building at 222 North Person Street, a vacant lot and a lot on which a residential structure was located were excluded from coverage under the Oakwood Ordinances. It appears, although it is by no means certain from the record on appeal, that the lot with residential structure and the vacant lot, both owned by the Medical Society, are adjacent to its building at 222 North Person Street. Other property zoned for office and institutional use in nearby blocks also appears to have been excluded from the requirements of the Oakwood Ordinances.

[4] The plaintiff, by interrogatories directed to the defendant, sought to have the defendant state reasons for the exclusion of the properties belonging to the State Medical Society from the Oakwood Ordinances. The defendant objected to questions relating to the properties of the State Medical Society as irrelevant and did not answer such questions. On appeal, the defendant contends there is a reasonable basis for its discrimination between the property of the plaintiff and the properties of the State Medical Society. The defendant asserts that, as the record reveals the State Medical Society has recently built a new building on one of its lots and as a part of the cost of construction has provided for the later addition of two more stories to that building, its exclusion from the historic district created by the Oakwood Ordinances was reasonable. In support of this contention, the defendant points to statements made by one of the councilmen present when the ordinances were passed. Although courts may consider the circumstances surrounding the adoption of a statute or ordinance in determining the evil sought to be remedied, it is not permissible in this jurisdiction to prove the intent of a legislative body by statements of one of its members. *Compare Commissioner of Insurance v. Automobile Rate Office,* 293 N.C. 365, 392, 239 S.E. 2d 48, 65 (1977), *with D & W, Inc. v. The City of*

Charlotte, 268 N.C. 577, 581, 151 S.E. 2d 241, 244 (1966). The record on appeal does not indicate that the defendant offered any other explanation for its exclusion of the remainder of the properties of the State Medical Society or other properties in nearby blocks from the requirements of the Oakwood Ordinance, while including the plaintiff's lot.

[5] The plaintiff introduced evidence which reveals that his lot and two others have been included within the historic district created by the Oakwood Ordinances, while other similar lots in the area have not. This constituted a prima facie showing of arbitrary and capricious spot zoning. *See* 82 Am. Jur. 2d, Zoning and Planning, §§ 76, 77 and 78, pp. 514-20. Therefore, the defendant City of Raleigh was required to present a clear showing of a reasonable basis for such distinctions in order to prevail. *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972). Based upon the record in its present state, we are of the opinion that the defendant has not made such clear showing of a reasonable basis for these distinctions as will support summary judgment in its favor. The defendant City will be afforded a full opportunity to produce such evidence upon remand of this case to the trial court. We, of course, express no opinion as to whether it will be able to produce such evidence at that time.

[6] The plaintiff also contends the trial court erred in concluding for purposes of summary judgment that the defendant had at all times maintained a comprehensive plan for zoning and that the Oakwood Ordinances were made in accordance with that plan. When the evidence before the trial court is carefully scrutinized with all inferences arising therefrom drawn against the defendant for whom summary judgment was entered, it fails to support entry of summary judgment for the defendant. The evidence offered by the defendant on these issues was, at best, self-contradictory. In testifying as to the existence of a comprehensive plan, for example, Mr. A. C. Hall, Jr., Director of Planning for the City of Raleigh, was questioned concerning a document entitled "Greater Raleigh Central Area Plan," which he indicated was a part of the comprehensive plan. He testified that the information contained in the document was essentially correct, but then stated:

> The only statement that was made that I would clarify is the statement made by the drafter of the document that said

> "Raleigh has now grown far beyond the original plan; for the most part this development has been without planning and direction". I would just question what is meant by that. The rest of it seems to be all right.

When such testimony is carefully scrutinized and all inferences of fact arising therefrom drawn against the defendant, the testimony presents substantial issues of material fact with regard to the existence *vel non* of a current comprehensive plan for development of the City of Raleigh and its application to the plaintiff's property.

Other evidence for the City with regard to the issue of the existence of a comprehensive plan tended to be self-contradictory. The defendant's evidence allows inferences inconsistent with the existence of a comprehensive plan or the zoning of the plaintiff's property in accordance with such plan. Where, as here, the evidence of the party to be awarded summary judgment is self-contradictory or allows reasonable inferences inconsistent with conclusions necessary to entitle that party to summary judgment, the trial court should not enter summary judgment and should allow the case to proceed to trial. M. Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. Rev. 729 (1972), *quoted in Kidd v. Early*, 289 N.C. 343, 366, 222 S.E. 2d 392, 408 (1976).

In its brief, the plaintiff strongly contends that other substantial questions of material fact prevented the trial court from properly entering summary judgment in favor of the nonmoving defendant. As has been pointed out by one authority, prior to entry of summary judgment in favor of a nonmoving party, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." 10 Wright & Miller, Federal Practice and Procedure: Civil § 2720, p. 471 (1973). Our decision in this case, however, makes a detailed consideration of these additional contentions of the plaintiff unnecessary. We assume that, upon reversal and the remanding of this case for further proceedings, both parties will have full opportunity to present evidence concerning all issues they seek to raise.

For the reasons previously set forth herein, the entry of summary judgment for the defendant is reversed and the cause remanded for further proceedings in accordance with law.

Reversed and remanded.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. THURMAN GUNTHER

No. 783SC445

(Filed 17 October 1978)

Constitutional Law § 34; Kidnapping § 1; Rape § 17— assault with intent to commit rape—inclusion in kidnapping indictment—separate punishment for assault improper

Defendant could not lawfully be sentenced upon conviction of the charge of assault with intent to commit rape since the State included that charge as a part of the kidnapping bill of indictment in order to subject defendant to the greater punishment provided under G.S. 14-39(b).

Judge CLARK dissenting.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 3 February 1978 in Superior Court, PITT County. Heard in the Court of Appeals 19 September 1978.

Defendant was tried upon two indictments, kidnapping of Eyvonne Wooten Summerell with the victim being sexually assaulted and assault with intent to rape Eyvonne Wooten Summerell.

At trial, the State offered evidence which tended to show that on 2 November 1977 Eyvonne Wooten Summerell was living with her husband and three children. Her husband left for work about 10:30 that night. She had put her children to bed when defendant knocked at her door. She had known defendant for about five months and recognized him at the door. After learning Mr. Summerell was not at home, defendant asked her if she would take his sister to the hospital to give birth to a child. Mrs. Summerell knew defendant's sister and knew she was about nine

months pregnant. After some discussion she agreed to take defendant's sister to the hospital. Upon getting in her car and driving for some time at defendant's direction, Mrs. Summerell said she was going back. Defendant then pulled a knife on her and held it to her throat. He directed her to drive to a place beside a tobacco barn. On the way to the barn, defendant told her not to try anything and to do what he said. Defendant said if she would let him, he'd let her go back home. Defendant tried to kiss her and felt of her breasts and private parts. After the car was parked and still with the knife in his hand, he ordered her into the back seat. She obeyed. At defendant's order, she removed all her clothes except her brassiere. Defendant then laid the knife down and started removing his clothes. When he got his pants down about his feet, she opened the door and ran. He chased her and caught her, but she shoved him and got away. Defendant did not have the knife then. She ran to a trailer, screaming for help. The door opened and she found safety inside. Her wounds on her feet and legs were tended, she was covered with a blanket, and the Sheriff was called. Meanwhile, the defendant drove off in Mrs. Summerell's car containing her clothes. Later that morning defendant was arrested in Edgecombe County with Mrs. Summerell's car.

Defendant did not offer evidence.

The jury returned verdicts of guilty of aggravated kidnapping and guilty of assault with intent to rape.

Defendant was sentenced to imprisonment for twenty-five years on the aggravated kidnapping charge and imprisonment for five years on the felonious assault charge, to commence at the expiration of the kidnapping sentence.

From the judgments, defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant argues four assignments of error.

First. Defendant contends the court erred in excluding testimony on cross-examination of State's witness Guill as to

statements made by the defendant. If permitted to answer, the witness would have said, "He [the defendant] told me that he had been robbed." The assignment of error is overruled. The State had not introduced any part of the statements made by defendant. The defendant did not testify. The statement was self-serving hearsay. The court properly excluded this evidence. *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444 (1957); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Williams*, 38 N.C. App. 138, 247 S.E. 2d 630 (1978).

Second. Defendant contends the court erred in admitting testimony of State's witness Parker as to where defendant lived. Defendant argues Parker acquired this knowledge from a hearsay source. Although Parker testified Melvin Gunther told him where defendant lived, the record shows that Parker had known defendant for about two years and knew where he lived prior to Melvin Gunther's statement. Eyvonne Summerell had previously testified, without objection, she knew defendant and knew where he lived and had shown Parker where he lived. Such evidence is ordinarily harmless when testimony of the same import is introduced without objection. *State v. Creech*, 265 N.C. 730, 145 S.E. 2d 6 (1965); *State v. Barrow*, 6 N.C. App. 475, 170 S.E. 2d 563 (1969). This assignment of error is overruled.

Third. Defendant makes a broadside exception to the charge of the court. This assignment is ineffective to challenge the correctness of the charge. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973). This assignment is overruled.

Fourth. Defendant contends there was error in the signing of the judgments because of the above assignments of error. We do not agree. However, the record in this case raises this question: Can Gunther be lawfully sentenced upon conviction of the charge of assasult with intent to commit rape (No. 77CRS18040) when the State has included that charge as a part of the kidnapping bill of indictment in order to subject defendant to the greater punishment under N.C. Gen. Stat. 14-39(b)? The answer requires analysis of the facts in this case as well as the opinions in *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), 294 N.C. 503, 243 S.E. 2d 338 (1978), and *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978).

In this case, Gunther was charged as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of November, 1977, in Pitt County Thurman Gunther unlawfully and wilfully did feloniously kidnap Eyvonne Wooten Summerell, a female person who had attained the age of sixteen years, by unlawfully removing her from one place to another without her consent and for the purpose of facilitating the commission of a felony, to wit: rape. The person kidnapped was sexually assaulted during the kidnapping.

He was also charged in a separate bill for assault with intent to commit rape on Mrs. Summerell. The trial judge charged the jury with respect to two possible kidnapping verdicts. The first included as a fourth element that the State must prove the defendant sexually assaulted the victim during the kidnapping. The second charge on kidnapping eliminated this fourth element. Thus, the court required the State to prove as a part of the offense of kidnapping, to which the jury returned a verdict of guilty, the circumstance that would subject the defendant to the greater punishment of a maximum of life imprisonment. The court sentenced defendant as hereinabove set out. The evidence disclosed only one sexual assault of the victim by the defendant. From the moment defendant pulled his knife, he disclosed his intent to rape his victim. All of his conduct during the travel to the barn and until the escape of Mrs. Summerell constituted the assault with intent to rape her. There is no evidence of any sexual assault on Mrs. Summerell during the kidnapping other than the assault with intent to rape her. There is no evidence of any assault with intent to rape Mrs. Summerell other than that committed by the defendant during the kidnapping of her.

In *Fulcher*, the State did not allege in the kidnapping bill that defendant actually committed the offense of crime against nature. This was alleged in a separate indictment. In Fulcher's appeal he contended that N.C. Gen. Stat. 14-39 was unconstitutional as subection (a)(2) subjected him to conviction for two crimes, *i.e.*, kidnapping and crime against nature, when he committed only crime against nature. Defendant contended the kidnapping was merely incidental to the commission of crime against nature. Fulcher contended that as applied in the case against him, G.S. 14-39(a)(2) violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United

States and Article I, Section 19, of the North Carolina Constitution. This would subject defendant to a penalty of twenty-five years, rather than ten years for the offense of crime against nature, by charging the defendant with kidnapping for the purpose of facilitating the felony of crime against nature. Thus, we see that in *Fulcher* the Court was concerned with the question of whether the facts of that case were sufficient to support convictions of both crime against nature and kidnapping. The Supreme Court held that the restraint of the victim was separate and apart from, and not an inherent incident to, the offense of crime against nature. There being two separate and distinct crimes, Fulcher's constitutional rights were not violated by the two convictions. Counsel in *Fulcher* did not challenge the validity of the bill of indictment to support a sentence of greater than twenty-five years. Neither appellate court addressed this question. Likewise, the Court was not faced in *Fulcher* with the question of whether a defendant can be sentenced on the felony, which the State relies upon for the increased punishment, on a separate bill, where the State alleges in its kidnapping indictment that such felony was actually committed and the jury so finds. The Supreme Court, on page 524 of its opinion, referred to the possibility of these problems in this language:

> Let us suppose, for example, a restraint for the purpose of committing rape followed by a rescue of the victim before the contemplated rape is accomplished. Such a restraint would constitute kidnapping under G.S. 14-39. We need not presently determine whether the perpetrator thereof could also be convicted of and punished for assault with intent to commit rape.

In *Fulcher*, the Court further held that upon proof of the unlawful restraint of the victim with the purpose of facilitating the commission of the felony of crime against nature, the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature ever occurred.

In *State v. Banks, supra*, the State alleged in its kidnapping bill of indictment that the kidnapping was for the purpose of facilitating the commission of the felonies of crime against nature, assault with intent to rape, and armed robbery. The State also alleged in the kidnapping bill: "The person kidnapped was sexual-

ly assaulted during the kidnapping." The State also charged the defendant in three separate bills of indictment with the offenses of crime against nature, assault with intent to rape, and armed robbery. The defendant contended that the court should arrest judgment as to those three felonies which were alleged to have been the purposes of the kidnapping. The Supreme Court held that those three felonies were alleged to be the *purposes* of the kidnapping and therefore were not *elements* of the offense of kidnapping, the Court holding that when the State proved the elements of kidnapping and the purpose for which the victim was confined, restrained, or removed, the conviction of kidnapping may be sustained. Thereby, the Court held the offenses of crime against nature, assault with intent to commit rape, and robbery with a dangerous weapon were separate and distinct offenses from the kidnapping charge and punishable as such. Upon conviction of all four charges, the trial court entered separate judgments upon each verdict and ordered the sentences so imposed to run concurrently. The Supreme Court held that consequently the defendant had failed to show he suffered substantial prejudice from the denial of his motion to arrest judgment upon the verdicts of guilty of crime against nature, armed robbery, and assault with intent to commit rape. As in *Fulcher*, the Court in *Banks* was not faced with and did not decide the question of whether a defendant can be punished upon conviction in a separate bill of the very sexual assault alleged and proven by the State in the kidnapping charge.

In the *Banks* opinion, the Court states, without comment or elaboration, the following:

> We note in passing that some of our opinions refer to the crime defined in G.S. 14-39A as "aggravated kidnapping." This is a misnomer. The proper term for the crime there defined is "kidnapping." Subsection (b) of the statute states the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear.

With these principles in mind, we turn to the Gunther case. Where the State seeks to subject a defendant to a greater statutory punishment for an offense by proof of other circumstances, the State must allege those circumstances in the bill of indictment and prove them beyond a reasonable doubt. *Harrell v. Scheidt*, 243 N.C. 735, 92 S.E. 2d 182 (1956); *State v. Cole*, 241

N.C. 576, 86 S.E. 2d 203 (1955) (driving under influence, second offense); *State v. Bennett*, 271 N.C. 423, 156 S.E. 2d 725 (1967) (escape, second offense); *State v. McCotter*, 18 N.C. App. 411, 197 S.E. 2d 50 (1973) (worthless checks); *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297 (1965) (larceny); *State v. Tanner*, 25 N.C. App. 251, 212 S.E. 2d 695 (1975) (damage to personal property).

In the statement quoted from *Banks* above concerning G.S. 14-39(b), the Court was silent as to the question of burden of proof on the factors set out in that section of the statute. However, in considering the "increased punishment" cases referred to above, we hold that the State has the burden of proof concerning those factors which would subject the defendant to the increased punishment. Where the State alleges in the bill of indictment the additional factor that will support the increased punishment, the State has accepted the burden of proof as to that factor.

Thus, it appears that in order for the State to subject a defendant to a punishment of greater than twenty-five years upon conviction of kidnapping, the State must allege and prove beyond a reasonable doubt that in the course of the kidnapping the defendant either sexually assaulted the victim, or seriously injured the victim, or released the victim in an unsafe place. N.C. Gen. Stat. 14-39(b).

By charging in the kidnapping bill that Gunther committed a sexual assault on Mrs. Summerell in the course of the kidnapping and upon conviction and sentence for kidnapping, the defendant was punished for the offense of assault with intent to commit rape. The separate sentence in No. 77CRS18040 on the indictment of assault with intent to commit rape violates the defendant's rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19, of the North Carolina Constitution.

The problem facing this Court in Gunther is analogous to *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). In *Thompson*, the Court held that when the State in the trial of a murder case uses evidence that the murder occurred in the perpetration of another felony so as to establish first degree murder, the underlying felony becomes a part of the murder charge to the extent of preventing a further sentence of the defendant for commission of the underlying felony. *See also, State*

v. White, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State. v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933).

"It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in, and a part of, the greater . . .." Wharton's Criminal Law and Procedure, Volume 1, Section 148 (1957). The rule is stated in *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962), as follows: "[W]hen an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution to the other." Chief Justice Stacy thus stated the rule in *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933):

> The principle to be extracted from well-considered cases is that by the term, "same offense," is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment.
>
> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.
>
> To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which is embedded in our organic law as a safeguard to the liberties of the citizens.

See also, the concurring opinion of Justice Higgins in *State v. Richardson*, 279 N.C. 621, 635, 185 S.E. 2d 102, 111 (1971).

In the case *sub judice*, the State sought to subject defendant to a greater punishment by charging that he committed a sexual assault on Mrs. Summerell during the kidnapping. By so doing, the sexual assault became a necessary element of the crime charged. *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971). The trial court submitted this charge and the lesser included offense of kidnapping to the jury. Kidnapping in which the victim is sexually assaulted is punishable by a maximum of life imprisonment. Kidnapping without the commission of a sexual assault on the victim, or other G.S. 14-39(b) factor, is punishable by imprison-

ment for not more than twenty-five years. Defendant was convicted of this charge, thereby exposing him to the greater punishment of up to life imprisonment. The defendant was sentenced on this indictment and verdict. After entering sentence based upon this indictment and verdict, the court could not enter judgment on the charge of assault with intent to commit rape as this was the same sexual assault included in the kidnapping case. To do so would punish the defendant twice for the one offense, violating Article I, Section 19, of the North Carolina Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. Judgment must be arrested in No. 77CRS18040, being a sentence of imprisonment for five years commencing at the expiration of the prison sentence in the kidnapping case, No. 77CRS18041. *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970).

In the kidnapping charge (No. 77CRS18041), we find no error.

The judgment is arrested in the assault with intent to commit rape charge (No. 77CRS18040).

Chief Judge BROCK concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The *Fulcher* and *Banks* decisions of the North Carolina Supreme Court, discussed in the majority opinion, recognized that kidnapping was a crime separate and distinct from the other crimes committed during the course of the kidnapping. The indictment in the case *sub judice* did not allege that defendant assaulted the victim with intent to commit rape, only that the victim was "sexually assaulted during the kidnapping." G.S. 14-39(b) reduces the maximum punishment for kidnapping from life to 25 years if the victim "was released by the defendant in a safe place and had not been sexually assaulted or seriously injured." In *Banks* the court observed that "the statute states the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear." 295 N.C. at 407, 245 S.E. 2d at 749. The majority opinion places the burden on the State to prove the absence of one of these mitigating circumstances. Proof of the

absence of a mitigating circumstance does not require the State to prove a separate and distinct crime committed during the kidnapping. In the case *sub judice* the State alleged and proved a sexual assault, thus proving the absence of a mitigating circumstance which would have required a reduction of the maximum sentence from life imprisonment to 25 years. The statutory recognition of a circumstance affecting punishment for kidnapping does not preclude conviction of and punishment for a distinct and separate crime committed during the kidnapping even though the conduct of the defendant in committing that crime results in the absence of a mitigating circumstance. The trial judge in imposing judgment following a conviction may properly consider the totality of the circumstances of the crime, including mitigating circumstances, prior convictions, and other pertinent factors. G.S. 14-39(b) mandates that a mitigating circumstance be considered and provides for a lesser maximum punishment if the mitigating circumstance is present. Neither the statute nor its application in the case before us, violates the Due Process Clause or the Equal Protection Clause.

WILLIAM R. HOGAN, BY HIS GUARDIAN, MARY HOGAN, PLAINTIFF v. JOHNSON MOTOR LINES, EMPLOYER; SELF-INSURER (CARRIERS INS. CO., REINSURANCE CARRIER) DEFENDANTS; CECO CORPORATION, THIRD PARTY TORT-FEASOR

No.7810IC451

(Filed 17 October 1978)

Master and Servant § 89.4— workmen's compensation—recovery against third party tort-feasor—apportionment of attorney fees

The provision of G.S. 97-10.2(f)(2) which directs that the attorney fee incurred by the party who effects recovery against a third party tort-feasor be apportioned between and paid by the employee and his compensation paying employer in proportion to the amount which each receives from the recovery does not unjustifiably impair the freedom of the employer and its insurance carrier to contract on their own for attorneys to represent them in the prosecution and settlement of their subrogation rights against the third party tort-feasor and is constitutional.

APPEAL by defendants from order of the North Carolina Industrial Commission entered 27 February 1978 in Docket G-8704. Heard in the Court of Appeals 29 September 1978.

This is an appeal by the employer and its reinsurance carrier from an order of the Industrial Commission entered pursuant to G.S. 97-10.2(f) directing disbursement of the proceeds of a consent judgment obtained by the employee against the third party tort-feasor whose negligence caused the employee's injuries.

On 23 June 1976 the employee sustained an injury by accident arising out of and in the course of his employment when he was involved in a vehicular accident caused by negligence of a third party. The employer, Johnson Motor Lines, admitted liability under the Workmen's Compensation Act and pursuant to an agreement approved by the Industrial Commission commenced paying compensation for permanent total disability due to loss of the employee's mental capacity. Under G.S. 97-29 such payments are to be made during the life of the injured employee. The employer, a self-insurer, had a reinsurance policy with Carriers Insurance Company by which Carriers assumed the employer's liability after certain payments were made. At the time of entry of the order appealed from, records of the Industrial Commission indicated that the employer had paid a total of $47,063.70 and its insurance carrier had paid a total of $7,535.32 in medical expenses and compensation.

The employee, through his guardian, brought suit in the Superior Court in Cabarrus County against the third party tort-feasor. This suit was settled by a consent judgment dated 10 October 1977 under which the defendant tort-feasor paid into court the sum of $850,000.00 to be disbursed by the Clerk of Superior Court in accordance with the orders of the Industrial Commission pursuant to G.S. 97-10.2(f). Since the plaintiff employee had been adjudged incompetent, Judge Hal H. Walker, prior to signing the consent judgment, heard evidence and found as a fact that the settlement was fair and equitable and for the best interest of the plaintiff. The consent judgment also contained the following:

> [I]t further appearing to the Court that Wardlow, Knox & Knox, the attorneys representing the plaintiff making the settlement set out herein, have rendered valuable legal services to the plaintiff (as a consequence of which Johnson Motor Lines, Inc. and Carriers Insurance Company have benefited) in connection with investigating the facts of the accident and the nature and extent of the plaintiff's injuries,

in negotating the settlement herein provided for and in the institution and prosecution of this action and that the sum of $283,333.00 is a fair and reasonable compensation for said services, it is ORDERED that the Clerk of this court pay from the recovery hereinabove provided, subsequent to and in accordance with such final order of the North Carolina Industrial Commission as may be issued pursuant to NCGS § 97-10.2(f), the sum of $283,333.00 to Wardlow, Knox & Knox as reasonable compensation for said legal services.

The employer and its reinsurance carrier joined in executing the 10 October 1977 consent judgment. A copy of this consent judgment was filed with the Industrial Commission.

On 14 October 1977 Chairman William H. Stephenson of the Industrial Commission signed an order which in substance recited the foregoing facts and further found that, since the subrogation interest of the employer and its reinsurance carrier could not as yet be determined, the Commission had no alternative but "to order reimbursement of the funds expended thus far, fix the attorney fees to be paid, and order the balance of the third party funds placed in trust until the total subrogation interest may be calculated." Chairman Stephenson's order then provided:

IT IS THEREUPON ORDERED that the $850,000.00 held by the Clerk of the Superior Court of Cabarrus County be disbursed as follows:

1. The sum of $283,333.00 shall be paid attorneys Wardlow, Knox & Knox as their fee for services rendered therein as provided in the Judgment entered in Superior Court.

2. The sum of $31,375.80 shall be paid Johnson Motor Lines to cover its subrogation interest as of this date.

3. The sum of $5,023.55 shall be paid Carriers Insurance Company to cover its subrogation interest to date.

4. The balance of the recovery in the amount of $530,267.66 shall be held in an interest-bearing account as trustee for the parties herein by the Clerk of the Superior Court of Cabarrus County until further order of this Commission.

IT IS FURTHER ORDERED that a certified copy of this Order be furnished the Clerk of the Superior Court of Cabarrus County for his information and guidance.

IT IS FURTHER ORDERED that defendants continue to comply with the Workmen's Compensation Act as regards medical and compensation benefits due the employee as provided in said Act and that nothing contained in this Order be construed as to relieve the compensation defendants of the duty in this regard imposed by the statute.

The employer and its reinsurance carrier appealed to the Full Commission, which on 27 February 1978 affirmed the order entered 14 October 1977 by Chairman Stephenson and adopted that order as its own. From this order of the Full Commission, the employer and its reinsurance carrier appealed to this Court.

Wardlow, Knox, Knox, Robinson & Freeman by Charles E. Knox, H. Edward Knox, and John S. Freeman for plaintiff appellee.

Hedrick, Parham, Helms, Kellam & Feerick by Hatcher Kincheloe and Edward L. Eatman, Jr., for appellants.

PARKER, Judge.

By this appeal the appellants challenge as unconstitutional the provision in G.S. 97-10.2(f)(2) which directs that the attorney fee incurred by the party who effects recovery against a third party tort-feasor be apportioned between and paid by the employee and employer in proportion to the amount which each receives from the recovery. We find the statute constitutional and affirm the order of the Industrial Commission.

As originally enacted, the North Carolina Workmen's Compensation Act required an employee injured by the tort of a third party to elect between accepting an award under the act or procuring a judgment against the third party. He could not do both. Acceptance of an award worked an assignment of his claim against the tort-feasor to his employer, who could enforce it. Any amount recovered by the employer was applied first to pay the reasonable expenses and attorney's fees incurred in effecting the recovery, next to reimburse the employer in the amount for which he was liable under the act, and finally any excess was held

for the benefit of the injured employee. Sec. 11, Ch. 120, Public Laws of 1929. By amendment in 1933, the injured employee was in any event given the right to receive compensation under the act, and the employer was given the right within the first six months after the injury to file suit against the tort-feasor. If he failed to do so within that time, the injured employee thereafter had the right to bring the action. Any recovery effected against the tort-feasor, whether by action of the employer or employee, was applied in the same sequence as formerly. Sec. 1, Ch. 449, Public Laws of 1933. By amendment in 1943 the employer was given the exclusive right to bring the action against the third party during the first six months in cases in which the employer filed with the Commission written admission of liability under the act as well as in cases in which an award under the act had been issued. The 1943 amendment also provided that the attorney fees incurred in effecting recovery against the third party "shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery." Sec. 1, Ch. 622, 1943 Session Laws.

The statutory provisions relating to the prosecution of claims against third party tort-feasors were further amended by Sec. 1, Ch. 1324, 1959 Sessions Laws and by Sec. 1, Ch. 171, 1971 Sessions Laws. These provisions are still in effect and are now codified in G.S. 97-10.2. Under these provisions the injured employee, rather than the employer, is given the first right to proceed to enforce the liability of the third party, if such proceedings are instituted not later than 12 months after the date of injury. Thereafter, either the employee or the employer, if he has filed written admission of liability under the act, has the right for a certain time to proceed to enforce the liability of the third party. G.S. 97-10.2(c). Distribution of any amount recovered from the third party is governed by G.S. 97-10.2(f), which is as follows:

> (f)(1) If the employer has filed a written admission of liability for benefits under this chapter with, or if an award final in nature in favor of the employee has been entered by, the Industrial Commission, then any amount obtained by any person by settlement with, judgment against or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial

Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

In the present case the amount of the attorney fee allowed the attorneys representing the injured employee for their services in effecting the recovery against the third party was set by the consent judgment which terminated the action against the third party in the Superior Court. All parties to the present proceeding consented to that judgment. The fee allowed, being one-third of the recovery, was within the limitation contained in G.S. 97-10.2(f)(1)b. In the disbursement order now appealed from the Industrial Commission followed the directive of G.S. 97-10.2(f)(2) that such fee be paid by the employee and the employer in direct proportion to the amount of the recovery from the third party each receives. Since it could not be known at the time the Commission's order was entered exactly how much the employer and its reinsurance carrier will ultimately be required to pay in benefits to the injured employee during his lifetime, it was impossible to determine exactly what amount the employer and its reinsurance carrier will ultimately be entitled to receive out of

the third party recovery. For this reason the Commission properly approved payment by way of partial distribution based on the amounts actually paid to the date of its order by the employer and its reinsurance carrier for the benefit of the injured employee. By directing that the employer and its carrier be reimbursed out of the third party recovery only two-thirds of the payments made by them, the Commission followed the directive contained in G.S. 97-10.2(f)(2). Appellants do not contend to the contrary. Rather, their contention is that the statute itself is unconstitutional. Specifically, they contend that the statute is unconstitutional in that it unjustifiably impairs their freedom to negotiate a contract on their own for representation by attorneys of their choice to represent them in the prosecution and settlement of their subrogation rights against the third party tortfeasor. We do not agree.

As reference to the statutory history discloses, our Legislature has tried a number of different approaches in its efforts to achieve an equitable accommodation between the rights of the injured employee and his compensation paying employer as against the third party whose fault created the injury and loss of both. For the last thirty-five years, since the amendment effected by Ch. 622 of the 1943 Session Laws, our statutes have directed that the burden of the attorney fees incurred in effecting a recovery against the third party be borne by both the injured employee and his employer in proportion to the amount which each receives out of the recovery, and this without regard to which one employed the attorney. This solution has the merit of fairness. Under it neither party is allowed to reap the benefits of a recovery without bearing a share of its costs. The workmen's compensation statutes of at least fourteen States other than our own provide a similar solution. *See* Annot., 74 A.L.R. 3d 854 (1976). Although the appellate courts of those States have many times been called upon to apply their statutes, we have found but one case in which the constitutionality of an apportionment statute similar to ours has been challenged. In that case, *Reno v. Maryland Casualty Company*, 27 Ill. 2d 245, 188 N.E. 2d 657 (1962), a challenge similar to the one in this case was made to the constitutionality of the Illinois attorney fee apportionment statute. In rejecting that challenge, the Supreme Court of Illinois said:

> It is next argued that the [attorney fee apportionment statute] abrogates the employer's freedom to contract, that it deprives him of his property without due process of law and that it deprives him of the equal protection of the law. The underlying basis of the employer's right to subrogation is the prevention of an unjust enrichment on the part of the employee in the form of a double recovery for the same injury. On the other hand, the legislature has provided that the employer pay a part of the necessary costs including attorney fees in order to prevent an unjust enrichment on the part of the employer who has a right of reimbursement from the recovery secured by the employee. We do not believe that requiring an employer to pay his proportionate share of the necessary costs incurred in securing the fund from which he is to be reimbursed denies him his property without due process of law or denies him equal protection of the law.

27 Ill. 2d at 248, 188 N.E. 2d at 658.

We agree with the reasoning of the Illinois Court. We find the provisions directing apportionment of attorney fees contained in G.S. 97-10.2(f) to be constitutional.

The order of the Industrial Commission here appealed from complied with that statute and is

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

MARY W. ROBERTS v. CARLTON N. ROBERTS

No. 7718DC965

(Filed 17 October 1978)

1. Divorce and Alimony § 20.1— permanent alimony awarded—no effect from absolute divorce

The trial court properly determined that an earlier consent order was for permanent alimony and therefore was not superseded by a subsequent decree of absolute divorce where the consent order provided that defendant "shall pay alimony to the plaintiff . . . monthly until the plaintiff remarries or dies,

whichever event first occurs," and a subsequent motion by plaintiff and reply by defendant indicated that both parties understood that the consent order had provided for permanent alimony.

2. **Divorce and Alimony § 19.4— dependent spouse—burden of proof to show changed circumstances**

Defendant's contention that the trial court erred in finding that plaintiff was a dependent spouse entitled to alimony is without merit, since an earlier consent order found plaintiff to be a dependent spouse, and, if defendant sought to change that designation, the burden was his to prove a material change in circumstances to justify a finding that plaintiff was no longer a dependent spouse. Defendant not only failed to offer a motion to terminate alimony on the grounds plaintiff was no longer a dependent spouse, but he also produced no evidence to carry his burden of proof.

3. **Divorce and Alimony §§ 20.3, 27— attorney fees—sufficiency of evidence to support award**

The trial court's award of attorney fees in an action for child support and alimony was supported by competent evidence that plaintiff lacked the financial resources to pay her attorney and that her attorney devoted in excess of 20 hours to this action.

4. **Divorce and Alimony § 19.4— changed circumstances—sufficiency of evidence—increase in child support and alimony proper**

Evidence of changed circumstances was sufficient to support the trial court's modification of monthly alimony and child support payments where such evidence tended to show that plaintiff could no longer provide for herself and her child an adequate standard of living; she could not purchase suitable furnishings and appliances for the home and had insufficient funds to provide dependable, economic transportation for herself and her child; and while plaintiff's assets had become depleted and inflation had outrun her modest salary increases, defendant's financial ability to provide adequate support for his former wife and natural child had increased substantially.

APPEAL by defendant from *Hatfield, Judge.* Judgment entered 18 July 1978, District Court, GUILFORD County. Heard in the Court of Appeals 28 August 1978.

This civil action originated as a suit seeking alimony without divorce and child custody. The original order was entered 7 July 1971. This appeal is from an order entered 22 July 1977 increasing child support and alimony payments after a hearing on plaintiff's motion in the cause.

From the record it appears that plaintiff instituted this action on 7 July 1971. The first order was entered 30 August 1971. The court found plaintiff to be a dependent spouse and the defendant the supporting spouse. Defendant was ordered to give

plaintiff possession of the house owned by plaintiff and defendant as tenants by the entirety for the use of her and the two minor children born of the marriage. He was also ordered to make the mortgage payments on the house and pay $25 per week child support and $15 per week alimony. In addition he was ordered to pay $150 attorney's fee.

On 19 April 1973, an order was entered upon plaintiff's prior motions that defendant be found in contempt for failure to make the support payments ordered. Defendant was then $2748 in arrears in support payments and $1462.60 in arrears on the mortgage payments. He had quit his job and entered a beautician's school and was then working as a beautician. The court ordered that he convey to plaintiff his interest in an undeveloped lot owned by plaintiff and defendant as tenants by the entirety for which $2,000 would be credited on his arrearage; that $1,210 of the arrearage be excused and the remaining $1,000 be held in abeyance. The support payments were reduced to $150 per month alimony and child support.

On May 1975, plaintiff moved in the cause for increased payments. Defendant, through counsel, responded averring that although defendant then owned his own business (Headhunter Salon, Ltd.), he had had to borrow substantial amounts and was not then able to take more than $600 per month from the corporation. He further averred that he felt the business had a good future. The parties, on 13 October 1975, entered into a consent judgment and amendment thereto. The order included findings that defendant owned a beauty parlor employing 12 stylists; that plaintiff had a take home pay of $89.52 from her employment with Dillard Paper Company; that the house in which plaintiff and the children resided needed repairs totalling $2,000; and that monthly expenses for plaintiff and the children amounted to $695.57. By consent, defendant was ordered to pay $300 per month for child support; "alimony to the plaintiff in the amount of $100.00 monthly until plaintiff remarries or dies, whichever event first occurs"; all mortgage payments on the house; and not more than $2,000 for the necessary house repairs. The $1,000 arrearage was to remain in abeyance and be a lien on defendant's interest in the property and plaintiff and the children were to have sole and uninterrupted possession of the house until plaintiff remarries or the younger

child reached 18, whichever event occurred first. Defendant was also ordered to pay counsel fees to plaintiff's attorney.

On 8 March 1976, defendant in this action was granted a divorce from plaintiff in this action. The divorce action was not contested by plaintiff in this action and was based on the statutory one-year separation.

On 23 May 1977, plaintiff again moved for increased child support and alimony alleging substantial increase in needs of herself and her minor child and that her income had not kept pace with inflation.

At the hearing for plaintiff's motion in the cause for increased alimony payments, the plaintiff presented evidence which tended to show the following facts concerning her financial status: that plaintiff Mary W. Roberts still resides in the house owned by the entirety with defendant; that her daughter, 12 years of age, and her son, 19 years of age, reside with her; that her full-time job with Dillard Paper Company provides a gross income of $509.38 monthly, an increase of $10 per week since the last order for increased alimony and child support; that plaintiff is unable to afford adequate furnishings for the home; that there is no furniture in the living room, and the den furniture consists of a couch, two end tables, and two lamps; that the only furniture in plaintiff's bedroom is a bed; that there are no drapes in the living room and those in the den are in need of replacement; that plaintiff has no color television, dryer, or dishwasher in the home; that plaintiff's only car is a 1971 Ford Pinto which is in frequent need of expensive repairs and provides poor gas mileage; that plaintiff cannot afford to purchase another car; that her son works part time and pays for his own clothes and living expenses; that plaintiff borrowed $200 to retain an attorney for this action; and that the attorney has spent in excess of 20 hours on this matter.

The evidence presented at the hearing by plaintiff tended to show the following facts concerning the defendant's financial status: that defendant is president and sole shareholder of a corporation known as Headhunter Salon, Ltd.; that he recently became owner of a four bedroom, $60,500 home subject to an outstanding debt of $47,500; that he owns one-half interest in a townhouse valued at $34,000 subject to outstanding debt of $28,500; that he purchased an 18-foot Marlin fiberglass boat for

$2,500 in the spring of 1975; that the corporation owns a 23-foot Glastion boat purchased for $10,500 and subject to an outstanding debt of $7,000 payable over three years; that the corporation owns a 35-foot Holiday house trailer costing between $10,000 and $14,000 subject to an outstanding debt of about $3,000; that defendant owns a 1975 Renegade Jeep which is fully paid for; that he bought and fully paid for an $11,742 Cadillac in March of 1977; that he has in his home, among other things, two color televisions; that defendant draws $2,000 monthly from the corporation; that defendant paid himself a $5,000 bonus in 1976 and probably would do so in 1977; that his savings and loan account is approximately $1,500; that the corporation's savings deposits exceed $10,000; that the corporation has $27,442.65 in retained earnings compared to $10,211.25 in October of 1975; that in the year ended 30 September 1976 defendant's corporation had a net profit of $17,231.40; and that the corporation has a net worth of over $32,000, disregarding the $18,000 written off as a depreciation.

The defendant presented no evidence at the hearing. Defendant, however, filed a motion prior to the hearing seeking to terminate the payment of alimony pursuant to the 13 October 1975 order on the grounds that such payments were alimony pendente lite and the order was thus superseded by the decree granting absolute divorce on 8 March 1976.

From the order of 22 July 1977, denying defendant's motion to terminate alimony pendente lite payments, and from the order of 22 July 1977 granting plaintiff increased child support and alimony, the defendant appeals.

Jordan, Wright, Nichols, Caffrey and Hill, by William W. Jordan, for plaintiff appellee.

James B. Rivenbark and John W. Kirkman, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant first argues that the consent order entered 13 October 1975, compelling defendant to make alimony payments to the plaintiff, was superseded and the rights to alimony pendente lite terminated by the 8 March 1976 decree granting defendant absolute divorce from the plaintiff. The plaintiff argues, and the

district court found, that the 13 October 1975 order was for permanent alimony and was, therefore, not superseded by the subsequent decree of absolute divorce.

If the 13 October 1975 consent judgment was one for permanent alimony, the right to receive alimony payments would not be terminated by the decree of absolute divorce. G.S. 50-11(c). However, if that judgment is merely for alimony pendente lite, the right of plaintiff to receive alimony payments terminated upon entry of the decree of absolute divorce. *Smith v. Smith,* 12 N.C. App. 378, 183 S.E. 2d 283 (1971). We must, therefore, determine whether the consent judgment of 13 October 1975 ordered alimony pendente lite or permanent alimony.

"A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties." *Bland v. Bland,* 21 N.C. App. 192, 195, 203 S.E. 2d 639, 641 (1974). This Court is not bound by the "four corners" of a consent judgment, but the judgment should be interpreted in light of the surrounding controversy and purposes intended to be accomplished by it. *Price v. Horn,* 30 N.C. App. 10, 226 S.E. 2d 165 (1976), *cert. denied,* 290 N.C. 663, 228 S.E. 2d 450 (1976).

The consent order entered into on 13 October 1975 provided, on the question of alimony, as follows:

> "(2) That the defendant shall pay alimony to the plaintiff in the amount of $100.00 monthly *until the plaintiff remarries or dies, whichever event occurs first.*" (Emphasis added.)

The amended order consented to by defendant provided:

> "(2) That the Defendant shall pay alimony to the Plaintiff in the amount of $100.00 monthly *until the Plaintiff remarries or dies, whichever event first occurs*; that $50.00 shall be due and payable on the 15th day of each month, and the remaining $50.00 shall be due on the 30th day of each month. . . ." (Emphasis added.)

The language of the original order and amended order clearly comprehended the permanent nature of the order for alimony. Furthermore, if the language of the first order had not been intended by defendant, he had ample opportunity to correct the language before consenting to the amended order.

In addition to the actual language of the order, a subsequent motion by the plaintiff and reply by the defendant indicated that both parties understood that the 13 October 1975 order had provided for permanent alimony.

Plaintiff's motion sought ". . . a modification and increase in *permanent* alimony . . . " . This language clearly connotes plaintiff's understanding that, as a result of the prior consent order, she was receiving permanent alimony. Likewise, defendant's understanding that the consent order provided for permanent alimony is apparent from the following reply to plaintiff's motion:

> "(1) That by order of this court dated October 13, 1975, the *permanent* alimony for the plaintiff was ordered and consented to by the parties, and this matter is not now subject to the court's review." (Emphasis added.)*

It is clear defendant's assertion that plaintiff's right to alimony was terminated by the decree of absolute divorce must be rejected.

[2] Defendant argues that the district court erred in its finding that plaintiff was, at the time of the hearing, a "dependent spouse" entitled to alimony. G.S. 50-16.1(3); G.S. 50-16.2. The 13 October 1975 consent order found plaintiff to be a dependent spouse. If defendant sought to change that designation, the burden was his to prove a material change in circumstances to justify a finding that plaintiff was no longer a dependent spouse. *Gill v. Gill*, 29 N.C. App. 20, 222 S.E. 2d 754 (1976). Defendant not only failed to offer a motion to terminate alimony on the grounds plaintiff was no longer a dependent spouse, he produced no evidence to carry his burden of proof. This assignment of error is overruled.

The defendant's remaining contentions assert that the district court abused its discretion in ordering defendant to pay attorney's fees, increased child support, increased alimony, and lump sum payments to assist plaintiff in purchasing needed furniture and a suitable automobile for the benefit of the child.

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* Of course, defendant's reply asserting that the alimony payments are not subject to review is incorrect. "The word 'permanent', as a prefix to the word 'alimony,' does not mean that it is permanent in any absolute sense. It is merely permanent as distinguished from alimony *pendente lite* or temporary alimony . . . A court may vacate or modify its prior award of either permanent or temporary alimony upon a showing of changed circumstances." 2 Lee, N.C. Family Law, § 135, p. 38 (1976 Cum. Supp.) (3d Ed. 1963); G.S. 50-16.9(a); *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E. 2d 67 (1977).

[3] In support of its award of attorney's fees, the trial court made a finding that plaintiff lacked the financial resources to pay her attorney and that her attorney devoted in excess of 20 hours to this action. When the court makes findings which are supported by competent evidence, the award of attorney's fees is binding on this Court in the absence of an abuse of discretion. *Wyche v. Wyche*, 29 N.C. App. 685, 225 S.E. 2d 626 (1976), *cert. denied*, 290 N.C. 668, 228 S.E. 2d 459 (1976). It suffices to say that, in view of the evidence as summarized above, the district court's award is supported by the evidence.

[4] Defendant's final contention is that the plaintiff failed to show changed circumstances which would justify a modification of monthly alimony and child support payments and the two lump sum payments of child support. The determination of the amount of alimony is governed by the following statutory provision:

> "§ 50-16.5. . . . (a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

The determination of child support payments is subject to the following guidelines:

> "§ 50-13.4. . . . (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

The statute directs that ". . . the court must consider not only the needs of the wife and children but the estate and earnings of both husband and wife." *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E. 2d 407, 410 (1976). Pursuant to a motion in the cause, the movant is entitled to increased alimony and child support upon a showing of sufficient changed circumstances. G.S. 50-13.7(a); G.S. 50-16.9(a); *McDowell v. McDowell*, 13 N.C. App. 643, 186 S.E. 2d 621 (1972).

It is apparent from the facts in this case that plaintiff is no longer financially capable of providing, for herself and her child, an adequate standard of living. Plaintiff is unable to purchase

suitable furnishings and appliances for the home and has insufficient funds to provide dependable, economic transportation for herself and her child. While plaintiff's assets have become depleted and inflation has outrun her modest salary increases, the defendant's financial ability to provide adequate support for his former wife and natural child has increased substantially. Based on these factors which are supported by the evidence, we cannot say the trial court abused its discretion. Absent such an abuse of discretion, a trial court's award of alimony and child support will not be disturbed on appeal. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975).

For the foregoing reasons, the judgment of the district court is

Affirmed.

Judges HEDRICK and WEBB concur.

H. HOWARD HOLBROOK, JR. v. VERNA D. HOLBROOK

No. 7821DC3

(Filed 17 October 1978)

1. Divorce and Alimony § 3— venue—finding as to residence

The trial court's finding that plaintiff husband was a resident of Forsyth County at the time he instituted an action in that county for divorce and child custody was supported by competent evidence and was conclusive on appeal.

2. Divorce and Alimony § 23.2— divorce action—jurisdiction of child custody action

Where a divorce action was properly filed by plaintiff husband in Forsyth County, the courts of Forsyth County attained exclusive jurisdiction of any action for the custody or support of the parties' child until the entry of a final judgment in the divorce action, and the District Court of Guilford County did not have jurisdiction to consider defendant wife's subsequent custody action or any matters arising therein; therefore, the District Court of Guilford County did not have jurisdiction to hear evidence and rule on the issue of whether plaintiff husband was a resident of Forsyth County when he instituted his divorce action in that county, and the District Court of Forsyth County did not err in hearing evidence and ruling on the same issue. G.S. 50-13.5(f).

3. Appeal and Error § 54.1; Divorce and Alimony § 23— motion to consolidate custody and divorce actions—exercise of discretion

A judge of the Forsyth County District Court properly exercised his discretion in denying defendant wife's motion to consolidate plaintiff husband's Forsyth County divorce and child custody action with defendant's Guilford County child custody action for the convenience of witnesses and to promote the ends of justice and in denying defendant's motion to stay all proceedings pending plaintiff's appeal from rulings made in the Guilford County action.

APPEAL by defendant from *Keiger, Judge.* Order entered 2 August 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 30 August 1978.

Plaintiff, H. Howard Holbrook, Jr., filed this action at 4:18 p.m. on 6 May 1977 in Forsyth County seeking a divorce from bed and board from defendant, Verna D. Holbrook, and custody of the parties' minor child, Amber Elaine Holbrook. The complaint alleged that plaintiff was a resident of Forsyth County. Defendant-wife was served with the complaint, summons, and notice on 9 May 1977.

On 9 May 1977, defendant-wife filed an action in District Court in Guilford County seeking custody of Amber Elaine Holbrook. On 11 May 1977 an order awarding defendant-wife temporary custody was entered by Judge Haworth in District Court, Guilford County. Prior to a hearing set by Judge Haworth to determine permanent custody of Amber Elaine Holbrook, plaintiff-husband filed two special appearance motions requesting that the court dismiss defendant-wife's Guilford County custody action. On 3 June 1977, Judge Haworth, presiding over District Court in Guilford County, entered an order denying plaintiff-husband's motion to dismiss. The court based its order on a finding that plaintiff-husband had been a resident of Guilford County at the time he commenced his divorce and custody action in Forsyth County.

On 13 May 1977, 16 June 1977, and 5 July 1977, defendant-wife filed motions in District Court, Forsyth County requesting: (1) a change of venue to Guilford County; (2) a stay of all proceedings in Forsyth County pending the outcome of an appeal taken by plaintiff-husband from the Guilford County District Court's action; and (3) an order by the court pursuant to G.S. 50-13.5(f) consolidating plaintiff-husband's action with defendant-wife's custody action in Guilford County for the convenience of

witnesses and to promote the ends of justice. A hearing on defendant-wife's motions was held on 11 July 1977.

In support of her motions, defendant-wife filed an affidavit on 5 July 1977 which alleges: Since their marriage on 19 August 1967, plaintiff and defendant have been residents of Guilford County. Defendant-husband was a resident of Guilford County on 6 May 1977, the date he commenced his action for divorce and custody in Forsyth County. Plaintiff-husband spent both the nights of May 5th and May 6th at the parties' home in Guilford County. Numerous witnesses saw or talked to plaintiff-husband at the parties' home in Guilford County on 6 May 1977. On 6 May 1977, plaintiff-husband had a checking account in Guilford County, a joint savings account, and retained his registration to vote there. The minor child of the parties was born in Guilford County and has always lived there with her parents.

Plaintiff-husband filed an affidavit in response to defendant-wife's motions which alleges: He has been continuously employed in Forsyth County since 1968. On account of certain alleged, adulterous conduct by his wife, he decided to move out of the parties' home in Guilford County and move to Forsyth County where he would be closer to his work. He leased an apartment for one year in Kernersville, Forsyth County, on 4 April 1977, intending to move into that apartment as soon as the parties' minor child was out of school. He discovered further evidence of defendant-wife's alleged, adulterous conduct on 24 April 1977 and decided to change his residence to Forsyth County earlier than he had previously intended. On 25 April 1977, he leased furniture for the apartment in Kernersville. On 5 May 1977, he moved his clothing, his daugther's clothing, and personal effects out of the parties' home in Guilford County and transferred them to the apartment in Forsyth County. Upon moving his belongings, he intended his new apartment to be his permanent residence. He returned to the parties' home in Guilford County on the 6th and 7th of May 1977 for the limited purpose of picking up his daughter and some remaining personal effects. He returned to the parties' home in Guilford County at 6:45 p.m. on 6 May 1977 for the sole purpose of being present when his wife had arranged to telephone him there. As of 23 June 1977, he has registered to vote in Forsyth County, he has a checking account there, and his mailing address has been changed to Kernersville.

Pertinent testimony by plaintiff-husband who was called to the stand by defendant-wife at the hearing on her motions was as follows: He returned to the parties' home in Forsyth County on the 5th and 6th of May 1977 for the purpose of receiving telephone calls from his wife. He returned there on 7 May 1977 for the limited purpose of removing other personal effects. Between the time he leased the apartment in Forsyth County and 6 May 1977, he spent substantial amounts of time there getting it into shape. When he moved his belongings into the apartment on 5 May 1977, he had made Forsyth County his permanent residence, intending to return to the parties' home in Guilford County only to remove other effects.

In his order denying defendant-wife's motions, Judge Keiger found as a fact that plaintiff-husband had been a resident of Forsyth County on 6 May 1977 and that venue was proper in that county. The judge ruled as a matter of law that G.S. 50-13.5(f) conferred exclusive jurisdiction on the Forsyth County Court with respect to custody of the parties' child. On that basis, the court denied defendant-wife's motions for change of venue, to stay proceedings, and for consolidation.

Harold R. Wilson for plaintiff.

Tate and Bretzmann, by C. Richard Tate, Jr., for defendant.

BROCK, Chief Judge.

[1] By her second assignment of error, defendant-wife challenges the court's finding of fact that plaintiff-husband was a resident of Forsyth County at the time he commenced his divorce and custody action. The findings of the court as to the residence of the parties are conclusive, however, when supported by any competent evidence. *Doss v. Nowell,* 268 N.C. 289, 150 S.E. 2d 394 (1966); *Howard v. Queen City Coach Co.,* 212 N.C. 201, 193 S.E. 138 (1937); *Clarke v. Clarke,* 15 N.C. App. 576, 190 S.E. 2d 390 (1972). The findings made by the judge in this instance with respect to plaintiff-husband's residence are fully supported by the evidence that was presented. Defendant-wife's second assignment of error is overruled.

[2] In two other assignments of error, defendant-wife contends: (1) that the court erred in hearing any evidence and ruling on the

question of plaintiff-husband's residence because that issue had already been ruled on in the denial of plaintiff-husband's special appearance motion made in the custody action filed by defendant-wife in Guilford County, and (2) that the court erred when it concluded as a matter of law that it had exclusive jurisdiction over any custody action brought by the parties. Although defendant-wife is correct in her assertion that the Forsyth County Court heard evidence on and decided the same issue as had been decided in her Guilford County custody action, it is clear that the Court did not err in doing so. G.S. 50-13.5 sets forth the procedures to be followed by the courts in all custody actions. Subsection (f) of that section sets forth certain venue provisions applicable to such actions. It provides: "An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided." The first proviso reads: "If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, *until there has been a final judgment in such case*, any action or proceeding for custody and support of the minor children of the marriage *shall* be joined with such action or be by motion in the cause in such action." (Emphasis added.) In *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E. 2d 215 (1976), we held that when a divorce action has been filed in one county, and there has not been a final judgment in that action, the courts of another county are, by virtue of the proviso in G.S. 50-13.5(f) quoted *supra*, "without jurisdiction to entertain an independent action for custody of the minor children of the parties." *Id.* at 406, 224 S.E. 2d at 216. Because the divorce action in this case was properly filed in Forsyth County District Court by plaintiff-husband, the courts of any other county were subsequently without jurisdiction to consider an independent action for custody. Conversely, the Forsyth County Court attained exclusive jurisdiction of any action or proceeding for the custody and support of the parties' child until the entry of a final judgment in the action. Therefore, the District Court in Guilford County did not have jurisdiction to consider defendant-wife's independent custody action or any matters arising therein. "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it never happened." *Hopkins v. Hopkins*, 8 N.C.

App. 162, 169, 174 S.E. 2d 103, 108 (1970). Although the Guilford County Court did hear evidence and rule on the issue of plaintiff-husband's residence on 6 May 1977, it was without jurisdiction to do so, and the Forsyth County Court did not err by hearing evidence and ruling on the same issue.

[3] Defendant-wife also contends the court erred in ruling on her motion to consolidate the Forsyth County action with the Guilford County custody action and her motion to stay all proceedings pending the outcome of plaintiff-husband's appeal from the ruling on his motions made in the Guilford County action. Defendant-wife contends that the court failed to exercise discretion in ruling on those motions. We find this assignment of error to be without merit. Judge Keiger's order reveals that he clearly understood his authority to rule on the motions in question was a matter within his discretion, that he heard and considered all of the evidence for the plaintiff, and that only after doing so did he rule on the motions.

Affirmed.

Judges CLARK and ARNOLD concur.

VERNA RUTH DOBBINS HOLBROOK v. HERBERT HOWARD HOLBROOK, JR.

No. 7718DC975

(Filed 17 October 1978)

Divorce and Alimony § 23.2— divorce action—jurisdiction of child custody action

Where a divorce action was properly filed by plaintiff husband in Forsyth County, the courts of Forsyth County attained exclusive jurisdiction of any action for the custody or support of the parties' child until the entry of a final judgment in the divorce action, and the District Court of Guilford County had no jurisdiction to consider defendant wife's subsequent custody action or any matters arising therein.

APPEAL by defendant from *Haworth, Judge.* Order signed 9 June 1977, *nunc pro tunc* as of 3 June 1977. Heard in the Court of Appeals 30 August 1978.

On 6 May 1977 the defendant in this custody action initiated an action for divorce and custody in Forsyth County District Court. On 9 May 1977, plaintiff-wife filed this action in Guilford County seeking custody of and support for the parties' minor child. Upon plaintiff-wife's motion of 10 May 1977, the court ordered that she be given temporary custody of the child and set a hearing to determine permanent custody. On 24 and 31 May 1977, defendant-husband filed special appearance motions seeking a dismissal of plaintiff-wife's custody action on grounds that the Forsyth County Court in which he had filed his divorce and custody action prior to the initiation of plaintiff-wife's Guilford County custody action had exclusive jurisdiction of all custody matters arising between the parties. Plaintiff-wife filed an affidavit in response to these motions asserting that because defendant-husband had not been a resident of Forsyth County at the time he commenced his action for divorce and custody there, her independent custody action could be maintained. After conducting a hearing on defendant-husband's motions to dismiss, Judge Haworth signed an order finding that defendant-husband had not been a resident of Forsyth County at the time he commenced his action there, denying his motions to dismiss the action, and awarding custody of the parties' child to plaintiff-wife pending the outcome of defendant-husband's appeal of the ruling.

Tate and Bretzmann, by C. Richard Tate for plaintiff.

Harold R. Wilson for defendant.

BROCK, Chief Judge.

In the opinion filed this date in *Holbrook v. Holbrook*, 38 N.C. App. 303, 247 S.E. 2d 923 (1978), we affirmed the ruling of the Forsyth County Court in which defendant-husband had filed his divorce and custody action that defendant-husband was a resident of Forsyth County at the time he commenced his action there. Because defendant-husband's action in Forsyth County was properly maintained there, and because we held in that opinion that G.S. 50-13.5(f) conferred exclusive jurisdiction of all custody matters on the Forsyth County Court until a final judgment should be entered, the Guilford County Court was without jurisdiction to consider this independent custody action or matters arising therein. The order of the District Court, Guilford

County, denying defendant-husband's motion to dismiss is vacated, and this cause is remanded for entry of an order dismissing this action.

Vacated and remanded.

Judges CLARK and ARNOLD concur.

WILLIS BERT SHELLHORN v. BRAD RAGAN, INC., BRADLEY E. RAGAN, ROBERT H. BUCHANAN AND HOMER L. HUSKINS

No. 7719SC1049

(Filed 17 October 1978)

1. **Rules of Civil Procedure § 34— motion for production of documents**

In an action for breach of an employment contract and tortious interference with the employment contract, the trial court properly granted plaintiff's discovery motions for the production of (1) documents relating to alleged wrongful acts by defendants directed toward third parties, since they were relevant to the issue of whether plaintiff's employment was terminated because of his knowledge of the alleged wrongful acts, and (2) documents relating to the employment of other persons by the corporate defendant, since they were relevant either because such persons were participants in the alleged wrongful acts or because they had evidence as to the nature and extent of such acts.

2. **Rules of Civil Procedure § 34— motion for production of documents—remoteness**

In an action for breach of an employment contract in 1974 and tortious interference with the employment contract, documents that came into existence between January 1966 and January 1974 were not too remote in time from the events of plaintiff's claim so as to defeat plaintiff's request for the production of such documents.

3. **Rules of Civil Procedure § 34— overly broad request for production of documents**

Plaintiff's requests for the production of any type of recording and the transcripts thereof of any telephone or other conversations by any past or present employee of the corporate defendant and for all documents related to any threatened, pending or closed civil or criminal action in which defendants have been or may be named a party or parties thereto were overly broad and indefinite and should have been denied by the trial court.

4. **Rules of Civil Procedure § 12— motion for judgment on pleadings**

Defendant's motion for judgment on the pleadings based on an alleged release executed by plaintiff as to all claims against defendants was properly

denied where plaintiff's complaint presented questions as to the validity of the alleged release and the circumstances giving rise to its execution.

5. **Rules of Civil Procedure § 12— striking matter from pleadings**

Matter should not be stricken from a pleading unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion to strike should be denied.

APPEAL by defendants from *Walker (Hal H.), Judge.* Judgment entered 4 November 1977 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 26 September 1978.

On 22 April 1977, plaintiff, a former employee, officer, and director of Brad Ragan, Inc., instituted this action against Brad Ragan, Inc. (hereinafter referred to as "BRI"); Bradley E. Ragan, chief executive officer of BRI; Robert H. Buchanan, a former vice president and director of BRI; and Homer L. Huskins, vice president and former director of BRI. Plaintiff alleged seven claims for relief: first, breach of employment contract between plaintiff and defendant BRI; second, tortious interference with the alleged employment contract by the individual defendants, Ragan, Buchanan, and Huskins; third, breach of an agreement between plaintiff and BRI by which BRI was obligated to pay legal and personal expenses of the plaintiff; fourth, tortious interference with the alleged contract to pay plaintiff's legal and personal expenses by the individual defendants, Ragan, Buchanan, and Huskins; fifth, allegations of libel, slander and invasion of privacy; sixth, conspiracy to commit the acts alleged in the above claims for relief; seventh, violations of Chapter 75 of the North Carolina General Statutes that constitute unfair and deceptive acts and practices in the conduct of business.

Based on the above claims for relief, plaintiff demanded actual damages of $1,908,500, this amount trebled pursuant to Chapter 75, and punitive damages of $2,739,000.

On 1 July 1977, plaintiff submitted seventy-seven discovery requests for the production of documents. Each defendant filed a response and objections to plaintiff's requests for production of documents; a motion to strike portions of the complaint, Rule 12(f); a motion to dismiss the sixth and seventh claims for relief, Rule 12(b)(6); and an answer to the complaint denying plaintiff's claims for relief.

On 9 September 1977, plaintiff moved for an order requiring defendants to produce documents in his discovery requests.

On 16 September 1977, defendants moved for judgment on the pleadings on the ground plaintiff had executed a release, a complete defense to each and all claims against defendants.

On 30 September 1977, all motions came before Judge Hal H. Walker for hearing. An order was entered on 4 November 1977 granting, in part, defendants' motion to strike certain allegations from the complaint on the grounds they were redundant, irrelevant, immaterial, and impertinent, in violation of North Carolina Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Rules 8(a) and 8(e)(1); granting defendants' motion to dismiss the sixth and seventh claims for relief on the grounds that they failed to state a claim upon which relief can be granted; denying defendants' motion for judgment on the pleadings; and granting plaintiff's motion for an order requiring defendants to produce documents. The court found that the requested documents were relevant to the first five claims for relief, and appeared reasonably calculated to lead to the discovery of admissible evidence. From this order, the defendants appeal. Upon motion of the defendants, Judge Walker entered a stay order pending the outcome of this interlocutory appeal.

Defendants entered a petition for writ of certiorari with this Court 4 November 1977, and it was denied 8 December 1977. The Supreme Court of North Carolina affirmed this Court's denial of the petition for writ of certiorari and denied defendants' petition for discretionary review before determination 1 February 1978.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and F. Joseph Treacy, Jr., for plaintiff appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts, for defendant appellant Brad Ragan, Inc. Manning, Fulton & Skinner, by Howard E. Manning, for defendant appellant Bradley E. Ragan. Jordan, Wright, Nichols, Caffrey & Hill, by Charles E. Nichols, for defendant appellant Robert H. Buchanan. Brinkley, Walser, McGirt & Miller, by Walter F. Brinkley, for defendant appellant Homer L. Huskins.

MARTIN (Harry C.), Judge.

Plaintiff moves to dismiss the appeal. Although this Court denied petition for certiorari on 8 December 1977, we now treat the appeal as a petition for review by way of certiorari. The petition is granted. The plaintiff's motion to dismiss the appeal is denied.

Defendants' first assignment of error is to the granting of plaintiff's discovery motion to produce documents, challenging the court's findings of fact and conclusions of law: "[T]he documents requested by plaintiff are relevant to the first five Claims for Relief, in that such documents appear to be reasonably calculated to lead to the discovery of admissible evidence as to the first five Claims for Relief." We must align the underlying claims for relief with the requested documents for discovery to determine if the documents are within the scope of discovery. *Willis v. Power Co.*, 291 N.C. 19, 229 S.E. 2d 191 (1976). The North Carolina Rules of Civil Procedure define the scope of discovery:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General.—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the information as to which discovery is sought.

N.C. Gen. Stat. 1A-1, Rule 26(b) (1969). The relevancy test for discovery is not the same as the relevancy test for admissibility into evidence. To be relevant for purposes of discovery, the information need only be "reasonably calculated" to lead to the discovery of admissible evidence. Relevant matter that is privileged is not discoverable unless the interests of justice outweigh the protected privilege. A determination that particular information is relevant for discovery is not conclusive of its admissibility as relevant evidence at trial. 4 Moore's Federal practice ¶¶ 26.56[1] and 26.56[4] (2d. ed. 1976).

[1] Defendants appeal from the discovery order to produce documents based on four categories of the individual requests. The first category involves requests relating to alleged wrongful acts directed at third persons. Requests Nos. 1-3, 4(c)-4(f), 22-32, 35-39, 45-50, and 52-77. Defendants contend the alleged guilt of wrongful acts by the defendants directed at third parties, specifically matters related to securities fraud, tax evasion, commercial bribery, and improper billing, are not within the elements necessary for plaintiff to prove his claims. The alleged illegal acts directed at third parties are relevant for discovery. The very heart of this lawsuit is related to the alleged illegal acts. Plaintiff maintains that his knowledge and awareness of the alleged illegal acts resulted in the termination of his employment. Defendants have asserted in defense that plaintiff's employment was terminated because he failed to properly and competently discharge his duties of employment and committed acts detrimental to the interests of BRI. The reasons for the termination of plaintiff's employment are directly in issue, therefore the alleged illegal acts to third persons are relevant. The scope of discovery is not limited to matters relevant to claims for relief but also includes matters relevant to defenses. The Court finds that the production of these documents will not be unreasonably burdensome. Defendants' objections to these requests are overruled, except No. 57 considered below.

The second category involves requests relating to the employment of persons who are not parties to this action. Requests Nos. 4(a)-4(b), 5, 6-10, 11, 12, 13-16, 21, 62, 65, and 72. Defendants contend that documents relating to the employment of others by BRI are irrelevant because the issue in this case is the employment of plaintiff. Plaintiff contends that this informa-

tion is relevant either because the individuals were participants or they "have evidence as to the nature and extent of the alleged scheme." We agree with appellee that these items are relevant for discovery and defendants' objections to these requests are overruled.

[2] The third category involves requests relating to documents remote in time from the events giving rise to Shellhorn's claims. Defendants contend that plaintiff's request for production of documents that came into existence between 1 January 1966 and 1 January 1974 is only of marginal relevance to the matters surrounding plaintiff's alleged employment contract that began in April 1974. The record indicates that plaintiff was employed by BRI from 1966 to 1972. In 1972, plaintiff was discharged from his employment with BRI. The discharges in 1972 and in 1974 were allegedly on the same grounds.

> In an ordinary case, discovery as to matters occurring outside the period of limitations or at some other time not relevant to the case may be denied, but where a continuing conspiracy, fraud, or other wrong is alleged, discovery may be had regarding acts prior to the period upon which the action is based.

4 Moore's Federal Practice ¶ 26.56[1], at 26-126 (2d. ed. 1976). Although plaintiff makes no claim with respect to the prior employment, we hold that the requested documents are not remote in time from the events of the plaintiff's present claim.

[3] The fourth category involves requests which defendants contend are overly broad and indefinite. Requests Nos. 32, 33, 34, 40-43, 47, 49, 50, 51, 56-60, 72, and 75. Plaintiff's Request No. 51 for "[a]ll records, whether by tape, wire, videotape, sound movie, or other electronic or mechanical means and transcripts thereof of any conversation whether conducted by telephone or otherse [sic] which record the words of any person who now is or has been in the past an employee of BRI" and Request No. 57 for "[a]ll documents related to any civil or criminal actions, whether threatened, pending, or closed in which the defendants have been or may be named a party or parties thereto" are overly broad and indefinite. Defendants' objections to Requests Nos. 51 and 57 are sustained. Defendants' objections to the remaining requests in the fourth category are overruled.

[4] Defendants' second assignment of error is the trial court's denial of their motion for judgment on the pleadings pursuant to Rule 12(c). N.C. Gen. Stat. 1A-1, Rule 12(c) (1969). Defendants must show that no material factual issues exist and that they are clearly entitled to judgment. This is a strict standard. "The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale v. Kennedy,* 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974). Defendants' motion is based on an alleged release executed by plaintiff to each and all claims against the defendants. The plaintiff's complaint presents questions as to the validity of the alleged release and the circumstances giving rise to its execution. Taking plaintiff's assertion in the light most favorable to him, there are contravening issues of fact. Defendants' motion for judgment on the pleadings was properly denied.

[5] Defendants' third assignment of error is the trial court's denial of their motion to strike pursuant to Rule 12(f). N.C. Gen. Stat. 1A-1, Rule 12(f). This motion was denied in part, from which defendants appeal. Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion should be denied. 2A Moore's Federal Practice ¶ 12.21, at 2429 (2d. ed. 1976). We affirm the trial court's order on the motion to strike.

Modified and affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. TONY WAYNE PARKER

No. 7827SC423

(Filed 17 October 1978)

Homicide § 21.8— second degree murder—self-defense claimed—sufficiency of evidence

Evidence was sufficient for the jury in a second degree murder prosecution and the evidence did not show self-defense as a matter of law where such evidence tended to show that defendant and his companions who were armed

approached the home of deceased seeking information about some earlier beatings; deceased pulled a gun on defendant and his companions; defendant wrestled with deceased; one of defendant's companions saw defendant shoot deceased in the side; and deceased's body bore three gunshot wounds, one of which was made by firing a weapon while it was against the skin of deceased.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 8 December 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 31 August 1978.

Defendant was charged in a bill of indictment, proper in form, with the offense of murder in the first degree of one John Hastings on 7 May 1977. Evelio Antonia Badia, Eric Harlan Bryant, John Edward Burnette, and Robert Frank Wyatt were indicted as codefendants. At the trial, Wyatt was granted immunity in exchange for his testimony against the other defendants. Cases were consolidated for trial. At the close of the State's case, the charges against defendants Bryant, Badia, and Burnette were dismissed. Defendant was found guilty of murder in the second degree by a jury and was sentenced by the trial judge to a term of not less than twelve years nor more than fifteen years in the State Prison. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Douglas A. Johnston, for the State.

Frank Patton Cooke and R. T. Wilder, Jr., for defendant appellant.

ERWIN, Judge.

The defendant brings forward two assignments of error, contending, first, that the trial court committed prejudicial error in failing to grant his motion for judgment as of nonsuit at the close of all of the evidence after the motion was denied at the close of the State's case. We do not find error.

A motion for judgment as of nonsuit challenges the sufficiency of the evidence to go to the jury. *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913 (1955). The trial judge is required "to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968). All admitted evidence which is favorable to the

State, whether competent or incompetent, must be taken into account and so considered by the trial court when ruling upon the motion. *State v. Crump*, 277 N.C. 573, 178 S.E. 2d 366 (1971); *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

The State's evidence tended to show that Russell Sidney Correll and Mack Teal fought with John Burnette and Frank Wyatt at the King's Mountain Men's Club on the morning of 7 May 1977; John Hastings, an employee of the club, was present but was not involved in the fight; Burnette and Wyatt left and went to the clubhouse of the Brothers Motorcycle Club; other club members including the defendant arrived, and they all went looking for Correll and Teal; defendant, Burnette, Wyatt, and Bryant were in one car, and Badia, Nadulek, and Webber were in another car; defendant was armed with a .38 Colt Cobra, Wyatt with a 9 mm pistol and a .44 caliber pistol; Bryant and other occupants of the cars were also armed.

This group of men went to a motorcycle shop and were told to go to see John Hastings to find out why Correll and Teal had beaten up Wyatt and the Burnettes. They all drove to Hastings' house.

Robert Frank Wyatt testified:

> "[M]r Badia was walking alongwide [sic] me. When we got within about ten or fifteen feet of the porch, Mr. Badia asked John Hastings if he knew where he could find Max Teal or Sid Correll. When Mr. Badia asked John that question, as soon as he got it out of his mouth, John said, 'If you are looking for trouble, you're fucking up,' and pulled his gun. At this time Mr. Parker was standing on the porch. Mr. Burnette had one foot on the porch and one foot on the ground. I moved to the left toward the Fire Station when Mr. Hastings came out with his gun from under his shirt. Seemed like simultaneously, when Mr. Hastings pulled his gun out, there was shot, and Mr. Burnette staggered. Burnette was on the porch, had one foot on the porch. He was spinning around, just toward the street, his face was.
>
> In response to your question as to how long did Mr. Burnette spin or remain upright, it wasn't long, not long at

all. He spun around and when he fell, he was laying on his back. His back was laying on the porch. His feet were dangling off the porch. At the time Mr. Burnette was spinning, Mr. Parker and Mr. Hastings were wrestling. It looked like more or less wrestling. He had John around the neck. Mr. Parker had John Hastings around the neck with his arm, his left arm. At that time I couldn't see Mr. Parker's right hand, but when they broke free from each other, Mr. Parker shot him in the side, right about here. It was right under your arm, right here in the rib cage toward your back. This side here.

. . .

In response to your question as to how many times did Mr. Parker fire the gun after I saw him fire into the left side of John Hastings, my answer is no more. He didn't shoot any more times. After Mr. Parker left, John Hastings was lying on the porch. I tried to pick Mr. Burnette up. He was bleeding very bad out of his face. He had been shot in the face. I pulled him up with one arm, and that guy called Cody, he started helping me, and I picked Mr. Burnette up. Mr. Burnette's pistol was laying underneath him. I picked his pistol up, a Browning 9 mm."

Dr. Wilton M. Reavis, Jr. (pathologist in the Office of the Chief Medical Examiner in Chapel Hill, who performed an autopsy on the body of John Arthur Hastings) testified:

"[E]xterior examination of the body of John Hastings revealed three gunshot wounds present on the body; two gunshot wounds were present on the back of the head; and a third gunshot wound was present on the back near the left armpit.

. . .

Based upon my examination of the body of John Hastings in the course of my autopsy examination, I formed an opinion satisfactory to myself as to the cause of death of John Hastings, and that opinion is that John Hastings died as a result of three gunshot wounds."

Dr. Reavis further testified that one of the head wounds was a "contact wound. That is, the muzzle of the weapon was against

the skin of the decedent at the time the weapon was fired." He also opined that the wounds were larger than .22 caliber and smaller than .45 caliber.

Defendant testified:

"[N]o, sir, John wasn't on the porch when I got out of the car and started walking up there. He came out right as we were approaching about five feet away from his steps. I said, 'John, do you know where Sid or Max could be found. Eddie and Frank had a little dispute with him, and they thought they were friends, and they want to straighten it out.' He said, no, he hadn't seen Sid or Max. About this time Frank Wyatt and Tony Badia was coming right up the drive, right up the pathway in front of the steps. Tony Badia was in front of Frank Wyatt, and he said, 'Hello, John, you know where Sid or Max is,' and John said, 'No, boy, but I want to tell you something, you came here looking for trouble you done fucked up.' He pulled gun out and he fired.

Standing up and showing the jury where his gun was, he had his shirt open like this right here, he had the gun stuck right in here. He flipped the shirt like that, grabbed the gun and came out and fired right toward Mr. Badia. Then someone hollered, 'Grab the gun.' I grabbed towards the gun like this and John shot my arm and it hit against the wall like this, and as I was falling, I got my pistol out of my pocket and fired. I don't know how many times I fired, my arm was hanging halfway off like this. I was panicky. I was in a state of shock. I thought the man was going to shoot me in the head. I thought he had done shot Asphalt. I seen Asphalt fall. The next thing I remember is getting up off the porch and going and getting in the car."

Defendant contends that the State's evidence affirmatively established the defendant's "self-defense"; that the evidence of defendant seems only to "elucidate and add dimension to the evidence already introduced by the State. The appellant's (defendant's) evidence was entirely consistent with that of the State." The defendant relies on *State v. Atwood*, 290 N.C. 266, 225 S.E. 2d 543 (1976), and *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). Again we disagree with defendant and find no merit in this assignment of error.

In review of the record before us, we find sufficient evidence for the trial court to submit this case to the jury on the charge of murder in the second degree and sufficient evidence to support a conviction of murder in the second degree. The question of whether or not the defendant acted in defense of himself was a valid jury question. Here, the defendant was armed as were all of his friends when they went to the home of the deceased. Of the numerous shots that were fired, defendant testified that he did not know how many times he had fired his .38. The gun was apparently never found, and there was expert medical testimony that one of the wounds was a contact wound and that the wounds were made by projectiles between .22 and .45 caliber.

State v. Johnson, 261 N.C. 727, 136 S.E. 2d 84 (1964), cited by the defendant, does not support his contention that the trial court should have granted his motion for judgment as of nonsuit by reason of self-defense as a matter of law. In *Johnson, supra*, the defendant was in her own home with the screen door hooked; deceased was drunk and had previously assaulted defendant, and after being told to leave began arguing and cursing; defendant went to the kitchen and procured a knife, and when deceased broke open the door and attempted to grab her, she stabbed him with the knife, inflicting a fatal wound.

Secondly, the defendant contends that the trial court committed prejudicial error in failing to grant his motion to set aside the verdict as being contrary to law and the evidence.

We hold that the verdict returned by the jury was not contrary to law for the reason set out above. A motion to set aside a verdict as being contrary to the greater weight of the evidence is addressed to the trial judge's sound discretion, and his ruling thereon will be upheld absent a showing of abuse of discretion. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975), *cert. dismissed*, 423 U.S. 918 (1975); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

In the trial below, we find no prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. WALTER CANNON, JR.

No. 782SC456

(Filed 17 October 1978)

Automobiles § 3; Criminal Law § 26.5— conviction of driving without license— trial for driving while license permanently revoked—double jeopardy

Where defendant entered a plea of guilty to a charge of driving without a license in violation of G.S. 20-7, the State was precluded by the prohibition against double jeopardy from thereafter prosecuting defendant for driving while his license was permanently revoked in violation of G.S. 20-28 based on the same occurrence, since evidence that defendant was driving an automobile while his license was permanently revoked would sustain a conviction for driving without a license.

APPEAL by defendant from order of *Cowper, Judge,* entered 20 April 1978 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 20 September 1978.

On 1 March 1978, defendant was charged with the offense of operating a motor vehicle without being licensed as an operator by the Department of Motor Vehicles, a violation of G.S. 20-7 and a misdemeanor punishable in the discretion of the court. The offense was alleged to have occurred at 6:30 p.m. on Wednesday, 1 March 1978. Defendant executed a waiver of trial and entered a plea of guilty, paying a total of $52 fine and costs. This case is #78CR1688.

On 20 March 1978, the same arresting officer issued a citation to defendant charging him with operating a motor vehicle when his operator's license had been permanently revoked, a violation of G.S. 20-28 punishable by imprisonment for not less than one year. This offense was alleged to have occurred at 6:30 p.m. on 1 March 1978. This case is #78CR2008 and was calendared for trial in the District Court, Beaufort County, on 28 March 1978. When the case was called, defendant moved for dismissal on two grounds: (1) The plea of guilty in case #78CR1688, driving without a license, precluded the State from proceeding in #78CR2008 because of the prohibition against double jeopardy, and (2) the offenses were joinable under G.S. 15A-926, and the statute prohibited the State from proceeding with the second case, #78CR2008.

The District Court entered an order of dismissal, finding as a fact "that the ultimate fact to be determined in each of the cases is whether or not (sic) the defendant had in his possession a valid North Carolina operator's license. The Court further holds that operating a motor vehicle without being licensed as an operator by the Department of Motor Vehicles is a lesser included offense to the more serious charge of G.S. 20-28; that both offenses arose out of the same transaction; and that jeopardy has attached in 78CRS1688 (sic) and the motion to dismiss on the basis of former jeopardy should be allowed."

The court also held that G.S. 15A-926 is not applicable to this situation since the defendant pled guilty to the previous charge.

The State appealed to the Superior Court under the provisions of G.S. 15A-1432(a). After hearing, the court entered an order reciting the above facts and concluding as a matter of law:

> "1) That the criminal offense of operating a motor vehicle upon the highways of the State of North Carolina with no operator's license and the criminal offense of operating a motor vehicle upon the highways of the State of North Carolina while one's operator's license is permanently revoked are mutually exclusive and they are not the same offenses both in fact and in law. Therefore, the State of North Carolina was not precluded from proceeding against the defendant for his operation of a motor vehicle while his operator's license was permanently revoked due to any prohibition against double jeopardy.
>
> 2) North Carolina General Statute 15A-926(c)(3) provides that the right to joinder under this subsection is not applicable when the defendant has pleaded guilty of (sic) no contest to the previous charge."

The court remanded the matter to the District Court for trial. Defendant appealed under the provisions of G.S. 15A-1432(d).

Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill, for the State.

Wilkinson & Vosburgh, by James R. Vosburgh, for defendant appellant.

MORRIS, Judge.

Defendant does not assign as error the court's conclusion that G.S. 15A-926 has no application here, and properly so. The statute, in subsection (c)(3) specifically provides that "[t]he right to joinder under this subsection is not applicable when the defendant has pleaded guilty or no contest to the previous charge." Defendant does assign as error the court's first conclusion of law. Disposition of this assignment of error presents much more serious problems.

"It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. (Citations omitted.)" *State v. Crocker*, 239 N.C. 446, 449, 80 S.E. 2d 243, 245 (1954). The principle is expressly stated in the Constitution of the United States in the Fifth Amendment. (*See also* Fourteenth Amendment.) While it is not expressly set out in the North Carolina Constitution, it is regarded by the courts as an integral part of the "law of the land" as provided by Article I, § 19, thereof. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Crocker, supra.*

In determining whether jeopardy had attached in the case *sub judice*, it is necessary to apply tests firmly established by the Courts.

First we look at the "lesser degree" rule. "Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, . . . an acquittal or conviction for the first is a bar to a prosecution for the second." Note, 15 N.C.L. Rev. 53, 55 (1936). In *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933), Chief Justice Stacy quoted with approval from *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416, as follows:

> "The principle to be extracted from well-considered cases is that by the term, 'same offense,' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment. *Reg. ex rel. Thompson v. Walker*, 2 Moody & R., 457; *Reg. v. Stanton*, 5 Cox, C.C., 324.

> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.
>
> To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which is embedded in our organic law as a safeguard to the liberties of the citizens." *Id.* at 227, 228.

See also State v. Midgett, 214 N.C. 107, 198 S.E. 613 (1938); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1971); *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

The State points out that a violation of G.S. 20-7 is not statutorily a lesser included offense of G.S. 20-28. This is, of course, true. It is also true that G.S. 20-7 is intended to apply where the defendant has either not been issued a license by the Department of Motor Vehicles or has been issued a driving privilege and let it expire without renewal. A person charged with a violation of this statute may absolve himself of liability by exhibiting at the time of trial an expired license and a renewal issued within 30 days of the expiration date of the expired license. However, under G.S. 20-28 the defendant has been issued a license which has been revoked permanently by the State as the result of successive violations of the law by the defendant, the abuse of the privilege having necessitated the permanent revocation. It would seem, therefore, that the two charges here are separate offenses both in fact and in law. Application of principles previously enunciated by the courts, however, requires a different result. We are not willing to say that driving without a license is a lesser degree of the offense of driving while one's license has been permanently revoked. However, we do not regard that as determinative of the question.

The Superior Court held that the two offenses are the same in law and in fact. In order to prevail upon a plea of former jeopardy, it was not enough to show that the two offenses grew out of the same transaction. "[T]hey must be for the same offense; *the same, both in fact and in law.*" *State v. Barefoot*, 241 N.C. 650, 655, 86 S.E. 2d 424, 427 (1955). To determine whether the offenses are the same, both in fact and in law, the Court has applied what is referred to as the "additional facts test." *State v. Birckhead*,

supra. The test was stated in *State v. Stevens*, 114 N.C. 873, 877, 19 S.E. 861 (1894), as follows:

> "A single act may be an offense against two statutes, and if *each* statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis ours.)

See State v. Birckhead, supra, and cases cited therein. The facts of *State v. Robinson*, 116 N.C. 1047, 21 S.E. 701 (1895), are illustrative of the principle. Defendant was charged with carrying a concealed weapon. He entered a plea of "former conviction" upon the premise that he had previously been convicted of assault with a deadly weapon and that the deadly weapon used in the assault was the weapon for the concealment of which he was being tried. Both offenses occurred at the same time. Defendant prevailed, and the State appealed. On appeal, the Court reversed and held that jeopardy had not attached. Each offense was separate and distinct. Although possession of a weapon was common to both offenses, concealment was not necessary to the assault with a deadly weapon charge and assault was not necessary to the concealment charge. The test is bilateral in its application. The two offenses may have one or more circumstances in common, but in order to constitute sufficiently for prosecution *either* of the offenses, some additional circumstance must be added. It is the added circumstance to *each* which makes *each* a separate and distinct offense. *State v. Nash*, 86 N.C. 650 (1882). In the case *sub judice*, the offenses cannot pass the test. Failure to have a license is a common circumstance. However, it is the *only* circumstance in the first charge. An added circumstance in the second charge is the permanent revocation, and the second offense includes and embraces the one element of the first—failure to have a license.

In the extremely well-reasoned and exhaustive opinion by Justice Moore in *State v. Birckhead, supra*, he suggests:

> "For further clarity *Barefoot [State v. Barefoot, supra]* states the corollary to the 'additional facts test' as follows: 'The rationale of the rule seems to be: If the facts alleged in the second indictment, when offered in evidence, would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise it does not.' This principle is

likewise deeply imbedded in our law and has been consistently applied as complimentary to the 'additional facts test.' The following are a few of the many cases in which this rule has been discussed and applied: *State v. Bell, supra; State v. Freeman,* 162 N.C. 594, 77 S.E. 780; *State v. Hankins,* 136 N.C. 621, 48 S.E. 593; *State v. Williams, supra; State v. Nash, supra; State v. Lindsay,* 61 N.C. 468; *State v. Stanly,* 49 N.C. 290; *State v. Birmingham,* 44 N.C. 120. For convenience, this rule is hereinafter referred to as the 'included offense rule,' and this is merely an enlargement or broader application of the 'lesser degree rule.' " 256 N.C. at 501.

See also State v. Richardson, 279 N.C. 621, 185 S.E. 2d 102 (1971) (concurring opinion of Justice Lake). When this rule is applied to the two offenses before us, it is clear that they are the same, both in fact and in law. Obviously, the evidence that defendant was driving an automobile while his license had been permanently revoked would sustain a conviction for driving without a license.

This may seem a harsh result in that, if guilty, the defendant goes free of punishment for a flagrant violation of the law, but the constitutional guarantees applicable to all the people should not be bent to convict one violator who thumbs his nose at the law. We feel compelled to comment that here the officer had available to him means of determining, at the time of the occurrence, whether defendant's license was in a state of permanent revocation.

For the reason stated herein, the plea of former jeopardy should have been sustained. The judgment of the Superior Court is

Reversed.

Judges MITCHELL and ERWIN concur.

Pope v. Pope

THERESA K. POPE v. GEORGE NICK POPE

No. 7714DC863

(Filed 17 October 1978)

1. **Process § 9.1— arrearages under separation agreement—nonresident defendant—in personam jurisdiction**

   Defendant's contention that G.S. 1-75.4(5)(c) would not give the district court *in personam* jurisdiction over a nonresident defendant in an action for arrearages due under a separation agreement is without merit.

2. **Process § 9.1— jurisdiction over nonresident defendant—money as a thing of value**

   Money payments are a "thing of value" within the meaning of G.S. 1-75.4(5)(c).

3. **Husband and Wife § 13— arrearages under separation agreement—proper forum for action**

   The proper forum for an action for arrearages due under a separation agreement is the state in which the separation agreement was entered into when one of the parties to the separation agreement is still a resident of that state.

APPEAL by defendant from *Moore, Judge.* Order entered 22 August 1977 in District Court, DURHAM County. Heard in the Court of Appeals 16 August 1978.

The parties entered into a separation agreement in North Carolina on 3 November 1967 while both parties were citizens and residents of this State. The agreement provided, among other things, that the defendant would pay $350.00 per month to the plaintiff for support. The parties were divorced on 31 July 1969 in North Carolina. Some time after the separation agreement was entered into, defendant moved to Florida and has continued to reside there since that date.

Defendant made payments as provided by the separation agreement until May 1976, but has made no payments since. On 16 September 1976, plaintiff brought suit in the District Court of Durham County for arrearages.

Plaintiff asserted that the court had *in personam* jurisdiction over the defendant pursuant to G.S. 1-75.4(5)(c) because the separation agreement was a local contract and the support payments a "thing of value" which were sent into this State. Plaintiff served the defendant in Florida pursuant to Rule 4(j)(9)

of the North Carolina Rules of Civil Procedure. On 16 September 1976, copies of the summons and complaint were deposited at the post office for mailing by certified mail, return receipt requested, addressed to defendant. The return receipt shows that defendant received the summons and complaint on 27 September 1976.

The defendant failed to answer or defend and so on 12 November 1976, the Clerk of Superior Court of Durham County entered default and judgment by default for plaintiff.

On 29 July 1977, defendant moved to set aside the entry of default and the default judgment claiming that the court lacked personal jurisdiction over the defendant. On 22 August 1977, Judge Moore denied defendant's motion.

Spears, Barnes & Baker by Robert F. Baker for defendant appellant.

Bryant, Bryant, Drew and Crill by Victor S. Bryant, Jr., for plaintiff appellee.

CLARK, Judge.

[1] The sole question presented on appeal is whether or not G.S. 1-75.4(5)(c) grants *in personam* jurisdiction over a non-resident defendant in an action for arrearages due under a separation agreement. The defendant contends that the statute only applies to commercial contracts and that money is not a "thing of value" within the meaning of G.S. 1-75.4(5)(c). Therefore, defendant argues, the district court had no statutory basis for asserting *in personam* jurisdiction over the defendant and the default judgment should be set aside.

G.S. 1-75.4 provides:

> "A court of this State . . . has jurisdiction over a person . . . under any of the following circumstances:
>
> . . . .
>
> (5) Local . . . Contracts.—In any action which:
>
> . . . .
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive

> within this State, or to ship from this State goods, documents of title, or other things of value; . . ."

A separation agreement is enforceable at law as is any other contract. *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E. 2d 444 (1978); *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964); *see*, Lee, North Carolina Family Law 3d, § 198, p. 414, § 201, p. 423 (1963). Since a separation agreement is treated just like any other contract under North Carolna law and since G.S. 1-75.4(5)(c), applies to "Local . . . Contracts," it is clear that the statute governs separation agreements as well as purely commercial contracts. In addition, other sections of the statute have been held to apply to domestic relations cases. In *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E. 2d 509 (1976), this court held that the abandonment of a spouse within the state was a "local act or injury" within the purview of G.S. 1-75.4(3) and therefore the North Carolina courts had *in personam* jurisdiction over the defendant. Since that section of the same statute applies to domestic relations cases, it follows that section (5) was designed to govern domestic relations cases as well. G.S. 1-75.4 was designed to extend jurisdiction over non-resident defendants to the full extent permitted by the Due Process Clause of the Fourteenth Amendment. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Therefore, defendant's contention that the statutory provisions of G.S. 1-75.4(5)(c) should be narrowly construed so as to exclude actions based upon separation agreements is contrary to the legislative and judicial mandate, and is without merit.

[2] Defendant next contends that money payments are not a "thing of value" within the meaning of G.S. 1-75.4(5)(c).

The right of a married woman to support and maintenance is held in this State to be a property right. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). *A fortiori* it is an asset or "thing of value." See *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973). The separation agreement entered into by the parties was essentially a release of marital rights in exchange for money payments. *See Lee, supra*, § 187 at 379. Since the money payments were exchanged for, and in consideration of, an asset or a thing of value, money payments are clearly a "thing of value" as well. In *Munchak, supra*, the court noted that "there is

no need to engage in a laborious analysis of the meanings of the key terms in . . . the provisos set forth in § 1-75.4(4). To strictly construe the terms as set forth in those subsections so as to defeat in personam jurisdiction when such jurisdiction would be constitutionally permissible would conflict with the legislative and judicial mandate." 368 F. Supp. at 1371-72. Since defendant concedes that the exercise of jurisdiction in this case would not violate defendant's due process rights, the statutory terms of G.S. 1-75.4(5)(c) should be broadly construed. *See, Sherwood, supra.* We will therefore not engage in a laborious analysis of the term "things of value." Money payments are clearly a thing of value within the meaning of G.S. 1-75.4(5)(c).

We note that three cases from Wisconsin, which has a jurisdiction statute identical to G.S. 1-75.4, have held that money is not a "thing of value." However, an examination of the cases (*Nagel v. Crain Cutter Co.*, 50 Wis. 2d 638, 184 N.W. 2d 876 (1971); *Universal Foods Corp. v. William Inglis & Sons Baking Co.*, 440 F. Supp. 612 (E.D. Wis. 1977) and *Towne Realty, Inc. v. Bishop Enterprises, Inc.*, 432 F. Supp. 691 (1977)) reveals that the holdings were based on due process considerations rather than an interpretation of the statutory language. In all three of these cases the defendant's sole contact with the state was a payment of money to the plaintiff in Wisconsin. Under these circumstances the exercise of jurisdiction would have violated the defendant's due process rights. In the case *sub judice* the payment of money was based on the property right of support and maintenance resulting from a marital relationship within this State, and the exercise of jurisdiction would not violate defendant's due process rights. A narrow construction of the term "things of value" would contravene the clear legislative intent. Therefore, we hold that money payments are a "thing of value" within the meaning of G.S. 1-75.4(5)(c).

[3] Defendant has conceded that the exercise of *in personam* jurisdiction by the district court fully comported with the due process requirements of the Fourteenth Amendment. The parties resided in North Carolina and were married and separated in North Carolina; the separation agreement was entered into in this State and the divorce was granted under North Carolina law. Clearly the defendant has "purposefully [availed] himself of the privilege of conducting activities within the forum state, [and has

invoked] the benefits and protection of its law." *Goldman v. Parkland*, 277 N.C. 223, 229, 176 S.E. 2d 784, 788 (1970). In addition, it should be noted that a recent Supreme Court case, *Kulko v. California Superior Court*, --- U.S. ---, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978), indicates that asserting *in personam* jurisdiction in the case *sub judice* would comport with due process. In *Kulko*, the husband and wife entered into a separation agreement in New York. The wife obtained a Haitian divorce and then moved to California. The wife brought suit in California for modification of the custody and support provisions as set out in the separation agreement and as incorporated into the Haitian divorce decree. The California courts asserted jurisdiction. On appeal the Supreme Court reversed the California judgment, stating that suit should have been brought in New York. Although *Kulko* is essentially a "mirror image" of the case *sub judice*, the same propositions hold true—the proper forum is the state in which the separation agreement was entered into when one of the parties to the separation agreement is still a resident of that state. Therefore, the proper forum in this case is North Carolina.

The district court had *in personam* jurisdiction over the defendant pursuant to G.S. 1-75.4(5)(c). The order is affirmed.

Affirmed.

Judges PARKER and ERWIN concur.

DACE F. TEAGUE v. JULIA DEAL ALEXANDER AND HUSBAND LEWIS ALEXANDER, VIRGINIA DEAL BRADFORD AND HUSBAND EARL BRADFORD; MARY WILLIE DEAL COLE AND HUSBAND JIM W. COLE; EMILY DEAL GIBBONS AND HUSBAND ROBERT A. GIBBONS; LINDSAY DEAL AND WIFE MRS. LINDSAY DEAL; WILLIAM M. DEAL AND WIFE MRS. WILLIAM M. DEAL; JOE M. DEAL AND WIFE MRS. JOE M. DEAL

No. 7724SC1011

(Filed 17 October 1978)

1. Boundaries § 10.2; Quieting Title § 2.2— opinion testimony by surveyor

In an action to quiet title, opinions or conclusions stated by a witness found by the court to be an expert in surveying were within his field of surveying and were properly admitted in evidence.

2. Boundaries § 13; Quieting Title § 2.2— admissibility of survey map

In an action to quiet title, the trial court properly admitted a survey map for the purpose of illustrating the testimony of a surveyor where the surveyor testified that he surveyed the tract shown on the map, that the map was based on his survey, and that the map correctly represented the survey lines and objects shown thereon marking the boundaries and corners.

3. Judgments § 35.1— res judicata not applicable

A prior action involving the sale of timber on the land in controversy was not *res judicata* in this action to quiet title to the land where there was no showing of identity of parties, subject matter and issues in the two actions.

APPEAL by defendants from *Walker (Ralph A.), Judge.* Judgment entered 15 July 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 19 September 1978.

This is an action to quiet title and to recover damages for trespass in the cutting and removal of timber from a part of plaintiff's land by defendants.

The parties admitted that they took title from a common source, specifically R. Kittie Deal. Both claim superior title to the lands in dispute, consisting of about 23 acres located on the north side of Mill Creek. Plaintiff claims ownership by mesne conveyances having the same land description of a tract of land containing 173 acres formerly owned by R. Kittie Deal and conveyed by her to Rufus A. Deal, Jr., by deed dated 6 April 1948, and the description therein included the disputed 23 acres located on the north side of Mill Creek. This deed was filed for registration on 6 April 1948. By deed dated 20 March 1948, R. Kittie Deal conveyed a tract containing 30 acres to Fred M. Deal, located on the north side of Mill Creek. This deed was filed for registration on 3 January 1949. Defendants claim title to the disputed tract as heirs of Fred M. Deal.

Defendants also claimed title by adverse possession and pled *res judicata,* alleging that this action was barred by a prior action by plaintiff against defendants involving the same issues which was terminated by a directed verdict for defendants entered in July 1972.

The parties stipulated that damages amounted to the sum of $65.00.

At trial plaintiff introduced in evidence a deed to plaintiff and several mesne conveyances taking title back to R. Kittie Deal, including a deed from her to Rufus A. Deal, Jr., dated 6 April 1948, and filed for registration on the same date. The description in this deed and in the various deeds constituting plaintiff's chain of title was substantially identical, but the acreage specified in the deed from R. Kittie Deal to Rufus A. Deal, Jr., as aforesaid, was 137 acres, and in the other deeds in the chain of title was 173 acres. The description included the disputed area, about 23 acres, located on the north side of Mill Creek.

Plaintiff also introduced in evidence a deed from R. Kittie Deal to Fred M. Deal dated 20 March 1948, for a tract containing 30 acres. It appears that this tract is the disputed tract located on the north side of Mill Creek. It is noted that the deed from R. Kittie Deal to Rufus A. Deal, Jr., was dated some 17 days after the deed to Fred M. Deal but was filed for registration prior to the registration of the deed to Fred M. Deal. Fred M. Deal is defendants' predecessor in title.

Plaintiff's evidence included the testimony of John Vaughn, a registered land surveyor found by the court to be an expert in his field, and his testimony tended to show that the descriptions in the various deeds in plaintiff's chain of title were substantially the same, that he surveyed the lands so described and made a map, which was received in evidence, and that plaintiff's tract included the 23-acre disputed area located north of Mill Creek, overlapping the 30-acre tract described in the deed from R. Kittie Deal to Fred M. Deal, claimed by defendants. Vaughn testified that he ran each line of the 173-acre tract described in the deed to plaintiff and described what he found at various corners.

Plaintiff's evidence also tended to show that plaintiff and his predecessors in title had farmed and cut trees on the disputed tract, that defendants and their predecessors in title had not claimed the disputed tract and done nothing to indicate adverse possession until the recent cutting of timber.

The evidence for the defendants tended to show that they or their predecessors in title had cut and removed timber from the disputed tract at least four times since 1966, that they had claimed the land since the deed was made from R. Kittie Deal to Fred M. Deal in 1948 and had listed it for taxation since 1953.

Issues submitted to and answered by the jury were as follows:

"1. Is the Plaintiff the owner of the land as shown in the survey, Plaintiff's Exhibit #9?

ANSWER: Yes.

2. Was the possession of the property by the defendants of such a character and of sufficient duration as to vest title to the property in the defendants?

ANSWER: No."

From judgment entered on the verdict defendants appeal.

Sigmon, Clark, and Mackie by E. Fielding Clark II for plaintiff appellee.

Wilson and Palmer by Bruce L. Cannon for defendant appellants.

CLARK, Judge.

[1] The defendants group 139 exceptions and assignments of error to the admission of testimony by plaintiff's witness, John Vaughn, a surveyor, in their first argument, contending that the surveyor was permitted to state his opinions and conclusions. We have examined all of the exceptions and find them to be without merit. On direct examination surveyor Vaughn, found by the court to be an expert in his field, described each line and corner of his survey made from the description of the 173-acre tract in the deed to the plaintiff. He testified that some of the tree marks and corner monuments he found were old, that at the end of some lines surveyed he found "no established corner," and he fully described the trees, stumps, and monuments at the end of other lines.

For many years in North Carolina surveyors have been recognized, when qualified, as expert witnesses who can give opinion testimony. *See West v. Shaw*, 67 N.C. 483 (1872). A surveyor may express his opinion of the age of tree marks. *West v. Shaw, supra; Dugger v. McKesson*, 100 N.C. 1, 6 S.E. 746 (1888). We find that any opinion or conclusion stated by the witness was within his field of surveying and was properly admitted.

[2] Nor do we find merit in defendants' argument that the court erred in admitting in evidence the survey map of the 173-acre tract described in the deed to plaintiff. Vaughn was a licensed surveyor. He testified that he surveyed the tract, that the map was based on his survey, that the map correctly represented the survey lines and the objects shown thereon marking the boundaries and corners. The trial court did not err in admitting the map for the purpose of illustrating the testimony of surveyor Vaughn.

[3] Defendants pled in bar an action instituted in 1971 by plaintiff against Mamie L. Deal and Lewis Alexander in which it was alleged that Alexander handled the sale of about 73 trees on plaintiff's land to a sawmill operator. The land was not described in the complaint. Defendants filed an answer denying the allegations in the complaint and alleging that Mamie L. Deal owned the lands on which the trees were cut. Soon thereafter Mrs. Deal died, and Virginia Deal Bradford and Julia Deal Alexander were substituted for deceased as parties defendant in that they were administrators of the Estate of Mamie L. Deal. The transcript of the trial, held in July 1972, reveals that plaintiff was unable to locate the boundaries of the 173-acre tract described in his deed. It appeared from cross-examination of plaintiff's witnesses that Mamie L. Deal, deceased, and her heirs claimed title by adverse possession to the 30-acre tract, which the defendants in the case *sub judice* now claim. There was no evidence of the location of the boundaries to the 30-acre tract. At the close of plaintiff's evidence defendants moved for directed verdict and judgment declaring them the owners of the land where the timber was cut. The trial judge stated: "I am going to ALLOW the motion as to the lines and boundaries pertaining to plaintiff's complaint as for damages because of no maps, plats, or surveys from which the Court or the Jury could determine any issues which the damage for wrongful cutting of timber would raise. As to the twenty years adverse of seven years color, motion is DENIED." Judgment was never entered.

The transcript of the 1972 trial reveals that counsel for plaintiff (not counsel for plaintiff in the action before us) during trial stated: "I think we're trying a boundary line or land lawsuit without the proper credentials." We agree. The lands claimed by plaintiffs were not described in the pleadings, nor did plaintiff of-

fer evidence of location at trial. The three parties defendant were parties to the action but not as owners of the 30-acre tract; Alexander was the agent in selling the timber, and Bradford and Alexander were administrators of the Estate of Mamie L. Deal, deceased.

The doctrines of *res judicata* and collateral estoppel are recognized in North Carolina. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655 (1958); *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 195 S.E. 2d 45, *cert. denied* 283 N.C. 393, 196 S.E. 2d 275 (1973).

Generally, for the judgment in a former action to be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues. *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167 (1953). It is clear the defendants have failed to show that the 1971-1972 action and the case *sub judice* have an identity of parties, of subject matter, and of issues. Thus, the trial court did not err in denying this plea.

We have carefully examined defendants' remaining assignments of error and find them to be without merit. After a lengthy trial the jury answered the issues in favor of the plaintiff. We find no error that requires a new trial.

No error.

Chief Judge BROCK and Judge MARTIN (Harry C.) concur.

BOARD OF TRANSPORTATION v. ELLA MAE INGRAM JONES

No. 7710SC1054

(Filed 17 October 1978)

1. Eminent Domain § 6.4— improper formula to determine value—evidence improperly admitted

In a condemnation proceeding instituted to secure right-of-way for construction of a highway, the trial court erred in refusing to strike the testimony of a value witness who derived his estimate of defendant's damages by applica-

tion of the "value of the part taken plus damages to the remainder" formula, rather than by application of the "before and after value" formula provided in G.S. 136-112(1).

2. **Eminent Domain § 13.5— general and special benefits—failure to request further jury instruction—jury instruction proper**

In a condemnation proceeding to secure right-of-way for construction of a highway, the failure to define more fully the meaning of general or special benefits or to distinguish between them, in the absence of timely request, may not be held for error.

3. **Eminent Domain §§ 6.8, 13.5— evidence of general benefits—failure to instruct jury—error**

In a condemnation proceeding to secure right-of-way for construction of a highway, the trial court erred in failing to instruct the jury that in assessing compensation they were to consider general benefits accruing to the parts of the tract not taken, since testimony that the value of a portion of the tract not taken had been enhanced as a result of the easy access to other areas of the county provided by the highway constituted evidence of general benefits.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 29 July 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1978.

This was a condemnation proceeding instituted by the North Carolina Board of Transportation on 21 October 1974 against property owned by defendant, Ella Mae Ingram Jones. The purpose of the condemnation was to secure right-of-way for construction of a portion of the Raleigh Beltline.

The property acquired by condemnation was a portion of a larger tract (166.43 acres) owned by defendant. Plaintiff condemned 29.48 acres of right-of-way and .37 acres as easements. The condemned portion ran approximately through the center of the tract owned by defendant. After the taking, defendant retained on the west side of the project a tract of land containing 61.26 acres, a tract on the east side containing 70.93 acres, and a tract containing 4.39 acres, also on the east side of the project but separated from the 70.93 acre tract by a road, which connected with the Beltline.

All issues raised by the pleadings were settled by stipulation of the parties at the pretrial conference except the issue of just compensation to the defendant. The matter was tried at the 25 July 1977 Civil Session of Superior Court, Wake County. Defend-

ant presented three value witnesses. Plaintiff presented two. Estimates of compensation due defendant varied substantially. The jury awarded defendant compensation of $250,000. From the judgment ordering that the Board of Transportation deposit into Court an amount equal to the jury award less amounts previously deposited pursuant to an estimate of just compensation, plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr. & Associate Attorney J. Christopher Prather for the State.

Johnson, Gamble & Shearon, by Richard O. Gamble for defendant.

BROCK, Chief Judge.

G.S. 136-112(1) sets forth the formula for the measure of compensation in partial taking cases. "Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." The Supreme Court applied this formula in *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961), stating, "The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner. . . ." *Id.* at 339, 118 S.E. 2d at 920.

[1] In the case *sub judice*, the trial court instructed the jury on the application of G.S. 136-112(1). In its first assignment of error, plaintiff contends, however, that the trial court committed error by failing to strike the testimony of defendant's value witness, W. R. Rand. Plaintiff's motion to strike was prompted by the failure of the witness to follow the statutory formula set forth in G.S. 136-112(1). Defendant contends that rather than estimating a value for the entire tract before the taking and subtracting therefrom an estimate of the value after the taking of the proper-

ty retained by defendant, the witness subtracted from his estimate of value of the entire tract before the taking an amount equal to the value of the part taken plus damages he estimated had occurred to the remaining tracts as a result of the taking.

On direct, defendant's witness Rand testified to the following: "According to my calculations by reason of this taking the total amount of damages was $310,890.00. In arriving at my opinion as to the total damage to the property I considered the value of the property taken. I also considered damage to the remainder of the property. I did not consider any general or special benefits to the remainder of the property. I didn't consider there were any." The witness continued on direct to specify numerous items of damage to the tracts retained by defendant used by the witness in arriving at his total estimate of damages to the property. On cross-examination, the following colloquy occurred:

"Q. You did not—all right. You went out originally and immediately prior to the taking, you appraised the 166.43 acres plus all the improvements located thereon; is that correct?

A. Right.

Q. And arrived at that figure?

A. Right.

Q. But you did not after, [the taking] . . . you did not then appraise the remaining land, some 136.58 acres, and improvements located thereon; is that what you're saying?

A. That's right."

The formula used by the witness, "value of the part taken plus damages to the remainder" is applied in partial taking cases by a majority of jurisdictions. Early North Carolina cases indicated the application of this formula was proper. *See* Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action*, 45 N.C. L. Rev. 587, 616 n. 102 (1967). At first glance, this formula would appear to be only a different way of stating the "before and after value" formula set out in G.S. 136-112(1). However, the "before and after value" formula mandated by G.S. 136-112(1) avoids "a very practical objection that

may be urged against the more popular rule of 'value of the part taken plus damages to the remainder'—the objection that a jury may include in 'damages to the remainder' a part of the very injury which it incorporates in 'value of the part taken'." 1 Orgel, Eminent Domain, § 52, p. 238 (2d ed. 1953). *See* 4A Nichols, Eminent Domain, § 14.232 [1], p. 14-126, (3d ed. 1976). North Carolina has clearly indicated by statute and case law that the "before and after value" formula is the law to be applied in determining compensation for a partial taking. *See Charlotte v. Charlotte Park & Recreation Commission*, 278 N.C. 26, 178 S.E. 2d 601 (1970); *Highway Commission v. Phillips*, 267 N.C. 369, 148 S.E. 2d 282 (1966); *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961).

In the case *sub judice*, the trial judge did instruct the jury they should apply the formula set out in G.S. 136-112(1). Defendant's value witness, however, gave an estimate admittedly derived by applying the "value of the part taken plus damages to the remainder" formula. It is possible that the jury could have gotten the impression that defendant's damages were greater than they actually were. The Supreme Court held in *Templeton v. Highway Commission, supra*, that it is error for the trial court to allow testimony with respect to estimated compensation due when a witness derives his estimate by application of the "value of the part taken plus damages to the remainder" formula. The trial court, therefore, committed error in this case by refusing to strike the testimony of defendant's witness Rand.

[2] Plaintiff's second and third assignments of error relate to the trial judge's instructions to the jury concerning their consideration of benefits resulting from the highway project for which the part of defendant's property was condemned. In its second assignment of error, plaintiff contends the trial judge erred by failing to define or otherwise explain the term benefits, particularly by failing to distinguish between general and special benefits. However, the Supreme Court has held that "the failure to define more fully the meaning of general or special benefits or to distinguish between them, in the absence of timely request, may not be held for error." *Simmons v. Highway Commission*, 238 N.C. 532, 535, 78 S.E. 2d 308, 311 (1953). (Citations omitted.) Plaintiff made no request at trial for further instructions on the term benefits, even when asked by the judge at the conclusion of his charge if there

was anything further plaintiff would desire to have the jury instructed on.

[3] In its third assignment of error, plaintiff contends that the court erred in failing to instruct the jury that in assessing compensation they were to consider general benefits accruing to the parts of the tract not taken. G.S. 136-112(1) expressly provides that both general and special benefits are to be considered. N.C.R. Civ. P. 51(a) directs that the trial judge "shall declare and explain the law arising on the evidence given in the case." On direct examination, plaintiff's witness Arnold testified that the value of the tract situated to the east of the Beltline had been enhanced by $500 per acre as a result of the easy access to other areas of Wake County provided by the Beltline. Plaintiff contends that such enhancement of the value of the tract constitutes a general benefit, and that it was entitled to an instruction charging the jury to consider both special and general benefits. The trial judge, however, only instructed the jury that they could consider any special benefits to the remaining tracts.

> "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Ordinarily the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to desireable object, or in various other ways." *Templeton v. Highway Commission, supra,* at 341, 118 S.E. 2d at 922.

Few recent North Carolina cases have applied the distinction because the present law provides for consideration of both types of benefits. There are numerous old cases drawing the distinction, however, decided under the common law rule, which provided for offsetting of special benefits only. *See, e.g., Town of Ayden v. Lancaster,* 197 N.C. 556, 150 S.E. 40 (1929); *Lanier v. Greenville,*

174 N.C. 311, 93 S.E. 850 (1917); and *Bost v. Cabarrus County*, 152 N.C. 531, 67 S.E. 1066 (1910). Those cases and others hold that a general benefit is an increase in value of land enjoyed in common with others affected by the improvement. Conversely, a special benefit is one peculiar to the landowner and not common to the entire community.

Applying this distinction, we hold that the testimony of witness Arnold was evidence of general benefits, and that the trial judge erred by only instructing the jury on consideration of special benefits. Although the witness did not explicitly state that the increase in value of defendant's property was an increase common to most property within reasonable proximity of the project, that fact is clearly implicit in his testimony. The witness stated that the basis for his opinion on the increased value of the tract was the easy access to other areas of Wake County. Obviously, such easy access resulting from the construction of the Beltline and the concomitant increase in land values were benefits enjoyed by all landowners in the area affected. Because the increase in the value of defendant's land testified to by witness Rand was enjoyed in common with others affected by the improvement and was a benefit which arose from the fulfillment of the public object which justified the taking, it constitutes a general benefit. Plaintiff was, therefore, entitled to have the jury instructed that they should consider general as well as special benefits.

For the foregoing reasons, plaintiff is entitled to a

New trial.

Judges CLARK and MARTIN (Harry C.) concur.

IN THE MATTER OF: EUGENE UNDERWOOD

No. 7712DC1022

(Filed 17 October 1978)

1. **Insane Persons § 1.2— involuntary commitment petition—hearing held on eleventh day of custody**

The trial court properly refused to dismiss an involuntary commitment petition because a hearing was not held within ten days of the day respondent was taken into custody as required by G.S. 122-58.7(a), since the tenth day after respondent was taken into custody was a Sunday; the hearing was held on the following day; G.S. 1A-1, Rule 6(a) provides that when the last day of a period of time prescribed by an applicable statute is a Saturday, Sunday or legal holiday, the period runs to the end of the next day which is not a Saturday, Sunday or legal holiday; and thus the hearing called for by G.S. 122-58.7(a) was held in apt time.

2. **Insane Persons § 1.2— involuntary commitment proceeding—no medical evidence required**

The involuntary commitment statutes do not provide that an order of commitment may issue only when the requisite factual findings are supported by competent medical evidence; rather, all that is required is that the court make the essential findings from "clear, cogent, and convincing evidence," which the court did in this proceeding. G.S. 122-58.7(i).

APPEAL by respondent from *Guy, Judge*. Judgment entered 16 August 1978. Heard in the Court of Appeals 20 September 1978.

This is a proceeding pursuant to G.S. Chap. 122, Art. 5A, for the involuntary commitment of the respondent, Eugene Underwood, to a mental health facility.

On 4 August 1977 Rev. Rudolph Brock, Director of the City Rescue Mission in Fayetteville, appeared before a magistrate and executed an affidavit and petition as required by G.S. 122-58.3(a) in which he alleged that the respondent was a mentally ill or inebriate person who was imminently dangerous to himself or others. The facts on which this opinion was based were stated in the affidavit to be as follows:

> The respondent has been a mental patient since approximately 8 years of age and at present time is at the City Rescue Mission. The respondent has broken out windows at the mis-

sion, and slashed his head and wrist, refuses medical treatments, threatened to kill everyone at the mission.

The magistrate found reasonable grounds to believe that the facts alleged in the affidavit were true and ordered that the respondent be taken into custody for examination by a qualified physician. Pursuant to this order, respondent was taken into custody on 4 August 1977 and on the same day was examined by a qualified physician, who found respondent to be mentally ill or an inebriate and imminently dangerous to himself or others. Respondent was then taken to the Dorothea Dix Hospital in Raleigh for temporary custody, examination, and treatment pending a hearing in the district court.

The matter was heard in the district court on 15 August 1977, respondent being present and being represented by his court appointed counsel.

At the hearing, the petitioner testified as follows:

I am Reverend Rudolph Brock, Driector of the City Rescue Mission since its opening, November, 1973. I have known the respondent and he has been a resident of the mission since January, 1974. I took out the Petition against the respondent. He had been a good patient for two and a half or three years. He went to the doctor with me every two weeks to get his shots. Then something happened to him; he began to go to Walker's Kitchen and Pool Room on Hay Street. I couldn't restrain him and he refused to stay away from up there. About July 20, 1977, he crashed through the window of the front doors. He would not let me take him to the doctor and he refused to take his medicine. He said the medicine made him sick and that he was going to support his wife and children, but Eugene is not married and has no children. We had to call the police to restrain him. They took him to the doctor and got him sewed up and he returned and agreed to take his medicine for a day or two after that. His medicine is Mellaril in 200 mg. doses. He would curse everyone in the mission and threaten to kill everyone. He accused me of starving the black patients and feeding the whites, and this is what led me to take out the papers to have him sent to Raleigh for medication. The respondent almost choked my cook to death the same night he broke through the front

doors. He pushed my wife up against the wall one time. He was never calm, but when he took his medicine he was more calm.

The court sustained the respondent's objection to the introduction of a medical report from a doctor at Dorothea Dix Hospital and no other medical evidence was presented by the petitioner. The respondent offered no evidence.

At the conclusion of the hearing, Judge Guy made oral findings of fact and entered an oral order of commitment for 90 days. On 16 August 1978 Judge Guy entered a written order of commitment for 90 days with written findings of fact including:

4. That the respondent has lived several years at the City Rescue Mission with good behavior; that his behavior changed; that he became violent; made threats to the director of the mission and others; that he crashed through a glass door of the mission and injured himself a short time ago; that he assaulted the cook by choking him; that he failed and refused to take medication prescribed to control his behavior; that he said he had to leave to support his wife and children when he has no wife and children;

5. That respondent was examined by a qualified physician on August 4, 1977 at Cape Fear Valley Hospital, Fayetteville, N.C., whose professional opinion is that respondent is mentally ill or inebriate of imminent danger to self or others, and recommends commitment;

6. That respondent is mentally ill or inebriate and is imminently dangerous to self or others and ought to be committed for treatment.

From the order of commitment, the respondent appealed.

Attorney General Edmisten by Christopher S. Crosby, Associate Attorney for the petitioner, appellee.

Tye Hunter, Assistant Public Defender for the respondent, appellant.

PARKER, Judge.

[1] Respondent's attorney moved in the District Court to dismiss the petition because the hearing was not held within ten days of

the day respondent was taken into custody as required by G.S. 122-58.7(a). The denial of this motion is the subject of respondent's first assignment of error. We find no merit in this assignment of error.

An involuntary commitment proceeding under Art. 5A of G.S., Chap. 122, is a proceeding of a civil nature which is governed by pertinent Rules of Civil Procedure. G.S. 1A-1, Rule 1. Rule 6(a) of the Rules provides that when the last day of a period of time prescribed by an applicable statute is a Saturday, Sunday, or a legal holiday, the period runs to the end of the next day which is not a Saturday, Sunday, or a legal holiday. Respondent in the present case was taken into custody on 4 August 1977. The tenth day thereafter fell on Sunday, 14 August 1977. The hearing was held in the District Court on the following day, Monday, 15 August 1977. Thus, in this case the hearing called for by G.S. 122-58.7(a) was held in apt time. We do not suggest that dismissal of the proceeding would have been required had the hearing been delayed for a few days beyond the ten day period specified in G.S. 122-58.7(a). On the present record that question is not presented, and we express no opinion concerning it. Respondent's first assignment of error is overruled.

[2] Respondent next contends that his motion to dismiss made at the conclusion of petitioner's evidence should have been allowed because there was no clear, cogent, and convincing evidence upon which the court could base its findings that respondent was mentally ill or inebriate and imminently dangerous to self or others. In support of this contention respondent points out that no testimony was presented from any qualified physician and no reports or findings of a qualified physician or records from a mental health facility were admitted into evidence. From our reading of the involuntary commitment statutes, however, we do not infer that an order of commitment may issue only when the requisite factual findings are supported by competent medical evidence. *In re Benton*, 26 N.C. App. 294, 215 S.E. 2d 792 (1975). All that is required is that the court make the essential findings from "clear, cogent, and convincing evidence." G.S. 122-58.7(i). It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing. *In re Hatley*, 291 N.C. 693, 231 S.E. 2d 633 (1977); 2 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 213, p. 162. Our function on appeal is simply to determine

whether there was any competent evidence to support the factual findings made. In the present case the trial court, as finder of the facts, expressly stated in the order appealed from that its factual findings were made "by clear, cogent and convincing evidence." We find that, although there was no evidence to support a finding that respondent was an inebriate, the petitioner's testimony furnished competent evidence to support the trial court's factual findings set forth in its Finding No. 4. These factual findings in turn furnished ample support for the court's ultimate findings that respondent was mentally ill and imminently dangerous to self or others upon which the commitment order was based. There was no error in the denial of respondent's motion to dismiss.

Respondent next contends that the commitment order must be reversed because the oral findings announced by the court on the day of the hearing were incomplete. This contention has no merit. The court's order was ultimately embodied in the written commitment order signed by the judge on 16 August 1977, and it is that order which is the subject of this appeal. The trial court had power during the term to modify or add to its decree. *Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E. 2d 33 (1966).

Finally, respondent assigns error to the court's Finding No. 5 which concerns the examination of the respondent by a qualified physician on 4 August 1977, the day he was taken into custody. Respondent correctly points out that no evidence of this examination was introduced at the hearing. Even so, the court's commitment order can be sustained. As above noted, the court's ultimate findings on which that order was based, that respondent was mentally ill and imminently dangerous to self or others, were amply supported by the court's detailed factual findings contained in Finding No. 4. Therefore, respondent can show no prejudice by the inclusion of Finding No. 5 in the order.

The order appealed from is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

JOHN D. MAHAFFEY, JR., P.A. v. MARY FRANCES SODERO

No. 7728SC964

(Filed 17 October 1978)

1. Accounts § 2— account stated

An account stated is an agreement between parties that an account rendered by one of them to the other is correct. Once this agreement is made the account stated constitutes a new and independent cause of action superseding and merging the antecedent cause of action.

2. Accounts § 2— retention of account—failure to object—account stated

The jury may infer from the retention without objection of an account rendered for a reasonable time by the person receiving a statement of account that the person receiving the statement has agreed that the account is correct.

3. Accounts § 2— account stated

In determining whether the defendant's failure to object to an account was an assent by defendant to its correctness and an agreement to pay it, the jury may consider the nature of the transaction, the relation of the parties, their distance from each other, the means of communication between them, their business capacity, their intelligence, and the usual course of business between them.

4. Accounts § 2— account stated—erroneous directed verdict

The trial court erred in directing a verdict for plaintiff, a Florida attorney, in an action on an alleged account stated against a client in this State since it was for the jury to determine whether defendant, by her retention of the statement of the account without objection, agreed that it was correct and agreed to pay it.

5. Compromise and Settlement § 6— offer to compromise—inadmissibility

In an attorney's action against a client on an alleged account stated, the trial court erred in admitting a letter written by defendant to plaintiff which constituted an offer to compromise the lawsuit.

Judge MORRIS concurs in the result only.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 29 June 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 August 1978.

This is an appeal by the defendant from a directed verdict against her. John D. Mahaffey is an attorney in Florida who practices law through a professional corporation. Mrs. Sodero retained him in December 1971 to represent her in regard to her mother's estate. He attempted to have the executrix removed, but was un-

successful. He represented her in other matters in regard to the estate and also two matters which were not connected with the estate. He testified that he was "looking to what she was going to obtain from the estate" as an indication of security for his fee. The plaintiff submitted an interim bill to defendant in October 1973 for $5,355.00. Mrs. Sodero testified that she called him and asked him "what in the world is it for?" She testified further that she told him at a later time that she would not quibble over the bill "if you wrap this thing up right now." Mr. Mahaffey continued representing Mrs. Sodero until 6 October 1975. Mrs. Sodero received a total of $6,900.00 from the estate. The executrix absconded with a large part of the estate. On 25 September 1975, the plaintiff submitted a bill to the defendant for $9,710.00. The plaintiff resubmitted the bill to her on 6 October 1975. The plaintiff did not hear from the defendant again and commenced this action on 13 November 1975. At the close of all the evidence, the court allowed the plaintiff's motion for a directed verdict. In its judgment, the court found:

> "when all of the evidence is considered in the light most favorable to the Defendant that the Plaintiff is entitled, as a matter of law, to a Judgment because the Defendant failed to protest or object as to the balance of the account stated in the evidence presented in Court and as stated in the pleadings and, furthermore upon the evidence being considered in the light most favorable to the Defendant that the evidence shows that this action was in fact an action on an ACCOUNT STATED, ..."

The defendant appeals.

James C. Coleman, for plaintiff appellee.

McLean, Leake, Talman and Stevenson, by Joel B. Stevenson, for defendant appellant.

WEBB, Judge.

We hold it was error for the superior court to direct a verdict for the plaintiff.

Neither party has raised the question of whether Florida law or the law of North Carolina should govern any aspect of this

case. Our research has not revealed any case from Florida or North Carolina as to the substantive law governing a suit on an account stated by an attorney against a client. The substantive law of both states as to accounts stated in other respects appears to us to be the same. As to the propriety of granting the motion for a directed verdict, this is a procedural law question and is governed by the law of North Carolina.

[1-4] An account stated is a contract. It is an agreement between parties that an account rendered by one of them to the other is correct. Once this agreement is made the account stated constitutes a new and independent cause of action superseding and merging the antecedent cause of action. The jury may infer from the retention without objection of an account rendered for a reasonable time by the person receiving a statement of account that the person receiving the statement has agreed that the account is correct. *See Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962) and 1 Am. Jur. 2d, Accounts and Accounting, § 21, p. 395. Crucial to the decision in this case is the fact that an account stated like other contracts is based on an agreement. The retention by the defendant of the account did not of itself create a cause of action. It is a jury question as to whether the defendant by the retention of the statement of the account agreed that it was correct and agreed to pay it. In determining whether the defendant's failure to object to the account was an assent by the defendant to its correctness and an agreement to pay it, the jury may consider several things. Among the things to be considered are the nature of the transaction; the relation of the parties; their distance from each other, and the means of communication between them; their business capacity; their intelligence or want of intelligence; and the usual course of business between them.

[5] The defendant's second assignment of error relates to the introduction of a letter written by the defendant to plaintiff dated 13 January 1976. The letter says:

> Dear Jack:
>
> This is to inform you that I have given much thought to the law suit that you have instituted against me, and I have arrived at the conclusion that it would be better for both of us if we commmunicate [sic] and try to work things out.

First, let me say, that the only asset that I have is a Torino Ford that I have, 1971, which I own jointly with Melissa, which has a $900 lien. I have had to give up my rental home and move in with a friend due to economic conditions. I can no longer maintain a home of my own.

I have become weary of my sister, Olivia King, and have come to the conclusion that to file any more civil suits would be of no advantage to me in trying to recover the money. I have no intention of paying more attorney's fees, as it would only, at best, establish the fact that it is owed by her and possibly get a judgment against her.

Since I have no assets, except a '71 Ford Torino, which needs over $200 worth of body work and transmission repairs, I have nothing to lose if you get a judgment against me. I plan to have a jury trial if we go to court and you, no doubt, will have to make several trips up here.

I am perfectly willing to sign an agreement with you to the effect that if you withdraw your suit, I will be willing to pay you $4,000, which would include the $500 I have already paid you. This would be paid when I receive the money from the estate of Mrs. King that is. I will file charges with the prosecuting attorney in Florida against her for embezzelment [sic]. Knowing her as I do, I know she will not go to jail.

If you get a judgment against me, I will not bring any action against Mrs. King and, therefore, there will be nothing to be gotten from me. It would not be worth all I have to go through for trips to Florida and time away from my job and give up so much.

Let me hear from you by return mail, if at all possible, if you are interested in this.

Regards,

Mary Frances Sodero

P.S. Court costs will also be yours for the suit you instituted.

We hold this letter was an offer to compromise the lawsuit and it was error to admit it into evidence. 2 Stansbury, N.C. Evidence

(Brandis Rev. 1973), § 180, p. 56. The plaintiff contends this letter should be admitted not as an offer to compromise, but as distinct admissions of an independent fact, the fact being the defendant's offer to prosecute her sister if the plaintiff would accept the compromise offer. The plaintiff argues this shows the state of mind of the defendant. We hold this statement that the defendant would prosecute her sister is a part of the compromise offer and the letter should have been excluded.

We note that the complaint does not allege that there was an account stated, but alleges that the defendant owes the plaintiff $9,710.00 "according to the account hereto annexed." Under our practice of liberal construction of pleadings this may be sufficient to allege an account stated, but the plaintiff may be well advised to amend the complaint to allege an account stated before the next trial.

We do not discuss the defendant's third assignment of error as it may not recur.

New trial.

Judge HEDRICK concurs.

Judge MORRIS concurs in the result only.

THEODORE McCLENDON AND RACHEL McCLENDON v. DAVID ELWOOD CLINARD, JR. DEFENDANT & THIRD PARTY PLAINTIFF v. GEORGE CARDWELL, D/B/A CARDWELL ELECTRIC COMPANY

No. 7721DC1008

(Filed 17 October 1978)

Judges § 5 — motion to set aside judgment — refusal of judge to disqualify himself — error

The trial judge erred in not disqualifying himself from ruling on plaintiffs' motion to set aside judgment against them on the ground of excusable neglect where the court dismissed plaintiffs' action with prejudice because neither they nor their attorney was present when their case was called; in the affidavits filed with plaintiffs' motion to set aside, it was revealed that plaintiffs' attorney, on the same day the case was called and dismissed, had lunched

with a venireman serving jury duty that week; the judge called the president of the county bar association into open court, informed him of the attorney's behavior and asked him to investigate the matter; the judge notified a newspaper reporter that he should be present in the courtroom that afternoon; the reporter's story appeared in the next morning's paper; and the judge granted an interview to another reporter and made statements relative to the incident which appeared in a second article.

APPEAL by plaintiffs from *Keiger, Judge*. Order entered 20 October 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 19 September 1978.

Plaintiffs brought this action against defendant Clinard, their landlord, seeking to recover damages for property destroyed in a fire, allegedly resulting from the landlord's negligent maintenance of the electrical circuitry in their apartment. Defendant Clinard, asserting a cause of action for indemnification, brought in third party defendant Cardwell, an electrician who had recently done maintenance on the electrical circuitry of plaintiffs' apartment. The case came on for trial during the week of 29 August 1977 before Judge R. Kason Keiger. It was on the court's calendar as the sixth case for trial.

At noon Wednesday, 31 August 1977, plaintiffs' attorney was informed that the jury had just been impaneled in the fourth case on the calendar. Plaintiffs' attorney then left for lunch. At 12:18 p.m. the assistant clerk of court called the office of plaintiffs' attorney and left a message requesting that the attorney call the clerk's office "re: Theodore McClendon case." For unexplained reasons, the message was not received by plaintiffs' attorney until 2:30 p.m. Upon returning from lunch, plaintiffs' counsel was notified at 2:15 p.m. that the case had been called at 2:00 p.m. and that Judge Keiger had dismissed it with prejudice because neither the plaintiffs nor their counsel had been present when the case was called.

On 9 September 1977, plaintiffs moved with supporting affidavits to have the judgment set aside under N.C.R. Civ. P. 60(b)(1) and (6) on grounds of excusable neglect. In the affidavits filed with the motion, it was revealed that plaintiffs' attorney, on the same day the plaintiffs' case was called and dismissed, had lunched with a venireman serving jury duty that week in district court.

On 14 September 1977, Judge Keiger called the President of the Forsyth County Bar Association into open court and informed him of the attorney's contact with the venireman and requested that he investigate the matter. Judge Keiger also, in effect, notified a newspaper reporter that he should be present in the courtroom that afternoon. The reporter covered the incident, and his story appeared the next morning in the *Winston-Salem Journal*. On that same morning, Judge Keiger also granted an interview to another reporter and made statements relative to the incident, which appeared in a second article. On 30 September 1977, plaintiffs made a motion, based on the statements made to the press, to have Judge Keiger recuse himself from hearing plaintiffs' motion to set aside the judgment. Plaintiffs' motion alleged the statements to the press indicated Judge Keiger had prejudged the merits of their motion to set aside the judgment. On 13 October 1977, a hearing was held before Judge Keiger on plaintiffs' motion to recuse and to set aside the judgment. At the hearing, the judge considered the pleadings, the affidavits of plaintiffs' attorney Paul Sinal, the attorney's secretary, and the venireman, Robert V. Ford, Jr., the newspaper articles, and the testimony of the two newspaper reporters who had written the articles. After hearing and considering this evidence, the court denied both the motion to recuse and the motion to set aside the judgment. Plaintiffs gave notice of appeal.

Legal Aid Society of Northwest North Carolina, by Bertram Ervin Brown II and Paul Sinal for plaintiffs.

Deal, Hutchins & Minor, by Richard Tyndall and Richard D. Ramsey for defendant and third-party plaintiff.

Hudson, Petree, Stockton, Stockton, and Robinson, by Jackson N. Steele for third-party defendant.

BROCK, Chief Judge.

Plaintiffs, in their first assignment of error, contend that the trial judge erred as a matter of law in denying plaintiffs' motion to recuse. We think disposition of this case is governed by *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). In that case the defendant made a motion to recuse, alleging personal bias and prejudice arising from an unfriendly ter-

mination of attorney-client relationship between the trial judge and defendant's family and a favorable disposition on the part of the judge towards the plaintiff. The Supreme Court declined to consider the merits of defendant's contention that the trial judge erred in failing to recuse himself. Instead, the Court held that "when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony." *Bank v. Gillespie, supra*, at 311, 230 S.E. 2d at 380.

This case is distinguishable from *Bank v. Gillespie, supra*, in that the basis of the motion to recuse in this instance was prejudgment of the merits of defendant's motion rather than personal bias. However, the two cases are basically similar in that the respective motions raised serious questions about the impartiality of the trial judge. We think the trial judge in this instance should have either disqualified himself from ruling on the plaintiffs' motion to set aside the judgment or referred the motion to recuse to another judge for consideration and disposition. Canon 3(c)(1) of the Code of Judicial Conduct directs that, "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." We think that where a motion to recuse of this nature is made, a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner.

We think it would unduly prolong the course of this litigation if we merely vacated the order denying the motion to recuse and remanded for referral of that motion to another judge. Therefore, we reverse the court's denial of the motion to recuse and hold that the judge committed error by not disqualifying himself in this instance. We also vacate the court's order denying the motion to set aside the judgment for excusable neglect and remand the case for consideration of that motion by another District Court Judge of Forsyth County.

We agree with Judge Keiger's concern that counsel lunched with one of the members of the jury venire. This very juror may have been called to serve for the trial of the case in which counsel was to appear. We also agree with Judge Keiger that the presi-

dent of the local bar should have been advised of counsel's conduct. We think Judge Keiger may have gone further and advised the grievance committee of the North Carolina State Bar in order that it might investigate the matter. However, counsel's conduct does not mitigate what we consider to be erroneous conduct by the trial judge in proceeding to pass upon counsel's motion to set aside the order dismissing his client's case with prejudice. The correctness or incorrectness of the trial judge's ruling on the motion to set aside is not decided. We decide only that under the circumstances Judge Keiger should have disqualified himself to pass upon the motion to set aside.

Reversed and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. MICHAEL TIMOTHY HAULK

No. 7829SC526

(Filed 17 October 1978)

Mayhem § 2— maiming without malice aforethought—intent as essential element

The trial court erred in instructing the jury that defendant could be found guilty of felonious maiming of a child without malice aforethought in violation of G.S. 14-29 if it found that the child was injured as a result of defendant's gross carelessness or criminal negligence, since an intent to maim is an essential element of the crime defined by G.S. 14-29.

ON certiorari to review trial of defendant before *Baley, Judge*. Judgment entered 18 March 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 28 September 1978.

Defendant was indicted pursuant to G.S. 14-29 for felonious maiming without malice aforethought, convicted by a jury, and sentenced to ten years.

At trial, the State's evidence tended to show that in September 1976, defendant was living with Sheila Meffer and took care of her three children, including two-year-old Sabrina,

while the mother worked at night. On 1 September 1976, Mrs. Meffer left for work at 11:30 p.m., at which time Sabrina was asleep in bed, and her feet were normal. At approximately 2:00 a.m., defendant went to a neighbor's house with Sabrina in his arms. Her feet and legs were seriously burned, and she eventually lost the toes of one of her feet. Medical testimony indicated that the injuries were caused by hot water. Defendant had told the child's grandmother that he had been running hot water in the bathtub, and Sabrina stepped into the tub.

The State was allowed to reopen its case to present the further testimony of the grandmother, who testified that about a week before Sabrina's injuries occurred, she observed marks on her four-year-old grandson's body. The boy told her that defendant had beaten him with a hairbrush. The trial court instructed the jury to consider this testimony on the question of intent only. Defendant presented no evidence.

Attorney General Edmisten, by Associate Attorney Marilyn R. Rich, for the State.

Robert W. Wolf, for defendant appellant.

ERWIN, Judge.

Surely there are few offenses more heinous than the maiming of a defenseless two-year-old child. We have concluded, however, that prejudicial error occurred below and accordingly award defendant a new trial.

Defendant has noted exceptions and assigned error to various portions of the trial court's instructions to the jury. Two such portions read as follows:

> "The State contends that the defendant . . . on purpose, with intent to maim the child . . . by dipping the child in boiling water, has caused the disfigurement and maiming of this child, and that you should be convinced from this evidence beyond a reasonable doubt that he did this deliberately and purposely [or that he was so grossly careless in his conduct that he permitted this to happen when he was in charge of a two-year-old child,]
>
> DEFENDANT'S EXCEPTION NUMBER EIGHT.

* * *

> Now, members of the jury, the defendant contends that this injury to the child was caused by accident and not with any deliberate purpose on his part. I charge you that if Sabrina Nicole Meffer was injured by accident or misadventure, that is, without wrongful purpose [or criminal negligence]
>
> DEFENDANT'S EXCEPTION NUMBER ELEVEN.
>
> on the part of the defendant, the defendant would not be guilty."

We agree with defendant's contention that these portions of the jury instructions constituted prejudicial error.

G.S. 14-29 provides as follows:

> "If any person shall, on purpose and unlawfully, but without malice aforethought . . . disable any limb or member of any other person . . . maim or disfigure any of the privy members of any other person, *with intent to* kill, *maim*, disfigure, disable . . . such person, the person so offending shall be imprisoned in the county jail or State's prison not less than six months nor more than ten years . . ." (Emphasis added.)

Clearly, intent is an essential element of the offense under the statute. The import of the above-quoted excerpts from the jury instructions is that something less, gross carelessness or criminal negligence, would suffice.

The State maintains that the trial court was merely stating contentions and that the charge, read in its entirety, correctly states the law. It is the general rule that a misstatement of a party's contentions must be brought to the trial court's attention to provide an opportunity for correction. If a party fails to do so, an exception thereto will not be considered on appeal. "However, when the mistatement presents an erroneous view of the law or an incorrect application of it, counsel is not required to bring the inadvertence to the court's attention." *State v. Winford*, 279 N.C. 58, 71, 181 S.E. 2d 423, 431 (1971).

We note that the State's case against defendant was based entirely on circumstantial evidence. A serious injury was sustained by Sabrina while she was under defendant's care. Thus, the error complained of must be considered prejudicial. The jury may have been in doubt as to whether the injury was intentionally inflicted but might quite plausibly have concluded that such an injury would not have occurred unless defendant had been negligent in his care and supervision of Sabrina. G.S. 14-29 does not, however, purport to define an offense based on negligence or carelessness; it condemns an intentional offense.

Our Supreme Court held as follows in *State v. Parrish*, 275 N.C. 69, 76, 165 S.E. 2d 230, 235 (1969):

> "[W]here the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. . . . A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation."

Thus, we hold that the portions of the instructions complained of impermissibly suggested to the jury that it could find defendant guilty of the offense charged without being satisfied beyond a reasonable doubt that defendant had the necessary intent under G.S. 14-29.

However, we hold that there was sufficient evidence to submit the case to the jury.

We do not treat defendant's other assignments of error as they may not recur upon retrial.

Defendant is awarded a

New trial.

Judges MORRIS and MITCHELL concur.

STATE OF NORTH CAROLINA v. JOHN EARLEY

No. 7829SC277

(Filed 17 October 1978)

Burglary and Unlawful Breakings § 5.9; Larceny § 7.4— possession of recently stolen property—sufficiency of evidence

In a prosecution for felonious breaking and entering and felonious larceny, evidence was sufficient for the jury to find that defendant was in possession of the recently stolen goods where it tended to show that defendant was the owner and operator of the car in which the stolen goods were found approximately 45 minutes after the break-in; there was no showing that defendant voluntarily or involuntarily relinquished his control over his car; and defendant must have been aware of the presence of a lawn mower and garden tiller in the car he was driving.

APPEAL by defendant from *Ervin, Judge*. Judgment entered 4 November 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 14 August 1978.

The defendant was indicted for felonious breaking and entering and felonious larceny. He was tried upon his plea of not guilty and found guilty as charged on both counts. The two charges were consolidated for judgment and, from judgment sentencing him to a term of imprisonment of not less than eight nor more than ten years, the defendant appealed.

The State offered evidence tending to show that during the early morning hours of 8 July 1975 a store owned by J. B. Harrell was broken into and a lawn mower and garden tiller stolen therefrom. About 1:30 a.m. the same morning, Deputy Sheriff L. R. Collins stopped the defendant's car. The defendant was driving and was accompanied by two other people. Deputy Sheriff Collins observed the articles stolen from the store in the defendant's car at that time.

The defendant offered evidence tending to show that he called Deputy Sheriff Ray Cline at approximately 10:30 p.m. on 7 July 1975 and told him that someone was going to break into Mr. Harrell's store. The defendant indicated that he learned of the planned break-in when two people approached him and tried to get him to buy the articles that they intended to steal. The defendant also attempted to call two other law enforcement officers that evening but could not reach either officer.

At approximately 12:30 a.m. on 8 July 1975, the defendant went to the home of Deputy Sheriff Charles Conner and awakened him. The defendant then told Conner that two people were breaking into Mr. Harrell's store. Conner telephoned Deputy Sheriff Collins and advised him of the situation and Collins said he would come to Conner's home in order that the two could go to the store together to investigate. The defendant told Conner that he would go back to the store and stall the two thieves until Conner and Collins could arrive. Approximately forty-five minutes later, Collins arrived at Conner's home. The two deputies were proceeding toward the store when they spotted the defendant's car. They stopped the car and arrested the two passengers but did not arrest the defendant. The defendant was later indicted on the charges which are the subject of this appeal.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

J. Nat Hamrick for the defendant appellant.

MITCHELL, Judge.

The defendant's sole assignment of error is directed to the failure of the trial court to grant his motion to dismiss made at the close of all the evidence. The defendant contends that the only evidence against him was the alleged possession of recently stolen goods, but that he never actually possessed those goods. A person is in possession of goods when he has the intent to control the goods and is in such physical proximity to the goods as to have the power to control them to the exclusion of others. Thus, a person who has the power and intent to control the access to and use of a vehicle has possession of the known contents of the vehicle. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966).

The defendant was the owner and operator of the car in which the stolen goods were found. Nothing in the record tends to indicate that the defendant voluntarily or involuntarily relinquished his control over his car. Additionally, it would appear obvious that the defendant must have been aware of the presence of a lawn mower and garden tiller in the car he was driving. There was sufficient evidence here for the jury to find that the defendant was in possession of the recently stolen goods. *State v. Ep-*

pley, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046, 34 L.Ed. 2d 498, 93 S.Ct. 547 (1972).

The defendant also argues that, if he was in possession of the stolen goods, he presented sufficient evidence to overcome the presumption or inference of guilt created by the doctrine of recent possession. When a person is in possession of stolen goods soon after a breaking and entering resulting in the larceny of those goods, the possession is a circumstance tending to show that the possessor is guilty of both the larceny and the breaking and entering. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578 (1965). In *State v. Eppley*, 282 N.C. 249, 253-54, 192 S.E. 2d 441, 444-45 (1972), the Supreme Court of North Carolina stated:

> The burden of proof is not thereby shifted to the defendant and his failure to offer evidence to explain how the stolen article came into his possession does not compel a conviction. In the absence of an explanation, or other circumstance tending to destroy the basis for the inference, evidence of such possession is sufficient, however, to justify the denial of a motion for judgment of nonsuit on the charge of larceny. The presumption or inference is to be considered by the jury along with other evidence in determining the defendant's guilt. Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. (Citations omitted.)

The inference which arises from the possession of recently stolen goods may be overcome by the presentation of a reasonable explanation for the possession of the goods. 50 Am. Jur. 2d, Larceny, § 163, pp. 349-51; 52A C.J.S., Larceny, § 110, pp. 608-11. However, the issue of whether a reasonable explanation has been given must be decided by the jury. 50 Am. Jur. 2d, Larceny, § 171, pp. 359-60; 52A C.J.S., Larceny, § 141, pp. 691-94. The apparent reasonableness of the explanation does not take the question from the jury nor does it necessarily lead to an acquittal. 52A C.J.S., Larceny, § 141, p. 693. *But see State v. Allen*, 56 Utah 37, 189 P. 84 (1920).

Here, the reasonableness of the defendant's explanation for his possession of the recently stolen goods was an issue for the jury. As there was sufficient evidence to justify a finding by the jury that the defendant was in possession of recently stolen goods, the jury was entitled to draw the inference that the defendant broke and entered the store in question and stole the goods therefrom. Therefore, the trial court did not err when it denied the defendant's motion to dismiss.

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

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

ESSIE LEE TRIPLETT v. ARLOW J. TRIPLETT

No. 7728DC690

(Filed 17 October 1978)

Divorce and Alimony § 7— action for divorce from bed and board—spouses still living in same house

A wife may maintain an action for divorce from bed and board and alimony while the husband is staying in the same house with her.

THE appeal in this case was earlier dismissed for failure of the appellant husband to comply with the Rules of Appellate Procedure. *Triplett v. Triplett*, 37 N.C. App. 283, 245 S.E. 2d 812 (1978). Upon motion to rehear it was stipulated by counsel that the record on appeal was in error with respect to the date of settlement of the record on appeal, and that, in fact, the record on appeal was certified by Clerk of Superior Court within ten days of settlement as required by App. R. 11(e).

With respect to the violation of App. R. 28(b)(3) appellant urges us to suspend that rule and consider the fundamental question raised by the appeal. That is: whether or not a married couple may litigate their differences while living together? For the purposes of this rehearing we elect to suspend the operation of

App. R. 28(b)(3) and consider the foregoing question urged by appellant. App. R. 2.

This cause was heard in District Court, BUNCOMBE County, before *Sluder, Judge*. Judgment was entered 20 May 1977. The appeal was originally heard in this Court on 24 May 1978, and was reheard in this Court upon the foregoing conditions on 22 August 1978.

This is an action by plaintiff wife seeking a divorce from bed and board and alimony from defendant husband on the grounds of defendant's excessive use of alcohol and wilfull failure to provide her with necessary subsistence. The trial judge made findings of fact and conclusions of law. Based thereon he granted to plaintiff a divorce from bed and board, ordered payment of alimony by the defendant, and granted plaintiff possession of the house owned by the parties as tenants by the entireties and possession of the furnishings located therein.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Philip J. Smith, for the plaintiff.

Richard B. Ford and Loren D. Packer for the defendant.

BROCK, Chief Judge.

The question which defendant contends is raised by this appeal (whether or not a married couple may litigate their differences while living together?) is stated much too broadly, and we will not address all the ramifications of the question as stated. Appropos to the present case the question raised is as follows: may a wife pursue an action for divorce from bed and board and alimony while the husband is staying in the same house with her?

The record on appeal discloses the following: Since 1973 defendant husband has been a resident of Louisville, Kentucky, where he is regularly employed by the Veterans Administration Hospital. Prior to 1973 the parties resided in Swannanoa, Buncombe County, North Carolina, at which time defendant was employed by the Veterans Administration Hospital in Buncombe County. For many years, and down to the time of trial, defendant has been an excessive user of alcohol, and this is the reason plaintiff refused to move to Kentucky with him.

After defendant moved to Kentucky, plaintiff visited defendant in Kentucky, and the two took several trips together to visit their children. Also defendant returned on numerous occasions for visits to the parties' home in Swannanoa. During all of these periods defendant continued to consume excessive amounts of alcoholic beverages.

The complaint in this action was filed on 16 August 1976, and defendant's answer was filed 30 September 1976. Thereafter defendant stayed in the parties' home in Swannanoa for three or four days in November 1976, for about five days in February 1977, and was staying in the Swannanoa home during the time of the hearing in the trial court in May 1977.

Defendant's reliance upon the holding in *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976) is clearly misplaced. In *Adamee* the plaintiff was seeking an absolute divorce on the grounds of separation. In the present case the plaintiff seeks only a divorce from bed and board and alimony. Indeed such an action may be the only method by which the injured spouse can obtain a writ for exclusive possession of the home so as to keep the offending spouse from continuing to stay in the home.

In the present case the trial judge concluded from adequate facts found from competent evidence, *inter alia*:

> "The defendant has constructively abandoned the plaintiff as a result of his failure to provide reasonable and adequate support to the plaintiff."
>
> "The defendant is an excessive user of alcohol so as to render the condition of the plaintiff intolerable and her life burdensome as provided in North Carolina General Statutes 50-7(5) and 50-16.2(9)."

Based upon his conclusions the trial judge awarded alimony to plaintiff and also awarded to plaintiff the sole possession of the home and furnishings.

There is no requirement for a separation of the parties in the sense of one moving out of the home before an action can be instituted and prosecuted under G.S. 50-7 for divorce from bed and board. "A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the hus-

band and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond." *Schlagel v. Schlagel*, 253 N.C. 787, 790, 117 S.E. 2d 790, 793 (1961).

Affirmed.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. NANCY LASSITER PILAND

No. 786SC518

(Filed 17 October 1978)

1. **Homicide § 21.9— voluntary manslaughter—killing of husband by wife—sufficiency of evidence**

Evidence was sufficient for the jury in a homicide prosecution where it tended to show that defendant and the victim were alone in their residence; a witness heard loud talking and four or five shots; defendant emerged from the house and asked the witness how long he had been there, to which he responded "a right good while"; defendant told the witness to say nothing and to wipe off her gun and hide it; defendant gave the witness twenty dollars; the witness hid the gun under the tongue of his trailer which was near defendant's house; a pistol was found at the end of the witness's trailer; it was the pistol which fired the bullet that killed the victim, defendant's husband; and defendant knew that her husband had been having an affair with another woman.

2. **Homicide § 30.3— failure to instruct on involuntary manslaughter—no error**

The trial court did not err in failing to instruct the jury on the offense of involuntary manslaughter where there was no evidence of an unintentional killing or of a culpably negligent killing upon which a finding of involuntary manslaughter could be made.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 13 January 1978 in Superior Court, HERTFORD County. Heard in the Court of Appeals 28 September 1978.

The defendant was indicted for murder, placed on trial for second degree murder, and found guilty of voluntary manslaughter. Judgment of imprisonment for a term of not less than twelve nor more than fifteen years was entered.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Cherry, Cherry & Flythe, by Thomas L. Cherry and Joseph J. Flythe, for the defendant.

BROCK, Chief Judge.

There were discrepancies and contradictions in the evidence at trial, both for the State and for the defendant. There were matters for the jury to resolve. All of the discrepancies and contradictions, as well as the credibility of the witnesses, were fully explored before the jury and its verdict has resolved them. Defendant seems to suggest that the court must analyze and weigh the evidence and allow her motion to dismiss unless the evidence points unerringly to her guilt and excludes every reasonable hypothesis of her innocence. "To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury." *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956).

[1] In the present case the testimony of Robert Ford (who was in custody on a charge of accessory after the fact of murder arising out of the killing in this case) when viewed in the light most favorable to the State tends to show the following: the defendant and the victim were alone in their residence; there was "sorta loud" talking; he heard four or five shots; a few minutes after he heard the shots defendant emerged from the house and asked Ford how long he had been there, to which he responded "a right good while"; defendant said to Ford, "don't say anything about what you heard, take this gun and wipe it off and go hide it; here is a twenty dollar bill"; Ford hid the pistol in a shallow hole under the tongue of his trailer residence, which was near defendant's house; a pistol was found at the end of Ford's trailer; that it was the pistol which fired the bullet that killed the victim, defendant's husband; and that in defendant's knowledge her husband, the victim, had been having an affair with one Elizabeth Smith.

We think this evidence clearly distinguishes this case from those relied upon by defendant. Here there is no need for conjecture as to the time and place of the killing, defendant's sole presence with the victim at the time of the shooting, her actions immediately after the shooting, and a motive for the shooting. Defendant's assertion that Robert Ford came into her house and shot the victim was fully explored before the jury and the jury rejected that assertion. In our opinion the motion to dismiss was properly denied.

[2] Defendant argues that the trial judge committed prejudicial error in failing to instruct the jury on the offense of involuntary manslaughter. The necessity for instructing the jury on a lesser included offense arises when and only when there is evidence from which the jury could find that such lesser included offense was committed. The presence of such evidence is the determinative factor. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). When there is no evidence of such lesser included offense the court should not charge on the lesser included offense. *State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978).

Involuntary manslaughter is defined as "the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977). In this case there is no evidence of an unintentional killing or of a culpably negligent killing upon which a finding of involuntary manslaughter could be made. Indeed, it is defendant's argument and contention that the State's witness, Robert Ford, deliberately shot and killed the victim. We find no error in the refusal of the trial judge to instruct the jury on involuntary manslaughter.

We have examined defendant's assignments of error to the charge of the court and find them to be without merit.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

WALTER ARNELL WEST v. G. D. REDDICK, INCORPORATED

No. 7723SC1016

(Filed 17 October 1978)

1. **Process § 12; Rules of Civil Procedure § 4— summons directed to agent of corporate defendant**

A summons was not fatally defective because it was directed to an agent of the corporate defendant rather than to the corporate defendant itself.

2. **Rules of Civil Procedure § 41.1— voluntary dismissal after defendant's motion to dismiss allowed**

The trial court did not err in allowing plaintiff's motion for voluntary dismissal under G.S. 1A-1, Rule 41(a)(2) after the court had allowed defendant's motion to dismiss for lack of personal jurisdiction where no appeal was pending at the time of the voluntary dismissal order, and both of the court's orders were entered at the same term of court.

3. **Appeal and Error § 16.1; Trial § 30— voluntary dismissal—pending appeal—subsequent supplemental order**

The trial court could not properly enter a supplemental order affecting two prior orders where the trial court had allowed a voluntary dismissal, defendant had given notice of appeal from the order of voluntary dismissal, and the term during which the two prior orders were entered had expired.

APPEAL by defendant from *Kivett, Judge*. Orders entered 15 and 30 September 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 20 September 1978.

Plaintiff instituted this action to recover for injuries allegedly received while in defendant's store on 25 July 1974. The civil summons was directed as follows:

> "Richard J. Tuggle, 228 W. Market Street, Greensboro, NC (Mr. Richard J. Tuggle, is the listed registered agent for G. D. Reddick, Inc.)"

Defendant answered, asserting that "plaintiff has not obtained valid in personam jurisdiction over the defendant."

Defendant's motion to dismiss for lack of personal jurisdiction was heard on 6 September 1977, at which time Judge Kivett announced in open court that he would allow the motion and that a written order would subsequently be entered; and the clerk so noted in her minutes. Judge Kivett, however, noted in settling

the record on appeal that he thereafter decided to reconsider the matter but did not so inform the clerk.

Judge Kivett signed an order on 12 September allowing the motion to dismiss, and this order was filed. On 15 September, plaintiff filed a motion for voluntary dismissal, and Judge Kivett signed an order allowing same. Defendant then gave notice of appeal from the 15 September order.

Then on 30 September, Judge Kivett, on his own motion, entered a supplemental order to the effect that: he had inadvertently signed the 12 September 1977 dismissal order, and an employee in the clerk's office had inadvertently filed it; he, in fact, never intended to issue a final ruling on the motion to dismiss; he studied the matter and decided to allow plaintiff a voluntary dismissal without prejudice; the 12 September order should be declared null and void; and the 15 September order stated his true intentions. Defendant also appealed the 30 September supplemental order.

Vannoy, Moore & Colvard, by J. Gary Vannoy, and Morris W. Keeter, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Keith W. Vaughan, for defendant appellant.

ERWIN, Judge.

[1] First, we reject defendant's contention that the trial court acquired no personal jurisdiction over it. A summons containing the alleged infirmity with which we are here confronted was upheld by our Supreme Court in *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978). The Court in *Wiles* overruled a line of authority to the extent that the cases therein were inconsistent with the rule announced by the Court. The *Wiles* rule was applied by this Court in *Public Relations, Inc. v. Enterpries, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978).

[2] We further conclude that the trial court properly allowed plaintiff's motion for voluntary dismissal. G.S. 1A-1, Rule 41(a)(2), "Voluntary Dismissal by Order of Judge," provides in pertinent part:

"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."

Whether an order granting voluntary dismissal under Rule 41(a)(2) should be entered is a matter of trial court discretion. *King v. Lee*, 279 N.C. 100, 181 S.E. 2d 400 (1971); *Lewis v. Piggott*, 16 N.C. App. 395, 192 S.E. 2d 128 (1972). Rule 41 places no time limit on the right of a plaintiff to move for a voluntary dismissal under 41(a)(2). *See* Shuford, N.C. Civil Practice and Procedure, § 41-5. In *King v. Lee, supra*, our Supreme Court remanded the case to permit a motion for voluntary dismissal. We note that no appeal was pending herein at the time the voluntary dismissal order was entered. *Cf. Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977). Further, the 12 and 15 September orders were entered during the same term of court.

[3] Further, we are of the opinion that the 30 September order is of no effect and must be vacated, because the trial court could not properly enter any further orders in the case in that defendant had at that point previously filed notice of appeal from the 15 September order, the trial court had allowed a voluntary dismissal, and the term of court during which the 12 and 15 September orders had been entered had expired. *See Bowen v. Motor Co., supra; Sutton v. Sutton*, 18 N.C. App. 480, 197 S.E. 2d 9 (1973); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973).

The results, therefore, are as follows: the order of 15 September 1977 is affirmed; the order of 30 September 1977 is vacated.

Judges MORRIS and VAUGHN concur.

In re Stroud

IN THE MATTER OF: THE ABANDONMENT OF BRADLEY JOEL STROUD, MINOR

DORIS T. STROUD RIGBY, PLAINTIFF v. CLARENCE REID STROUD, RESPONDENT

No. 7722SC1015

(Filed 17 October 1978)

Parent and Child § 9.2— abandonment of child—insufficiency of evidence

Evidence was sufficient to support the trial court's conclusion that respondent had not willfully abandoned his child where such evidence tended to show that respondent had regularly paid the petitioner the sum of $75 every two weeks as child support from the date of their separation until the separation agreement was reached by the parties; by the separation agreement, the respondent conveyed to the petitioner a 25 acre farm for the purpose of providing for the maintenance and support of the child; and respondent made gifts to his child at Christmas and had made attempts to visit the child.

APPEAL by petitioner from *Rousseau, Judge*. Order entered 8 September 1977 in Superior Court, IREDELL County. Heard in the Court of Appeals 20 September 1978.

The petitioner and the respondent obtained an absolute divorce in 1974. The petitioner, Doris T. Stroud Rigby, initiated this action in 1976 by the filing of a petition seeking a determination that the respondent, Clarence Reid Stroud, had abandoned their minor son by failing to make support payments and failing to exercise visitation privileges. By verified response, the respondent denied abandoning his son. He asserted that he had paid $75 in child support every two weeks between the time of the separation of the parties in 1973 and their execution of a separation agreement in 1974. The respondent also asserted that he had ceased paying support in accordance with the terms of the separation agreement whereby he had conveyed to the petitioner his equity in a twenty-five acre poultry farm for the maintenance and support of the child. The respondent further asserted that he had made regular attempts to visit his son, made numerous requests to have his son with him, and had given the child gifts regularly. The trial court, hearing the case without a jury, made findings of fact, concluded as a matter of law that the respondent had not willfully abandoned the child and dismissed the petition. The petitioner appealed.

Homesley, Jones, Baines & Dixon, by Wallace W. Dixon, for the petitioner appellant.

Harris & Pressly, by Edwin A. Pressly, for the respondent appellee.

MITCHELL, Judge.

The petitioner's appeal presents the single issue of whether the trial court correctly determined that the respondent had not abandoned his minor son. In this jurisdiction, by statutory definition, "an abandoned child shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child." G.S. 48-2(3a). A child has been "willfully abandoned" within the meaning of the statute when the conduct of the abandoning parent over the six months period reveals a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child. *Pratt v. Bishop*, 257 N.C. 486, 503, 126 S.E. 2d 597, 609 (1962).

In attempting to determine whether the respondent had willfully abandoned his minor child, the trial court made certain findings of fact. The petitioner contends that these findings were not based upon evidence presented during the hearing before the trial court. In reviewing the order of the trial court, we have determined that some of the facts found were not supported by competent evidence. The remaining facts found by the trial court were, however, supported by competent evidence and were sufficient to support the trial court's conclusion that the respondent did not willfully abandon his child.

The trial court found, *inter alia*, that the respondent had regularly paid the petitioner the sum of $75 every two weeks as child support from the date of their separation until the separation agreement was reached by the parties. By the separation agreement, the respondent conveyed to the petitioner a twenty-five acre farm for the purpose of providing for the maintenance and support of the child. Additionally, the trial court found that the respondent made gifts to his child at Christmas and had made attempts to visit the child. These findings were supported by competent evidence and constituted a sufficient basis for the trial

court's conclusion of law that the respondent had not willfully abandoned his child.

The burden of proof was upon the petitioner to show that the respondent had willfully abandoned the child. *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597 (1962). The trial court concluded that the petitioner had failed to carry that burden. The conclusion of the trial court being supported by the findings of fact previously set forth, which were in turn supported by competent evidence introduced at the hearing, the order of the trial court dismissing the petition must be and is

Affirmed.

Judges MORRIS and ERWIN concur.

DOROTHY WEARRING v. BELK BROTHERS, INC.

No. 7726SC955

(Filed 17 October 1978)

Process § 12; Rules of Civil Procedure § 4— summons directed to officer of corporation—sufficiency of service on corporation

A summons was not fatally defective because the directory paragraph contained the name of an officer of the corporate defendant instead of the name of the corporation itself where both the caption of the summons and the accompanying complaint clearly showed that the corporation rather than the individual officer was being sued.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 4 August 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 August 1978.

On 23 February 1977, the plaintiff filed a complaint against the defendant, Belk Brothers, Inc., alleging negligence. Five days later, the summons and complaint were personally served on the executive vice-president of the defendant corporation. The caption of the summons indicated that it concerned the matter of "Dorothy Wearring, Plaintiff Against Belk Brothers, Inc., Defendant," but it was directed to "Mr. Leroy Robinson, Exec. V. P., Belk Uptown, 115 East Trade Street, Charlotte, North Carolina."

On 24 March 1977, the defendant made a special appearance in superior court and moved to dismiss the action for insufficiency of process and of its service and for lack of personal jurisdiction. While the parties were awaiting a hearing on the motion, the statute of limitation on the action ran. When the hearing was conducted on 4 August 1977, the presiding judge entered an order and judgment dismissing the action for insufficiency of process and of its service and for lack of jurisdiction over the person of the defendant. From the entry of that judgment and order, the plaintiff appealed.

Chambers, Stein, Ferguson & Becton, P. A., by Karl Adkins, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by E. Fitzgerald Parnell III, for defendant appellee.

MITCHELL, Judge.

The plaintiff's sole assignment of error is directed to the trial court's determination that there was insufficient service of process. In support of this assignment, the plaintiff argues that the summons was not fatally defective even though the directory paragraph contained the name of an officer of the defendant corporation instead of the name of the corporation itself since the caption contained the correct name of the defendant corporation.

The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him. 83 C.J.S., Summons, p. 795. Fundamental fairness requires that a summons should be of sufficient particularity so as to leave no reasonable doubt as to whom it is directed. However, this requirement does not force the courts to overlook the obvious when determining the validity of a summons.

In dealing with this problem, the Supreme Court of North Carolina recently overruled long-standing authority and indicated in *Wiles v. Construction Co.*, 295 N.C. 81, 85, 243 S.E. 2d 756, 758 (1978), 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. (Citations omitted.)

In the case *sub judice*, the caption of the summons clearly indicated that the corporation was being sued. In addition, the complaint, which must accompany a summons pursuant to G.S. 1A-1, Rule 4(d), showed that the corporation rather than an individual was being sued. Therefore, there was no insufficiency in the service of process and the court had jurisdiction over the defendant. *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978).

For this reason, the decision of the trial court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. JEROME PHILLIPS

No. 783SC497

(Filed 17 October 1978)

Constitutional Law § 28; Criminal Law §§ 18.4, 26.9— conviction of misdemeanors in district court—appeal for trial de novo—indictment and conviction of felony in superior court—denial of due process

A defendant who appealed to the superior court from his conviction in the district court of nonfeloniously attempting to break and enter and nonfeloniously peeping secretly into a room occupied by a female person was denied due process by his indictment for burglary and conviction of attempted felonious breaking and entering in the superior court based on the same conduct for which he was convicted in the district court.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 5 January 1978 in Superior Court, PITT County. Heard in the Court of Appeals 26 September 1978.

Attorney General Edmisten, by Associate Attorney Tiare Smiley Farris, for the State.

John M. Savage for the defendant.

BROCK, Chief Judge.

Defendant was tried and convicted in District Court under two warrants. One charged defendant with non-felonious attempting to break and enter. The other charged defendant with non-felonious secretly peeping into a room occupied by a female person. Defendant was sentenced to consecutive terms of two years and one year imprisonment. He appealed both convictions to Superior Court for trials *de novo*. Both of the foregoing charges arose out of the same incident.

Prior to trial *de novo* in Superior Court the district attorney secured a grand jury indictment charging defendant with the felony of burglary. The charges in the bill of indictment arose from the same conduct for which defendant was convicted of the two misdemeanor charges in District Court from which he appealed to Superior Court for trial *de novo*.

In Superior Court defendant was arraigned, pled not guilty, was tried for burglary and convicted of attempted felonious breaking or entering for which he was sentenced to a term of ten years imprisonment on 5 January 1978.

On 20 January 1978 the district attorney entered a voluntary dismissal of the two misdemeanor charges which defendant had appealed to Superior Court for trial *de novo*. The grounds for the dismissal of each charge was stated as follows: "Defendant convicted of attempted felonious breaking and entering in 77CRS16860 based on same facts as enter into this case."

Defendant challenges the felony indictment and his conviction thereunder upon the grounds of denial to him of due process of law. We sustain his challenge on the grounds of denial of due process of law and do not reach his further challenge to the felony indictment on the grounds of double jeopardy.

The rationale of *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974) is applicable to the present case. In *Blackledge*, the defendant was convicted in District Court,

Northampton County, North Carolina, of a misdemeanor assault. He appealed to Superior Court for trial *de novo*. Prior to the trial *de novo* the district attorney secured a grand jury indictment charging defendant with a felonious assault for the same conduct for which he was tried and convicted in District Court of a misdemeanor assault. Fearing the possibility of vindictiveness by the prosecutor, the Court noted in *Blackledge* that "[a] prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the superior court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." Blackledge, *supra*, at 27-28, 94 S.Ct. at 2102, 40 L.Ed. at 634.

There is absolutely no evidence in this case that the district attorney acted in bad faith or maliciously in seeking the felony indictment against defendant. However, the rationale of *Blackledge*, similar to the rationale of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), is that actual retaliatory motivation by the district attorney need not be shown or even exist. The concern is that the fear of such vindictiveness by the district attorney may unconstitutionally deter a defendant's exercise of the right to appeal from the District Court to the Superior Court for trial *de novo*. "Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to [defendant's] invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." Blackledge, *supra*, at 28-29, 94 S.Ct. at 2103, 40 L.Ed. at 635.

For the reasons stated, defendant's conviction of the felony charge in Superior Court was in effect a nullity.

Judgment vacated and action dismissed.

Judges CLARK and MARTIN (Harry C.) concur.

SANDRA ELAINE PHILPOTT v. SAM EDWARD JOHNSON

No. 7714SC1031

(Filed 17 October 1978)

1. **Process § 1.1— manner of service of process—no findings of fact by trial court—consideration by Court of Appeals**

On a motion to dismiss for insufficiency of process where the trial court entered an order without making findings of fact, the Court of Appeals will determine as a matter of law if the manner of service of process was correct.

2. **Rules of Civil Procedure § 4.1— service by publication—affidavit filed six months after publication**

Though an affidavit showing service by publication was not filed until after a motion to quash had been filed and some six months after the last day of publication, the required affidavit was nevertheless filed "upon completion of such service," and defendant showed no prejudice resulting to him as a result of this plaintiff's waiting approximately six months to file the affidavit. G.S. 1A-1, Rule 4(j)(9)c.

3. **Process § 10.4— service by publication—proof of service by affidavit—affidavit of corporation's agent sufficient**

G.S. 1-75.10, requiring proof of service of process by the affidavit of a publisher or printer, his foreman or principal clerk, is complied with when an agent executes an affidavit for the publisher which is a corporation.

APPEAL by plaintiff from *Jackson, Judge*. Judgment entered 11 October 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 September 1978.

This is an appeal from an order of the superior court quashing a service of summons. The complaint was filed and the summons issued on 23 November 1976. The summons was returned by the Durham County Sheriff's Department on 24 November 1976 indicating the defendant was not to be found within Durham County. Thereafter, on 17 December 1976, service by publication was commenced in the *Durham Morning Herald*. On 10 June 1977, the defendant filed a motion to quash the service of summons. On 13 June 1977, the plaintiff filed an affidavit by Donna B. Minor, an agent of the Durham Herald Co., Inc., publishers of the *Durham Morning Herald*, saying that the notice of publication had been published once a week for three successive weeks commencing 17 December 1977. An affidavit by W. W. Perry, attorney for the plaintiff, was also filed on 13 June

1977. The superior court quashed the service of the summons and the plaintiff appealed.

W. W. Perry, and Malone, Johnson, DeJarmon and Spaulding, by Albert L. Willis, for plaintiff appellant.

Smith, Anderson, Blount and Mitchell, by J. G. Billings, for defendant appellee.

WEBB, Judge.

We hold it was error for the superior court to quash the service of summons and we reverse.

[1] The defendant first contends that since the judge of superior court entered the order quashing the service without any findings of fact and without a request for findings that the superior court judgment is deemed to be supported by the proper findings and the plaintiff is precluded from challenging them. *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E. 2d 509 (1976) holds that on a motion to dismiss for insufficiency of process where the trial court entered an order without making findings of fact, the Court of Appeals will determine as a matter of law if the manner of service of process was correct. In this case there is no dispute as to the manner of service of process. We hold we may examine this service to see if it is a correct service of the summons.

[2] The defendant also contends that the plaintiff did not file with the court an affidavit showing service by publication upon completion of the service. In order for service by publication to be complete, Rule 4(j)(9)c of the North Carolina Rules of Civil Procedure dealing with service by publication provides in part:

> "Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication."

The defendant argues that since the required affidavit was not filed until after the motion to quash had been filed and some six months after the last day of publication the required affidavit was not filed "upon completion of such service." No prejudice has been shown to the defendant as a result of the plaintiff's waiting ap-

proximately six months to file the affidavit. We hold that in this case the affidavit was filed "upon completion of such service."

[3] Finally, the defendant contends that the affidavit does not comply with G.S. 1-75.10 dealing with proof of service of process which says:

> "Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> * * *
>
> (2) Service of Publication.—In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, ..."

The defendant contends that the affidavit was not made by the "publisher or printer or his foreman or principal clerk," but by an agent of the publisher as shown on the affidavit. The affidavit shows that the publisher is a corporation. Corporations act through agents. We hold that it is compliance with the statute when an agent executes an affidavit for the corporation.

For the reasons stated in this opinion, we hold the defendant was properly served by publication.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. GEORGE DANIELS, JR.

No. 782SC441

(Filed 17 October 1978)

1. Assault and Battery § 16.1— assault with a deadly weapon—no instruction on simple assault—no error

Since a blackjack has been held to be a deadly weapon *per se*, and the evidence tended to show that defendant struck the victim in the head with a blackjack, the trial court was not required to charge on the lesser included offense of simple assault in a prosecution for assault with a deadly weapon.

2. Assault and Battery § 15.1— assault with a deadly weapon—failure to define assault—no error

In a prosecution for assault with a deadly weapon, the trial court did not err in failing to define assault, since the jury was instructed that it must find from the evidence and beyond a reasonable doubt that defendant "struck Mr. Jackie Campbell over the head with a blackjack."

APPEAL by defendant from *Cowper, Judge.* Judgment entered 8 March 1978, Superior Court, BEAUFORT County. Heard in the Court of Appeals 19 September 1978.

Defendant was convicted of assaulting Jackie Campbell on 16 December 1977 with a deadly weapon, a blackjack, and he appeals from the judgment imposing a prison term of four months.

All of the evidence tends to show that defendant forcefully took a blackjack from Jackie Campbell, a store clerk, and struck him about the head three times, which required medical treatment including three sutures. Defendant testified that Campbell was advancing on him in a threatening manner when defendant struck him.

Attorney General Edmisten by Associate Attorney John R. Wallace for the State.

John H. Harmon for defendant appellant.

CLARK, Judge.

[1] The defendant assigns as error the failure of the trial court to submit to the jury the lesser offense of simple assault. If the weapon used in the assault by the defendant was a deadly weapon *per se* the trial court was not required to charge on the lesser included offense of simple assault, even though the trial court did not charge that the instrument used in the assault was a deadly weapon as a matter of law.

Though there is some discrepancy in the designation of the weapon by the various witnesses, we find from the record on appeal that the weapon was a blackjack. The narration of the testimony in the record reveals that Jackie Campbell, the owner of the weapon, referred to it as a "blackjack." The other two witnesses for the State used the word "blackjack." The defendant referred to the weapon as a "blackjack" several times and a

"stick" several times. Defendant's other witness also referred to the weapon as a "stick." In the instructions to the jury the trial judge, in summarizing the testimony of State's witness Rodney Atkins, said: "He said the blackjack was about eighteen inches long. Of course, you know what a blackjack is." Subsequently, after defining a deadly weapon as a weapon which is likely to cause death or serious injury, the trial judge added: "This weapon was described as about eighteen inches long, bound in leather." The defendant makes no exceptions to the instructions referred to. Under these circumstances we conclude that the weapon, about eighteen inches long and bound in leather, was a blackjack.

It has been held that a blackjack is a deadly weapon *per se*. *State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930). In both *Hefner* and the case *sub judice* the defendant struck the victim with force on the head.

In *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946), it was held that a brick thrown with force by the defendant constituted a deadly weapon as a matter of law, and it was not error for the trial court to refuse to submit to the jury the question of defendant's guilt of simple assault, even though the question of whether the brick as used was a deadly weapon was submitted to the jury.

The trial court did not err in failing to submit the lesser offense of simple assault to the jury.

[2] Nor do we find merit in defendant's other assignment of error, the failure of the trial court to define assault. The jury was instructed that it must find from the evidence and beyond a reasonable doubt that defendant "struck Mr. Jackie Campbell over the head with a blackjack." This instruction was similar to that made by the trial court in *State v. Harris*, 34 N.C. App. 491, 238 S.E. 2d 642 (1977), where it was held the instruction was sufficient to define and explain the law arising on the evidence. The defendant relies on *State v. Hickman*, 21 N.C. App. 421, 204 S.E. 2d 718 (1974), where this court found reversible error because the trial court charged that the jury must find beyond a reasonable doubt that defendant " 'assaulted Clayton Fenner with a knife,' " and the court did not define "assault." 21 N.C. App. at 422, 204 S.E. 2d at 719. The instructions in the case before us are clearly distinguishable.

We find that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. LASH LARUE HAMMONDS

No. 7818SC472

(Filed 17 October 1978)

Burglary and Unlawful Breakings § 6.3— breaking and entering with intent to commit larceny—failure to define larceny

The trial court in a prosecution for breaking and entering with intent to commit larceny erred in failing to define the crime of larceny in its jury instructions.

APPEAL by defendant from *Long, Judge*. Judgment entered 9 February 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 September 1978.

Defendant was convicted of felonious breaking and entering. He was not represented by an attorney at trial. The State's evidence tended to show that two High Point police officers answered a silent alarm at 5:50 a.m. at the Westwood Furniture Company on 21 July 1977. The defendant was inside the building and told one of the officers that he was opening the building for the day's work. A few minutes later defendant walked away from the building and was arrested by the officers. Defendant had never been employed by the Westwood Furniture Company. Defendant, testifying as his only witness, claimed that he had never been in the Westwood Furniture Company building and was at home in bed at the time of the alleged illegal entry.

Judgment imposing an active prison sentence was entered. Defendant was then found to be indigent, and counsel was appointed to perfect his appeal to this Court.

Attorney General Edmisten, by Associate Attorney C. Jan Napowsa, for the State.

Assistant Public Defender Frederick G. Lind, for defendant appellant.

VAUGHN, Judge.

Defendant assisgns as error the trial court's failure to instruct the jury as to the definition of larceny. The defendant's exception is well taken. Although the trial court told the jury that the defendant was charged with felonious breaking and entering with the intent to commit larceny, the jury was never instructed as to the meaning of the term "larceny." Larceny is a legal term and not readily understood by the layman. *Cf. State v. Hickman*, 21 N.C. App. 421, 204 S.E. 2d 718 (1974) (trial court must define assault where defendant was charged with assault with a deadly weapon with intent to kill wherein serious injury was inflicted). Furthermore, larceny is an essential element of the crime of breaking and entering with the intent to commit larceny and must be explained to the jury. *State v. Elliott*, 21 N.C. App. 555, 205 S.E. 2d 106 (1974). In *Elliott*, this Court awarded a new trial for the failure of the trial court to define "larceny" in its instructions when defendant was being tried for breaking and entering with the intent to commit larceny. The facts in *Elliott* are quite similar to those in the present case, and here, as was done in that case, we must order a new trial.

Defendant was not represented by counsel at trial and argues, in essence, that he was entitled to court-appointed counsel. Since we conclude that defendant is entitled to a new trial on other grounds, we need not address that argument. Defendant has since been determined to be an indigent and is now represented by court-appointed counsel.

New trial.

Judges ARNOLD and WEBB concur.

CITY OF HICKORY v. CATAWBA VALLEY MACHINERY COMPANY

No. 7725DC1036

(Filed 17 October 1978)

Appeal and Error §§ 36.1, 39.1 — failure to serve and docket record in time

Appeal is dismissed for failure of appellant to serve the proposed record on appeal within the time allowed by the trial judge and for failure of appellant to file the record on appeal within 150 days after giving notice of appeal as required by App. R. 12.

APPEAL by defendant from *Edens, Judge*. Judgment entered 17 May 1977 in District Court, CATAWBA County. Heard in the Court of Appeals 21 September 1978.

The City of Hickory instituted this action to require defendant to remove a canopy which allegedly violated the City's zoning ordinance. Prior to trial the parties stipulated: that defendant's property is zoned "general business"; that such zoning prohibits extensions of canopies or other structures into the "front yard", the space between the main building and the street or highway; that when the zoning ordinance was adopted in January 1967 defendant already had a canopy which constituted a permissible non-conforming use; that sometime prior to October 1973, defendant removed the canopy and within 360 days replaced it with a larger canopy; that defendant did not secure a building permit before constructing the new canopy; and that on 25 October 1973 defendant was notified by the City that defendant's canopy was in violation of the zoning ordinance.

At the conclusion of the hearing the trial judge determined that defendant's construction of the new canopy was in violation of the zoning ordinance and defendant was ordered to remove the canopy. Defendant appealed.

Tate, Young & Morphis, by E. Murray Tate, Jr., for the plaintiff.

Rudisill & Brackett, by J. Steven Brackett, for the defendant.

BROCK, Chief Judge.

Notice of appeal was given in this case on 23 May 1977. On that date the trial judge enlarged the time within which appellant

was to serve its proposed record on appeal upon the appellee to 60 days from entry of notice of appeal. Appellant did not serve its proposed record on appeal upon appellee until 21 November 1977, which was 122 days beyond the time allowed by the trial judge. No extension of time beyond the 23 May 1977 order appears in this record.

The Rules of Appellate Procedure, (Rule 12), requires that the record on appeal be filed in the appellate division no later than 150 days after giving notice of appeal. Notice of appeal was entered on 23 May 1977. The record on appeal was filed in this Court on 13 December 1977, 204 days after giving notice of appeal. No extension of time to file the record on appeal appears in this record.

The Rules of Appellate Procedure are mandatory unless the Appellate Division suspends them under App. R. 2. We decline to suspend the rules applicable in this case.

The time schedules set out in the rules and such extension orders as may be entered are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. "Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time . . . if counsel can show good cause for extension." *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E. 2d 836 (1976); *see also, State v. Johnson*, 38 N.C. App. 111, 247 S.E. 2d 286 (1978).

Appeal dismissed.

Judges CLARK and MARTIN (Harry C.) concur.

In re Boyles

IN THE MATTER OF JACKIE G. BOYLES, RESPONDENT

No. 7821DC473

(Filed 17 October 1978)

Insane Persons § 2.1— motion to rehear—statutory notice not given—proceeding not dismissed

Failure to give respondent whose commitment to a state mental health facility was about to expire at least fifteen days notice of a motion by the acting chief of medical services to rehear did not require dismissal of the proceeding; instead, unless respondent could show some prejudice, the proper action would be to continue the proceeding until ample notice was given. G.S. 122-58.11(e).

APPEAL by respondent from *B. Allen, Judge*. Judgment entered 2 February 1978 in District Court, GRANVILLE County. File transferred to Forsyth County following hearing in accordance with directive from the Administrative Office of the Courts. Heard in the Court of Appeals 21 September 1978.

Respondent was committed to John Umstead Hospital for a period to expire 1 February 1978. On 27 January 1978, six days before the expiration of the commitment period, the acting chief of medical services of Umstead Hospital filed with the clerk of court a request for rehearing pursuant to G.S. 122-58.11. On 30 January 1978 respondent and his attorney were served with notice of the rehearing scheduled for 2 February 1978, three days away. When the case was called for hearing on that date, respondent moved to dismiss the proceedings for lack of a timely request for rehearing and lack of timely notice of rehearing. Respondent's motion was denied, and at the conclusion of the hearing respondent was ordered committed for 180 days. From the denial of his motion respondent appeals.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

S. F. Olive for respondent appellant.

ARNOLD, Judge.

N.C. G.S. § 122-58.11 sets out the procedures for involuntary commitment rehearings. As this was not the first rehearing, subsection (e) applies: "Fifteen days before the end of the . . . commitment period . . . the chief of medical services of the facility

shall . . . evaluate the condition of each respondent, and if he determines that a respondent is in continued need of hospitalization . . . shall so notify the respondent, his counsel, and the clerk of superior court. . . ." Respondent contends that this 15-day period has the effect of a statute of limitations, so that a proceeding brought on less notice must be dismissed. We disagree. Dismissal is too drastic, and unless respondent can show some prejudice the proper action would be to continue the proceeding until ample notice has been given.

Affirmed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 OCTOBER 1978

BUYERS CORP. v UNDERWRITERS, INC. No. 7726SC1028	Mecklenburg (75CVS8180)	No Error
FITCH v. MILLER No. 7715SC944	Orange (75SP155)	Affirmed
FOX v. MILLER No. 7725DC980	Caldwell (68CVD161)	Affirmed
GRAY v. GRAY No. 778DC1005	Wayne (76CVD146)	Appeal Dismissed
IN RE JONES No. 779DC1062	Guilford (77SP1416)	Reversed
McNAIR v. STEVENS & CO. No. 7810IC24	Industrial Comm. (G-6621)	Affirmed
SHEET METAL, INC. v. DISTRIBUTORS, INC. No. 7823DC8	Wilkes (76CVD1072)	No Error
SUPPLY CO. v. COLE No. 784DC7	Duplin (76CVD88)	Appeal Dismissed
STATE v. ABERNATHY No. 7825SC490	Catawba (77CRS15980)	No Error
STATE v. BLACK No. 7827SC411	Gaston (77CR7011) (77CR7012) (77CR7013) (77CR7014)	No Error
STATE v. CAGLE No. 7817SC406	Caswell (77CR889) (77CR894) (77CR895)	No Error
STATE v. HALL No. 7827SC512	Gaston (77CRS20346)	No Error
STATE v. JONES No. 7818SC501	Guilford (77CRS1930) (77CRS1931) (77CRS1932) (77CRS1933)	No Error
STATE v. MOORE No. 787SC485	Wilson (77CR3504)	No Error

CASES REPORTED WITHOUT PUBLISHED OPINION

STATE v. TOMS No. 7818SC522	Guilford (77CRS18361)	No Error
STATE v. WOOTEN No. 788SC306	Wayne (77CR11622)	No Error

HARRINGTON MANUFACTURING COMPANY, INC. v. POWELL MANUFACTURING COMPANY, INC.

No. 776SC602

(Filed 7 November 1978)

1. **Unfair Competition § 1— unfair competition or trade practices—application to disputes between competitors**

The statute prohibiting unfair methods of competition and unfair or deceptive trade practices, former G.S. 75-1.1, does not apply only to dealings between buyers and sellers but applies to disputes between competitors.

2. **Unfair Competition § 1— advertisement not false or misleading—no unfair competition**

Defendant's reference in its advertisement of a tobacco combine to its "exclusive CutterBar" for priming tips did not constitute an unfair method of competition or unfair or deceptive act or practice within the meaning of former G.S. 75-1.1 where, at the time the advertisement appeared, defendant was the only company which held a license to manufacture and sell the patented "CutterBar," plaintiff only obtained a similar license some two months after this suit was filed, and the advertisement was, therefore, neither false nor misleading.

3. **Unfair Competition § 1— puffing in advertisement—no unfair competition or deceptive act**

A statement in defendant's advertisement that only defendant's tobacco combine primed lugs through tips, when, in fact, a combine manufactured by plaintiff also primed lugs through tips, did not go so far beyond tolerable limits of puffing as to constitute unfair competition or an unfair or deceptive act within the meaning of former G.S. 75-1.1 where the advertisement concerned a machine which cost in excess of $16,000, and it was directed to knowledgeable buyers who would not normally make such a large capital outlay by relying solely upon such an advertisement.

4. **Unfair Competition § 1— puffing in advertisement—no unfair competition or deceptive act**

Allegedly false statements in plaintiff's advertisement that its tobacco primer was "years ahead of any other automatic tobacco harvester on the market," that its primer was a dramatic breakthrough in tobacco harvesting, and that its tobacco curing barns and racks had greater capacity, strength and fuel economy than those manufactured by defendant did not go so far beyond tolerable limits of puffing as to constitute unfair acts proscribed by former G.S. 75-1.1.

5. **Unfair Competition § 1— passing off competitor's goods as own product—unfair method of competition**

Defendant's allegations that plaintiff incorporated into its automatic tobacco harvester a defoliator manufactured by defendant and demonstrated this

defoliator to potential customers as a product manufactured by plaintiff stated a claim for relief under the statute prohibiting unfair methods of competition, former G.S. 75-1.1.

APPEALS by plaintiff and defendant from *James, Judge.* Judgment entered 11 May 1977 in the Superior Court, BERTIE County. Heard in the Court of Appeals 25 April 1978.

Decisions on prior appeals in connection with this litigation are reported in 26 N.C. App. 414, 216 S.E. 2d 379 (1975), *cert. denied,* 288 N.C. 242, 217 S.E. 2d 679 (1975), and in 30 N.C. App. 97, 226 S.E. 2d 173 (1976), *appeal dismissed, pet. for discretionary review allowed for limited purpose of granting leave to Powell to assert counterclaims,* 290 N.C. 662, 228 S.E. 2d 454 (1976), *appeal dismissed and cert. denied,* 429 U.S. 1031, 50 L.Ed. 2d 743, 97 S.Ct. 722 (1977).

Plaintiff, Harrington Manufacturing Company, Inc., and defendant, Powell Manufacturing Company, Inc. are competitors in the manufacture and sale of tobacco harvesting and curing equipment. On 12 September 1974 Harrington brought this action against Powell alleging that certain claims made in Powell's advertisements were false and fraudulent and that such advertisements constituted an unfair method of competition and a deceptive act declared unlawful by G.S. 75-1.1. Powell filed answer alleging as a defense that its advertising had been true. Powell also alleged as counterclaims: first, that certain claims in Harrington's advertisements concerning its automatic tobacco primer were untrue, disparaged Powell's tobacco combine, and were unfair and deceptive acts declared illegal by G.S. 75-1.1; second, that Harrington had wrongfully passed off certain of Powell's tobacco harvesting equipment as its own; and third, that Harrington had falsely advertised its tobacco curing barns and racks as having greater capacity, strength, and fuel economy than Powell's.

Defendant Powell's motion under Rule 12(b)(6) to dismiss Harrington's complaint for failure to state a claim upon which relief may be granted was denied. Powell then moved pursuant to Rule 56 for summary judgment dismissing plaintiff Harrington's action, supporting its motion by affidavits, answers to interrogatories, and depositions. Plaintiff Harrington moved pursuant to Rule

12(b)(6) to dismiss Powell's counterclaims for failure to state a claim upon which relief can be granted. The court allowed both motions, and both parties appealed.

Pritchett, Cooke & Burch by Stephen R. Burch and William W. Pritchett, Jr., for plaintiff, Harrington Manufacturing Company, Inc., appellant-appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage and William P. Farthing, Jr., for defendant Powell Manufacturing Company, Inc., appellant-appellee.

PARKER, Judge.

PLAINTIFF'S APPEAL

On plaintiff Harrington's appeal, Harrington assigns error to the granting of Powell's motion dismissing Harrington's action by way of summary judgment. Defendant Powell contends the summary judgment was properly entered and cross-assigns as error the denial of its earlier motion to dismiss Harrington's complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

In substance, plaintiff Harrington alleged in its complaint that defendant Powell had advertised falsely that its tobacco combine was the only one which "primes lugs through tips" and that it owned the "exclusive CutterBar" for priming tips, that these statements were not true in that Harrington also manufactured a tobacco harvester which primed lugs through tips and also held a license to manufacture and sell the same device advertised by Powell as its "exclusive CutterBar," and that such false advertising by Powell constituted an unfair method of competition with Harrington and was a deceptive act declared unlawful by G.S. 75-1.1(a). Plaintiff Harrington further alleged that Powell's untrue advertisements had damaged plaintiff in the sum of $10,000,000.00, for which it prayed that it be awarded treble damages under G.S. 75-16.

We note initially that Chap. 747 of the 1977 Session Laws, which rewrote Subsections (a) and (b) of G.S. 75-1.1, is not applicable to the present case. This action was pending when the 1977 act was adopted, and Sec. 5 of that act expressly provides

that it shall not apply to pending litigation. Therefore, as applicable to this case G.S. 75-1.1 is the form of that statute as it existed prior to the 1977 amendment, and the further references to that statute in this opinion will be to the statute as it was originally adopted in 1969 and as it read when this case was instituted. At that time, G.S. 75-1.1(a) and (b) read:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

[1] At the outset, we consider and reject defendant Powell's contention, asserted as one of its grounds for sustaining the summary judgment and also as a ground in support of its cross-assignment of error, that G.S. 75-1.1 does not apply to disputes between competitors but only to "dealings" between "buyers and sellers." From this, Powell argues that, there having been no "dealings" between it and Harrington as "buyers and sellers," G.S. 75-1.1 can have no application to this case. We do not so narrowly read the statute. G.S. 75-1.1(a) expressly proscribes "[u]nfair methods of competition," and competition necessarily requires that there be a competitor. G.S. 75-1.1(b) speaks in terms of declaring and providing civil means of maintaining ethical standards of dealings "between persons engaged in business," as well as between such persons and the consuming public. We hold, therefore, that G.S. 75-1.1 is applicable to the transactions alleged in plaintiff's complaint. The question presented by plaintiff's appeal thus becomes whether, when that statute and any applicable common law principles are properly applied to the material facts as to which no genuine issue has been shown, defendant was as a matter of law entitled to the summary judgment dismissing plaintiff's action. We hold that it was.

Affidavits, depositions, and answers to interrogatories show that there is no genuine issue as to the following facts:

Powell placed the following advertisement in the September and October 1974 issues of *The Progressive Farmer* and in the 5 September 1974 issue of *Southeast Farm and Livestock Weekly*:

IF YOU ALREADY OWN A POWELL TOBACCO COMBINE, SHOW THIS AD TO YOUR NEIGHBOR.

HE WANTS TO STAY IN BUSINESS TOO:

Like you, with labor high, hard to find and harder to keep, most tobacco growers have no choice. They *have* to mechanize to stay in business.

Powell's exclusive, *proven* system of Total Tobacco Mechanization is the answer. It's flexible . . . you start on any scale you want and add to it each year.

Consider the high-capacity Powell Tobacco Combine. Used with Powell Bulk Curing/Drying Systems, it can cut your *total* harvest labor to just 4 people! (Driver, Transporter, 2 Rack & Barn Loaders.) This high capacity machine enables you to harvest one acre per hour with this small crew.

And *only* the Powell Combine primes *lugs through tips*. Our FlexBar header, plus exclusive CutterBar for priming tips, gets the job done.

Mechanize the Powell Way. Start now for '75-Advance planning is the key. Ask Powell to help. Mail the coupon today.

Powell also had the following advertisement broadcast on four dates in August 1974 from television stations in High Point, Raleigh, and Greenville, North Carolina, and from television stations in Florence, South Carolina, and Albany, Georgia:

"Total Mechanization

"With this year's tobacco crop season winding up, it's not a day too soon to begin planning next year's crop, and how you'll handle it.

"With labor high and hard to find, most growers have no choice. They must mechanize to stay in business.

"Usually you'd begin by installing one or more Powell bulk curing systems, like these Powell three-tier mobile units. This high-capacity, efficient system can cut both your curing labor and fuel costs in half.

"Then there's the proven, high-capacity Powell tobacco combine, that harvests an acre an hour—usually with just one man—the driver. It's the only combine on the market that primes lugs through the tips.

"Also the two or four row Powell Aerotopper, to top and spray your crop . . .

"And single and multi-row Powell transplanters, with once-over fertilizer units.

"That's Total Tobacco Mechanization . . . pioneered by Powell. Talk to your Powell dealer. Start planning now for seventy-five."

Powell has manufactured and sold its "CutterBar" since 1962. "CutterBar" is a descriptive term used exclusively by Powell to describe a mechanical tobacco harvesting device consisting of a blade assembly which operates on the principle of utilizing blades revolving with an upward cutting motion to cut leaves from the tobacco stalk. This blade assembly was invented by Dr. William Splinter of North Carolina State University, and it is sometimes referred to as the "Splinter knife type defoliator." The patent rights on this invention were assigned by North Carolina State University to Research Corporation of America, which in turn granted Powell a license to manufacture and sell machines covered by the patent. From March 1962 until 15 November 1974 Powell was the only firm licensed under the Splinter patent. On 15 November 1974 Research Corporation of America granted Harrington a license to manufacture under the patent. Both the license granted to Powell and the license granted to Harrington were non-exclusive.

Beginning in 1967 Harrington has also manufactured a fully automotic tobacco harvester which it has advertised and sold under the name "Roanoke Automatic Tobacco Harvester." Prior to the fall of 1974 this machine utilized a revolving rubberized spiral type defoliator to wipe the leaves from the stalk in a

downward motion. This machine would prime lugs through tips. In August 1974 an employee of Harrington purchased a Powell "CutterBar" from Revelle Tractor Company. This unit, which had been manufactured by Powell, was brought to Harrington's plant in Lewiston, North Carolina, where it was incorporated into one of Harrington's automatic tobacco harvesters. Harrington added a hydrosynchronizer, a device which had been invented by Harrington's engineers, which synchronized by hydraulics the timing of the knife of the blade assembly with the forward motion of the harvester. On 28, 29, and 30 September 1974 Harrington broadcast a commercial over television stations in Greenville and Durham, North Carolina, and in Roanoke, Virginia. The video portion showed a blade assembly operating in a tobacco field and this was accompanied by the following audio announcement:

> Mr. Tobacco Farmer:
>
> Attend the Roanoke Automatic Tobacco Harvester Demonstration Monday, September 30; Tuesday, October first. See the Roanoke Automatic Tobacco Harvester using the Roanoke Hydro-Synchronized Blade Assembly. The Hydro-Synchronized Blade Assembly is a Dramatic Break-Through in harvesting tobacco. For information and direction, call Harrington Manufacturing Company, Lewiston, North Carolina.

As advertised in this commercial, Harrington demonstrated its automatic harvester, to which the Powell "CutterBar" had been attached, to some three hundred farmers who came from Eastern North Carolina, South Carolina, and Georgia. Harrington did not tell them it was a Powell "CutterBar" that they were looking at. Harrington took approximately fifteen orders for its Hydrosynchronized blade assembly for delivery before the 1975 tobacco season.

The list price for a fully equipped 1974 Powell tobacco combine was $16,398.60. The retail price of a 1974 standard Harrington Roanoke harvester was $16,500.00.

[2] As above noted, the gravamen of plaintiff Harrington's complaint is that Powell violated G.S. 75-1.1 by falsely advertising that Powell's tobacco combine was the only one which primed lugs through tips and that it owned "the exclusive CutterBar for

priming tips." As to this latter charge concerning the CutterBar, the only reference made to this device by name in the advertisement of which Harrington complains was in the sentence which stated, "Our FlexBar header, plus exclusive CutterBar for priming tips, gets the job done." It is undisputed that at the time this advertisement appeared in 1974 and for some twelve years prior thereto, Powell was in fact the only company which held a license to manufacture and sell the patented device to which it gave the name "CutterBar." It was not until 15 November 1974, approximately two months after this case was instituted, that Harrington obtained a similar license. Under these circumstances the reference in Powell's advertisement to "exclusive CutterBar" was neither false nor misleading. Publishing an advertisement which is neither false nor misleading is not an unfair method of competition or unfair or deceptive act or practice within the meaning of G.S. 75-1.1.

[3] As to the statement in Powell's advertisement that "only the Powell Combine primes lugs through tips," Harrington contends that the logical implication of such a statement is that Harrington's automatic tobacco harvester did not prime lugs through tips, that this was untrue, and that the making of such a disparaging statement constituted an unfair method of competition and was an unfair or deceptive act declared unlawful by G.S. 75-1.1(a). If it be conceded that the disparaging implication of which Harrington complains may be drawn from the Powell advertisement as a matter of strict logic, it does not necessarily follow that the making of the advertisement, in the context of this case, comes within the ambit of unfair conduct proscribed by the statute. Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair." *Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E. 2d 59, 61 (1942). Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others. The experience of our times is that a certain amount of puffing of one's own goods, even when the logical implication is to disparage the goods of another, has long been prevalent in our culture. Whether such puffing in the case of particular advertisement exceeds the bounds of fairness must be

determined by viewing it against the background of all of the relevant facts of that case. One relevant fact concerns the market which the advertisement is designed to influence. A false advertisement designed to influence the buying habits of children should be judged by stricter standards than one directed only toward the knowledgeable and sophisticated. In the present case Powell's advertisement concerned a machine which cost in excess of $16,000.00. It was directed to farmers who could afford such a substantial investment and whose operations had been sufficiently successful that they had grown big enough to justify the use of such expensive equipment. Buyers of this type would not normally make such a large capital outlay by relying solely upon a magazine advertisement or a radio or television broadcast, especially when accurate technical information concerning the item was readily available. It is our opinion, and we so hold, in the context of this case Powell's advertisement did not constitute unfair competition or an unfair or deceptive act within the meaning of G.S. 75-1.1.

The order granting defendant's motion for summary judgment is

Affirmed.

DEFENDANT'S APPEAL

Defendant Powell appeals from the order granting plaintiff's motion under Rule 12(b)(6) dismissing defendant's three counterclaims for failure to state a claim upon which relief can be granted.

[4] Powell's first and third counterclaims (alleged in its "Fourth Defense" and "Sixth Defense" respectively) present essentially the same question as was presented by plaintiff's appeal.

In its first counterclaim, Powell complains that the following advertisements published by Harrington were untrue, disparaged Powell's tobacco combine, and were unfair within the meaning of G.S. 75-1.1:

> "Roanoke's '76 Model Automatic Tobacco Primer . . . years ahead of any other automatic harvester."
>
> "Roanoke was the '74 field champion."

"Roanoke Automatic Tobacco Primer, the one that really works; a dramatic breakthrough in tobacco harvesting."

"Roanoke's '74 Model Automatic Tobacco Primer is years ahead of any other automatic tobacco harvester on the market."

"Harrington Manufacturing Company, Inc. has announced a new tobacco harvester component which was demonstrated to tobacco harvester dealers and farmers in the U.S. and Canada.

A blade defoliator that gets all the leaves on the upper half of the stalk without getting all the suckers is working very effectively, say the developers."

Powell alleged that the foregoing advertisements by Harrington damaged Powell's business reputation and the business reputation of its machines in the sum of $10,000,000.00, and it prayed recovery of treble damages under G.S. 75-16.

In its third counterclaim, Powell complains about an advertisement published by Harrington that Harrington's tobacco curing barns have the "largest capacity rack" and that it has "the only bolted rack on the market—no welding or self-tapping set screws." Powell also complained concerning a Harrington advertisement which proclaimed:

Loading Capacity Unequaled

The Roanoke Bulk Tobacco Curing Rack is the brute of the industry. It's designed for heavy loading for fuel savings. Its capacity is unequaled—13% larger than Long, stronger than Powell. The Roanoke Rack has 5 more tines than the Powell Rack—more tine support for more holding power, less fallout. Strong cradle section allows full packing. The Roanoke Rack is designed for heavier loading for fuel economy—fill it up and save on fuel costs.

Powell alleged that Harrington's tobacco curing racks and barns do not have a greater capacity than Powell's, are not stronger than Powell's, do not save on fuel costs more than Powell's, and that Powell's are bolted, not welded, and have no self-tapping set screws. Powell alleged that Harrington's adver-

tisements were misrepresentations of facts and were unfair and deceptive acts prohibited by G.S. 75-1.1. Powell alleged that its damages directly caused by these acts were as much as $13,500,000.00, and it prayed for treble damages under G.S. 75-16.

What was said in connection with plaintiff's appeal is applicable to defendant's appeal from the order dismissing its first and third counterclaims. The statements in Harrington's advertisements as to which Powell complains did not, in our opinion, go so far beyond tolerable limits of puffing as to constitute unfair acts proscribed by G.S. 75-1.1. Harrington's advertisements, as was the case with Powell's which were the subject of Harrington's complaint, were directed to knowledgeable buyers who could not easily have been misled by exaggerated claims. We caution, however, that all advertisers would be well advised to exercise care not to step over the necessarily vague but nonetheless real boundary line dividing fair conduct from foul which the court from time to time may be called upon to draw. This is particularly true in view of the possibility that treble damages might be imposed under G.S. 75-16. We hold only that, under the circumstances of this case, the advertisements which were the subject of defendant's first and third counterclaims, like those which were the subject of plaintiff's complaint, did not pass over that line. There was no error in the trial court's order dismissing defendant's first and third counterclaims.

[5] Powell's appeal from the order dismissing its second counterclaim presents a different question. In its second counterclaim (alleged as its "Fifth Defense and Counterclaim"), Powell in substance alleged: that in the fall of 1974 Harrington advertised extensively in newspaper advertising and on television that its "Roanoke Hydro-Synchronized Blade Assembly" was a "dramatic break-through;" that a demonstration of the "Roanoke Automatic Tobacco Harvester using the Hydro-Synchronized Blade Assembly" was conducted by Harrington at or near Ahoskie, North Carolina, on 30 September and 1 and 2 October, 1974, and was witnessed by a considerable number of tobacco growers; that the blade assembly which was demonstrated harvesting tobacco in that demonstration was not a "dramatic break-through" as advertised by Harrington but on the contrary was Powell's "CutterBar" which Powell had started selling in 1962; that Harrington further wrongfully passed off Powell's

"CutterBar" as Harrington's "Hydro-Synchronized Blade Assembly" in newspaper advertising, leaflets, TV and at the Raleigh State Fair from 18 to 27 October 1974 and at a field demonstration at South Boston, Virginia, in the fall of 1974; that by wrongfully passing off Powell's "CutterBar" as Harrington's equipment, Harrington wrongfully misappropriated the very large investment which Powell had made in experimentation, engineering, and development to bring its "CutterBar" to a high level of quality and efficiency; that Harrington's acts constituted unfair methods of competition and unfair and deceptive acts or practices in the conduct of Harrington's trade or commerce prohibited by G.S. 75-1.1; that the damages directly caused Powell by Harrington's acts were as much as $14,500,000.00; and that Powell is entitled to recover treble damages under G.S. 75-16.

No precise definition of the term "unfair methods of competition" as used in G.S. 75-1.1 is possible. Perhaps it is not even desirable that there be one. This is so because the acts to which the term should properly be applied are ever changing in character as social and business conditions change. Speaking of the body of law term "unfair competition," one authority has said:

> It applies to misappropriation as well as misrepresentation; to the selling of another's goods as one's own, to misappropriation of what equitably belongs to a competitor; to acts which lie outside the ordinary course of business and are tainted by fraud, coercion, or conduct otherwise prohibited by law. Most courts continue to confine it to acts which result in the passing off of the goods of one man for those of another, but this limitation is not universally accepted.

1 Nims, The Law of Unfair Competition and Trade-Marks (4th ed. 1947) § 1, p. 3.

The "passing off" of one's goods as those of a competitor has long been regarded as unfair competition. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. Rev. 199, at 248 (1972). In the present case Powell did not allege in its second counterclaim that Harrington attempted to pass off its own machine as Powell's. Quite the contrary, Powell charged that Harrington took Powell's product, the blade assembly which had been manufactured by Powell, and

demonstrated this to potential customers of both companies as Harrington's product. Although the nature of the deception alleged in this case differs from that found in the usual case of "passing off," the underlying nature of the wrong is the same. Both cases involve the misappropriation of benefits which flow from the quality of a competitor's product.

It should be noted that Powell has not alleged that Harrington has wrongfully copied Powell's product. The allegation is that Harrington used Powell's actual product in demonstrations to potential customers, at the same time falsely representing to the potential customers that the product had been manufactured by Harrington. Although such conduct may not fit the mold to which the term "passing off" has traditionally been applied, in our opinion it does constitute an unfair method of competition within the purview of G.S. 75-1.1.

We hold that Powell's second counterclaim, as alleged in its "Fifth Defense and Counterclaim," did state a claim upon which relief can be granted.

The result is:

On plaintiff's appeal the order granting defendant's motion for summary judgment is

Affirmed.

On defendant's appeal, the order granting plaintiff's motion under Rule 12(b)(6) dismissing defendant's first and third counterclaims, alleged in defendant's "Fourth Defense and Counterclaim" and in its "Sixth Defense and Counterclaim," is

Affirmed.

The order dismissing defendant's second counterclaim, alleged in its "Fifth Defense and Counterclaim," is

Reversed.

Judges VAUGHN and WEBB concur.

WILTON R. JOHNSON AND WIFE, INGELBERGE R. JOHNSON v. GREG WALL AND TERMINIX SERVICE II, INC.

No. 7710SC982

(Filed 7 November 1978)

1. Contracts § 14— third party beneficiary

Where a contract between two parties is entered into for the benefit of a third party, the law implies privity of contract, and the third party may maintain an action for its breach or in tort if he has been injured as a result of its negligent performance.

2. Contracts § 15; Vendor and Purchaser § 12— wood infestation report—liability of exterminating company to purchaser of house

An exterminating company is liable to purchasers who bought a house in reliance upon a false or inaccurate wood infestation report provided by the exterminating company to the vendor where the inspection contract was entered into for the benefit of the purchasers, and the exterminating company was aware that the report would be provided to potential purchasers and that purchasers might rely on such report.

3. Negligence § 29.1; Vendor and Purchaser § 12— inspection of house for termite damage—negligence in report

Plaintiffs' evidence was sufficient for submission to the jury on the issue of negligence by defendant exterminating company in failing accurately to report the findings of an inspection of a house for termites and termite damage where it tended to show that the house had substantial termite damage which resulted in structural weakness at the time of the inspection, but that defendant's report contained a statement that there was no evidence of prior infestation of termites or other wood-boring insects and another statement that, although there was old damage throughout the house, there was no structural weakness. Furthermore, plaintiffs' evidence was sufficient to show that defendant's negligence was a proximate cause of their damages where it tended to show that plaintiffs relied on the report in purchasing the inspected house.

4. Negligence § 35.3; Vendor and Purchaser § 12— contributory negligence—house purchasers—failure to discover termite damage

The purchasers of a house were not contributorily negligent as a matter of law in failing to discover termites where their evidence showed that they were aware that there might be some termite damage and required the vendor to submit a negative termite inspection report as a condition of the purchase, and that the inspection report submitted by defendant exterminating company was subject to the reasonable interpretation that there was no prior or present infestation by termites or other wood-boring insects but that there was some other inconsequential damage to the house.

APPEAL by plaintiffs from *Godwin, Judge*. Judgment entered 18 July 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 31 August 1978.

Plaintiffs seek to recover as damages the costs of repairing a home which they purchased for $40,000 from Lewis Murray, alleging that in July 1974 they contracted to buy the house upon the condition that Murray submit a negative termite report, that defendant Wall, employed as a supervisor by the defendant Terminix, inspected the premises and made a report to Terminix, which submitted a negative infestation report to Murray who transmitted the report to plaintiff, that plaintiffs relied on the report (Complaint Exhibit A), purchased the home, and then found extensive structural damage to the house resulting from termite infestation, and that the reasonable cost of repairing the damage is $28,990.

In their answer defendants admitted making a termite inspection and submitting the report (Complaint Exhibit A), as requested by owner Murray, but otherwise made a general denial, and pled contributory negligence by plaintiffs.

At trial, plaintiffs' evidence tended to show that before purchasing the house plaintiffs inspected it three times and observed in the basement a sagging center beam supported by three jacks, new timbers nailed to some of the girders, and silver paint on the basement ceiling, but they observed no termite damage. They did not go into the crawl space under the house where termite damage was clearly visible. Because of the conditions observed, plaintiffs wanted assurance that there was no termite damage, and therefore required as a condition of the purchase contract that Murray furnish a negative termite report at the closing of the transaction.

It was stipulated that defendant Greg Wall, supervisor for defendant Terminix Service II, Inc., inspected the house for Murray on about 30 November 1972, and submitted a written report; and that on 2 August 1974 he inspected the premises and submitted the Wood Infestation Report, identified as Complaint Exhibit "A" and introduced in evidence. The Report was a printed form, with blanks filled in by typewriter. The body of the Report con-

sisted of eight numbered statements followed by two block spaces, one under "YES" and one under "NO". The four statements relevant to the case at hand were answered by a typed "x" in the appropriate block space, indicating a "NO" answer to the following:

	Check One YES	NO
1. There is active infestation of: (A) Termites	☐	☒
(B) Other wood destroying insects	☐	☒
2. There is evidence of a previous infestation of: (A) Termites	☐	☒
(B) Other wood destroying insects	☐	☒
3. There is evidence of conditions conducive to infestation (earth-wood contact, faulty grades, insufficient ventilation, etc.) If yes, describe on reverse side of form	☐	☒
4. There is evidence of damage to structural items (columns, girders, sills, joists, plates, headers, stairs, porch supports, rafters, etc.) If yes, describe on reverse side of form	☒	☐

But the typed "x" in the "NO" space following statement 4 above was marked over with a handwritten scrawl and a handwritten "x" appeared in the "YES" space. On the reverse side of the form was the following:

> "Item #4. Old damage throughout the house which has been replaced in areas and it is my personal opinion that there is no structural weakness."

The Report was signed by Clyde W. Canup, local manager of defendant Terminix.

The Report was submitted by Murray to plaintiffs at the transaction closing. They relied on the Report and purchased the house. After purchasing the house the plaintiffs discovered termite damage while installing an exhaust fan in the kitchen wall. Mr. Canup, of defendant Terminix, came to their house at their request, was shown the Report, and he stated there was a typographical error and that Terminix would take corrective action if the house was then infested. There was no present infestation. A meeting was arranged between plaintiffs, Mr. Canup of Terminix, and the Pest Control Division of the Department of Agriculture. Terminix denied liability and the Pest Control Division recommended that the plaintiffs seek legal counsel.

A building contractor examined the house and estimated it would cost $12,094.68 to repair the damage to the house resulting from prior termite infestation.

The defendants' evidence, presented at trial, tended to show that defendants first inspected the house for Murray in November 1972 and prepared a grid map showing extensive termite damage throughout the house. After making some repairs, Murray put the house under contract with defendant Terminix.

Defendant Wall, supervisor for Terminix, inspected the house at Murray's request on 2 August 1974 and reported by radio to a secretary of Terminix that the termite damage was the same as found in the 1972 inspection and there was no present infestation. He did not make the pen and ink changes in the "YES" and "NO" spaces following Item No. 4, and did not report to the secretary the words that appear on the back of the Report, but he later told Canup there were no structural weaknesses.

A building contractor estimated that the cost of repairing the termite damage was $4,111.42.

At the close of plaintiffs' evidence, defendants moved for a directed verdict on the grounds that plaintiffs had failed to offer evidence of (1) a contractual relationship between plaintiffs and defendants, (2) a legal duty owed by defendants to plaintiffs, (3) negligence of defendants proximately causing damage, and (4) plaintiffs' own evidence established contributory negligence as a matter of law. The motion was denied, but was again made at the close of all the evidence. The trial court allowed the motion, and plaintiffs appeal from the judgment.

Kimzey & Smith by James M. Kimzey for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey; Manning, Fulton & Skinner by John B. McMillan for defendant appellees.

CLARK, Judge.

The trial court did not specify which one or more of the four grounds set forth by the defendants were accepted in granting the directed verdict. Because any one of the grounds would sup-

port the granting of the defendants' motion, we must consider all of them in order to determine whether the directed verdict was properly granted.

Plaintiffs first contend that the defendants owed a duty to the plaintiffs to exercise due care in inspecting for termite damage and in reporting the results of the inspection, and that therefore, the directed verdict could not be properly granted on the basis that there was no duty. Defendants contend that the directed verdict was properly granted because such a duty arises only through a contractual relationship, and the parties here were not in privity of contract.

[1] It is well settled in North Carolina that where a contract between two parties is entered into for the benefit of a third party, the latter may maintain an action for its breach or in tort if he has been injured as a result of its negligent performance. *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132 (1964); *C. F. Industries v. Transcontinental Gas Pipe Line*, 448 F. Supp. 475 (W.D. N.C. 1978). If the third party is an intended beneficiary, the law implies privity of contract. *Calder v. Richardson*, 11 F. Supp. 948 (S.D. Fla. 1935), *aff'd*, 118 F. 2d 249 (1941). *See, Pickelsimer v. Pickelsimer*, 257 N.C. 696, 127 S.E. 2d 557 (1962). The question of whether a contract was intended for the benefit of a third party is generally regarded as one of construction of the contract. The intention of the parties in this respect is determined by the provisions of the contract, construed in light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish. 17 Am. Jur. 2d Contracts § 304.

[2] In this case, the plaintiffs' contract with the vendor provided that the vendor would obtain a wood infestation report. The clear intent of the vendor, in contracting with the defendants, was to benefit the plaintiffs. Although the plaintiffs never dealt directly with the defendants, the testimony of defendant Wall tended to show that the defendants were aware that the vendor would provide the report to potential purchasers and that a purchaser might rely on such a report. Since Terminix had already reported on past termite damage in 1972, and the house was thereafter under contract with defendants, the defendants should have been put on notice that the report on the status of termite damage was intended for a third person. Wall also testified that this type of

report was normally obtained by a vendor to give to prospective purchasers as a condition of the sale. The contract itself indicates that the defendants were aware that parties other than the vendor would receive the report. The contract provides:

> "I hereby certify that neither I nor the company for whom I am acting has had, presently have or contemplate having any interest in the property involved. I do further certify that neither I nor the company for whom I am acting is associated in any way with any party to this transaction."

Although the contract does not specifically state that the plaintiffs were the intended beneficiaries of the contract, it is sufficient that the contract was evidently made for the benefit of third persons. *See*, 17 Am. Jur. 2d, Contracts, § 304. Since defendants had provided the vendor with a grid map of existing termite damage in 1972, and since the contract was not an agreement to *treat* the home, the benefit to the vendor was minimal. He was already fully aware of the damage. The vendor's status could not be altered by the report submitted in 1974. See *Foreman v. Jordan*, 131 So. 2d 796 (La. Ct. App. 1961). Therefore, it seems clear that the benefit to the vendor was small in comparison to the benefit to be gained by the plaintiffs.

There are several cases from other jurisdictions which have held that an exterminating company is liable to a plaintiff who purchases property in reliance upon a false or inaccurate wood infestation report provided to the vendor. *See, Hardy v. Carmichael*, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (1962); *Wice v. Shilling*, 124 Cal. App. 2d 735, 269 P. 2d 231 (1954); *Hamilton v. Walker Chemical & Exterminating Co.*, 233 So. 2d 440 (Fla. Ct. App. 1970); *Ruehmkorf v. McCartney*, 121 So. 2d 757 (La. Ct. App. 1960).

A similar rule has been applied in cases where a title abstract company negligently prepares an abstract and a purchaser relies on the report. The abstracter is generally held liable if he was aware that the report would be provided to persons other than the vendor who contracted for the abstract. 1 Am. Jur. 2d, Abstracts of Title, § 16. In *Williams v. Polgar*, 391 Mich. 6, 215 N.W. 2d 149 (1974), the court held that an abstracter was liable to a third party who relied on an inaccurate report if the existence of the third party was reasonably foreseeable. The

court noted that the bounds of duty are constantly enlarged by the knowledge of a prospective use. For an analysis of the rules regarding the liability of abstract companies to third parties, *see Williams, supra*, app. A, B; Annot., 34 A.L.R. 3d 1122 §§ 5, 6(b) (1970); Annot., 68 A.L.R. 375, 376 (1930); *see*, Annot., 35 A.L.R. 3d 504, § 4(a) (1971) (liability of surveyor to third party who relies on inaccurate survey).

In North Carolina there are no cases in which a purchaser has sought to recover from an exterminating company who provided a false or inaccurate infestation report. But in *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899), it was held that a third party could recover for the negligent breach of a contract between a water company and a municipality. The company had negligently failed to supply water to the city and, as a result, plaintiff's home was destroyed by fire. The Court noted that "the object [of the contract] is the comfort, ease and security from fire. . . . The benefit to the nominal contracting party . . . is small in comparison." 124 N.C. at 333, 32 S.E. at 721.

There was ample evidence presented by the plaintiffs which tended to show that the contract between the vendor and the defendants was entered into for the benefit of the plaintiffs, and that the defendants were aware that potential purchasers would receive the report. There was sufficient evidence presented to overcome defendants' motion for directed verdict on the grounds that the defendants owed no duty to the plaintiffs.

[3] The second ground asserted in defendants' motion for directed verdict is that there was insufficient evidence of defendants' negligence as a matter of law. *See, Prevatte v. Cabble*, 24 N.C. App. 524, 211 S.E. 2d 528 (1975). In determining whether the evidence is sufficient, the plaintiff's evidence must be taken as the truth and considered in the light most favorable to him. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Brooks v. Boucher*, 22 N.C. App. 676, 207 S.E. 2d 282, *cert. denied*, 286 N.C. 211, 209 S.E. 2d 319 (1974). The evidence presented by the plaintiffs tended to show that the report which the plaintiffs received did not accurately reflect the findings made by Wall. Although finding number four on the report was changed to indicate that there was some structural damage, the second finding was not altered. Finding number two stated that

there was no evidence of prior infestation of termites or other wood destroying evidence. On the back of the report is a notation supplementing statement 4 that, in the inspector's opinion, "there is no structural weakness." There was overwhelming evidence presented by plaintiffs which shows that the home had substantial termite damage which resulted in structural weakness at the time of the inspection. Plaintiffs presented sufficient evidence to show that the defendants negligently failed to accurately report their findings. The granting of a directed verdict in favor of the defendants cannot be supported on the ground that there was insufficient evidence of negligence as a matter of law.

Nor can the directed verdict be supported on the ground that the plaintiffs failed to establish proximate cause. Defendants contend that the plaintiffs inspected the home themselves and relied solely upon the representations of the vendor and the real estate agent. The plaintiff, Wilton Johnson, testified that he observed some sagging beams in the basement and so requested a termite report. He testified that he had relied upon the report. Taking the plaintiffs' evidence as the truth and considering it in the light most favorable to them, there was sufficient evidence to establish the plaintiffs' reliance on the report.

[4] The final ground asserted by defendants in support of their motion for directed verdict was that the plaintiffs were contributorily negligent as a matter of law. A directed verdict on the ground of contributory negligence is proper only when the plaintiff's evidence so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. *Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E. 2d 222 (1971). Defendants cite several cases which hold that a purchaser may not rely upon misrepresentations by a vendor without making his own independent investigation of the premises to support their contention that the plaintiffs cannot rely on misrepresentations by third parties. It is a well-settled rule that a purchaser is contributorily negligent if he relies on statements by a vendor as to the physical condition of property. *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); *Harding v. Southern Loan & Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940); *Goff v. Frank Ward Realty & Insurance Co.*, 21 N.C. App. 25, 203 S.E. 2d 65, *cert. denied* 285 N.C. 373, 205 S.E. 2d 97 (1974); *see, Davis v. Dunn*, 58 So. 2d 539 (Fla. Sup. Ct. 1952). In the case *sub judice*, the plaintiffs did not rely on the ven-

dor's statments but obtained an independent examination of the premises by a neutral third party. The cases cited by defendants require a purchaser to make an independent check of the premises and this is precisely what the plaintiffs did.

Defendants also contend that the plaintiffs' own evidence establishes that they were put on notice that the house was structurally damaged and that therefore the plaintiffs were contributorily negligent as a matter of law. The plaintiffs' evidence, taken in the light most favorable to them, shows that they were aware that there was, or might be, damage and as a result they required a negative termite inspection report. The report, although confusing, can reasonably be interpreted to mean that there was no prior or present infestation by termites or other wood-boring insects, but that there was some other inconsequential damage to the house. Considering the evidence in the light most favorable to the plaintiffs, the defendants have failed to show contributory negligence as a matter of law.

The granting of defendants' motion for directed verdict cannot be supported by any of the grounds set forth by the defendants.

Reversed and remanded.

Judges PARKER and ERWIN concur.

BACHE HALSEY STUART, INC. v. GEORGE E. HUNSUCKER, JR.

No. 7726SC916

(Filed 7 November 1978)

1. Brokers and Factors § 4; Unfair Competition § 1— actions of commodities broker—unfair trade practices

The unfair trade practices statute, G.S. 75-1.1, will not support a cause of action against a commodities broker for activity which is regulated by the Commodity Exchange Act, 7 U.S.C.A. § 1 *et seq.* Therefore, defendant failed to state a claim for treble damages under G.S. 75-1.1 based on plaintiff broker's alleged unauthorized sale of futures contracts for defendant, unauthorized purchases of contracts to close out defendant's position, and subsequent liquidation of defendant's cash and margin accounts.

2. Appeal and Error §§ 5.1, 10.1— subject matter jurisdiction— raising question for first time on appeal

The question of subject matter jurisdiction may properly be raised for the first time on appeal, and the appellate court may raise the question on its own motion even when it was not argued by the parties in their briefs. G.S. 1A-1, Rule 12(h)(3).

3. Contracts § 9— action on commodities account—futures contracts—G.S. 16-3

The question of whether futures contracts giving rise to a deficit in defendant's commodities account were traded on an exchange complying with the requirements of G.S. 16-3 was not before the appellate court where there has been entered no judgment, final order or any order of any kind relating to plaintiff's action which is reviewable.

APPEAL by defendant from *Graham, Judge.* Judgment entered 15 September 1977, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 August 1978.

This action was initiated 16 February 1976 by Bache Halsey Stuart, Inc., a stock and commodities broker, to recover a deficiency created in defendant's commodities account. The deficiency arose as a result of the sale and purchase of Maine potato futures contracts. In his answer to the complaint, defendant included three counterclaims alleging negligence and mismanagement, unfair acts and practices in the conduct of a trade or business, and a class action seeking injunctive and declaratory relief for defendant and a similarly situated class consisting of commodities investors dealing with plaintiff.

The facts as alleged in defendant's counterclaims are as follows: The plaintiff is a stock and commodities broker registered with all major American exchanges. Plaintiff has a strong and highly qualified research department for the purpose of advising the plaintiff and his customers. The defendant had common stock in a cash account and margin account with plaintiff in August and September of 1975. Defendant had credit in his commodities account with plaintiff of $8,591.37 prior to defendant's being placed in a position in Maine potatoes.

On 4 August 1975, defendant authorized the plaintiff to sell six contracts of May 1976 Maine potatoes for him at a price of no less than 9.5. On or about 4 August 1975, plaintiff sold in defendant's name three contracts for May 1976 Maine potatoes at a price of 9.17. Futhermore, defendant alleges that on or about 4 August 1975, plaintiff sold in defendant's name three contracts at

9.37 per contract. As a result of the sale of these six contracts, the defendant became obligated to deliver six contracts of potatoes in May 1976. As of 4 August 1975, defendant owned no Maine potatoes and owned no contracts for the delivery of Maine potatoes in May 1976. Defendant was therefore "short" six contracts. Defendant alleges that because of rising market prices, he was already in a loss position after the unauthorized sale of these six contracts.

Allegedly acting on the advice of the plaintiff, defendant authorized further sales of contracts. On 5 August 1976, plaintiff sold for defendant four contracts at 9.65. On 7 August 1976, two contracts were sold at 9.73 and two contracts were sold at 9.74.

The defendant alleges that the plaintiff negligently gave defendant advice to sell contracts when the plaintiff's research staff had forecast rising potato prices which suggests that customers should buy, not sell, potato contracts. The following week, as the price on the market continued to rise, the defendant's "short" position placed him in even greater danger of suffering significant losses if he were required to close out his position.

To cover the defendant's obligations in the continually rising market, the plaintiff, allegedly without authorization, bought in defendant's name 14 contracts of potatoes at a price of $12.28. This purchase resulted in a loss on the potato market of $19,824. Plaintiff charged this deficit against defendant's credit, resulting in a balance due of $11,232.63. On 23 September 1975, plaintiff, contrary to defendant's directions, sold the stocks in defendant's cash and margin accounts and credited the amount received to the balance allegedly owed to the plaintiff. The plaintiff applied this $4,237.08 to the defendant's commodities account leaving a balance owing of $6,995.55.

The plaintiff, on 10 June 1977, made a combined motion for dismissal and summary judgment on the defendant's three counterclaims. On 15 September 1977, an order dismissing the second and third counterclaims was entered for failure to state a claim actionable under G.S. 75-1.1. The defendant's first counterclaim was not dismissed and the motion for summary judgment was similarly denied as to the first counterclaim.

From the order dismissing the second and third counterclaims, defendant appeals.

Fleming, Robinson & Bradshaw, by C. Richard Rayburn, Jr., for plaintiff appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage, for defendant appellant.

MORRIS, Judge.

[1] The question defendant has presented to this Court is whether his second and third counterclaims allege a cause of action sufficient to withstand the plaintiff's motion to dismiss. G.S. 1A-1, Rule 12(b)(6). Defendant argues that plaintiff's unauthorized sale of futures contracts, unauthorized purchases of contracts to close out defendant's position, and subsequent liquidation of his cash and margin accounts constituted violations of the North Carolina unfair trade practices statute, G.S. 75-1.1, entitling him to treble damages and attorney's fees under G.S. 75-16 and G.S. 75-16.1. Plaintiff argues that the commodities brokerage business is not in "trade or commerce" as our Supreme Court has interpreted the coverage of the statute; and even if it is within the statute, it is not a violation of the standards imposed by that statute. Both plaintiff and defendant rely on the recent decision in *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977). For reasons discussed below, we find that decision not dispositive of this case.

The parties in their briefs point out that the commercial activity surrounding the commodities futures exchanges is a field highly regulated by federal statutes and administrative regulations under the Commodity Exchange Act, 7 U.S.C.A. § 1, *et seq.* Pursuant to the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, *et seq.*, which amended the Commodity Exchange Act, a regulatory commission was established and entrusted with enforcing the requirements and proscriptions of that Act. The jurisdiction of the Commission established by that Act is set out in 7 U.S.C.A. § 2 (Supp. 1978).

> "* * * *Provided*, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is

commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty'), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 15a of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. * * *"

The Act governs the conduct of parties involved in the commodities markets. It makes it unlawful for the employee of any member of a board of trade or commodity exchange "to cheat or defraud or attempt to cheat or defraud" a customer. 7 U.S.C.A. § 6b (Supp. 1978). The federal courts, in applying the Act, have held "[t]here is now no doubt that it is a violation of the Commodity Exchange Act for an account executive in the commodity brokerage business intentionally to carry on trading transactions not authorized by his customer." *Haltmier v. Commodity Futures Trading Commission*, 554 F. 2d 556, 560 (2d Cir. 1977). *See e.g., Silverman v. Commodity Futures Trading Commission*, 549 F. 2d 28 (7th Cir. 1977). It has also been held by an administrative agency that deliberate, wilful, and unauthorized trading by a commodities broker for the account of his customer violates 7 U.S.C.A. § 6b. We also note that the statute provides not only for suspension of brokers for violations of the Act, 7 U.S.C.A. § 9 (Supp. 1978), it also provides a complete administrative procedure for hearing customer complaints and provides for the award of monetary damages. 7 U.S.C.A. § 18 (Supp. 1978). There is full right of review to the appropriate United States Court of Appeals. *Id.* The exclusive nature of that procedure for redress against market members for damages resulting from a violation

of the Act is apparent from the cases dismissing actions for failure to exhaust administrative remedies. *Bartels v. International Commodities Corp.*, 435 F. Supp. 865 (D.C. Conn. 1977); *Consolo v. Hornblower & Weeks-Hemphill, Noyes*, 436 F. Supp. 447 (N.D. Ohio 1976).

In a very recent case the Supreme Court of Arkansas addressed the question, on demurrer, whether that State's securities commissioner could maintain a suit against a commodities broker to enjoin certain activity alleged to violate state securities laws. *International Trading, Ltd. v. Bell*, 556 S.W. 2d 420 (1977), *cert. denied*, 38 C.C.H. S.Ct. Bull, p. B2772 (12 June 1978). The Arkansas Court held that the state regulation of commodities brokers was pre-empted by the Commodity Exchange Act as amended by the Commodity Futures Trading Act as found in 7 U.S.C.A. § 2, and that the state court had no jurisdiction to issue an injunction based on the state securities act. The United States Supreme Court denied certiorari.

The *International Trading, Ltd.* case arose under a state securities statute. The provisions of that statute sought to be enforced against the appellant were intended to prevent fraud or deceit upon purchasers and investors in commodities futures. Ark. Stat. Anno., § 67-1236(a) (Repl. 1966). The remedy sought was an injunction to prevent appellant's continued "boiler room" like sales campaign tactics. The complaint alleged schemes to defraud and untrue statements of material fact. The Arkansas Court found that the Arkansas securities commissioner and the trial court were without authority to regulate conduct in the field of commodities futures in the face of a pervasive federal regulatory scheme and clear congressional intent to vest in the federal regulatory commission exclusive jurisdiction.

International Trading, Ltd., is instructive on the delicate balance which must be struck between the traditional exercise of state police powers and the regulation on the national level of activity in interstate commerce. That Court found that although the enforcement of state regulatory acts would be precluded, traditional private causes of action such as fraud would be less likely to interfere with the federal scheme and thus would not necessarily be pre-empted. This observation is supported by and indicates the purpose of this language in 7 U.S.C.A. § 2: "Nothing

in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." Other courts have also suggested that if a customer's claim arises out of a violation of the common law he may take his claim to state court. *Arkoosh v. Dean Witter & Co., Inc.*, 415 F. Supp. 535 (D. Neb. 1976); *E. F. Hutton Co., Inc. v. Lewis*, 410 F. Supp. 416 (E.D. Mich. 1976).

We consider *International Trading, Ltd.* to be persuasive authority in our construction of the scope of G.S. 75-1.1. Although the case *sub judice* is a private action under an unfair trade practices act, the present relief sought and the implications of a finding that plaintiff's conduct constitutes an unfair act or practice could result in state regulations no less intrusive on the federal scheme than that struck down in Arkansas. A finding that plaintiff's conduct violated G.S. 75-1.1 would expose it to a host of legislatively created sanctions in addition to those sought in defendant's counterclaims. G.S. 75-14 establishes a cause of action in the Attorney General for injunctive relief against violations of G.S. 75-1.1. Furthermore, the Attorney General would be entitled to seek a court order to restore money or property or cancel any contracts obtained as a violation of the statute. G.S. 75-15.1. If the Attorney General were plaintiff in this action and were seeking injunctive relief as is defendant in his counterclaim, we would be disposed to find that the State regulation was pre-empted.[1] We decline to view this case differently because it is in the nature of a private action seeking damages and injunctive relief. Therefore, because of the well-established principle of statutory construction that courts should interpret statutes so as to avoid unconstitutionality (*see generally* 16 Am. Jur. 2d, Constitutional Law, § 144), we decline to hold that G.S. 75-1.1 will support a cause of action against a commodity broker for activity which is regulated under the Commodity Exchange Act, 7 U.S.C.A. § 1 *et seq.*

In passing we reiterate that the defendant is not without remedy for any injury suffered. He may turn to traditional common law actions to seek damages. It would be inappropriate for this Court to expand a traditional common law action into an unfair trade practice in the face of the pervasive federal regulatory

1. Injunctive relief is also available against violations of the anti-fraud provisions of the North Carolina Securities Act, G.S. Chapter 78A. G.S. 78A-8; 78A-47. The Secretary of State is authorized to initiate suits seeking injunctive relief. Assuming plaintiff's alleged conduct was deemed to violate our own securities act anti-fraud provisions (as such conduct violated the federal anti-fraud provisions), we would again be disposed to hold that State regulation was pre-empted.

scheme. Recognizing an act as an unfair trade practice creates remedies unavailable at common law and could involve the Attorney General and the courts of this State in the sphere of a highly volatile commercial activity in interstate commerce. Such an expansion of state regulatory power is improper when Congress has clearly expressed its intent to exercise exclusive jurisdiction over the activity of the commodity exchanges and has provided elaborate administrative procedures for the redress of grievances. *See generally* Johnson, *Commodity Futures Trading Act: Pre-emption as Public Policy,* 29 Vanderbilt L. Rev. 1 (1976).

[2, 3] Finally, defendant has presented to this Court for the first time on appeal a "suggestion of lack of subject matter jurisdiction". The question of subject matter jurisdiction may properly be raised for the first time on appeal. G.S. 1A-1, Rule 12(h)(3). Furthermore, this Court may raise the question on its own motion even when it was not argued by the parties in their briefs. *Jenkins v. Winecoff,* 267 N.C. 639, 148 S.E. 2d 577 (1966). The defendant's assertion is based upon G.S. 16-3 which provides that, unless the contracts are traded on a recognized exchange whose rules and regulations require actual delivery of the commodity if demanded by either party, the courts of this State shall not have jurisdiction to entertain any suit brought upon a judgment based upon any such contracts. *See e.g., Paine et al v. Lambert,* 389 F. Supp. 417 (E.D. Tenn. 1975), *aff'd without opinion,* 524 F. 2d 1405 (5th Cir. 1976) (applying similar Tenn. statute). Though it may be inferred from defendant's allegations averring that the "plaintiff is a stock and commodity broker registered with all major American stock and commodity exchanges", it is not established by the record whether the contracts giving rise to defendant's account deficit were traded on an exchange complying with the requirements of the statute. That question, however is not properly before this Court. There has been entered no judgment, final order, or any order of any kind relating to *plaintiff's* action which is reviewable. *See Munchak Corporation v. McDaniels,* 15 N.C. App. 145, 189 S.E. 2d 655 (1972); 4 C.J.S., Appeal and Error, § 153(c) at 517. The trial court may, however, conclude that justice requires that plaintiff be allowed to amend its complaint to allege facts sufficient to indicate that the contracts complied with the requirements of G.S. 16-3.

For the foregoing reasons, the order of the trial court dismissing defendant's second and third counterclaims is

Affirmed.

Judges HEDRICK and WEBB concur.

HOWARD SCHULTZ AND ASSOCIATES OF THE SOUTHEAST, INC. v. JOE WILLIAM INGRAM, JR.

No. 7726SC1073

(Filed 7 November 1978)

1. **Rules of Civil Procedure § 65— preliminary injunction—absence of statement of reasons—order irregular**

The absence of a statement of the reasons for a preliminary injunction only rendered the order irregular, not void, and the irregularity should be corrected by the trial court, not the court on appeal.

2. **Rules of Civil Procedure § 60— order clarifying preliminary injunction order—propriety**

The trial court could properly issue a clarifying order, pursuant to G.S. 1A-1, Rule 60(a), setting forth the reasons for a preliminary injunction, since the correction did not alter the effect of the order but did clarify the record for appeal, and defendant was not prejudiced by this correction because he was well aware of the facts in the case which would support the injunction.

3. **Rules of Civil Procedure § 65— preliminary injunction—sufficiency of affidavits**

Defendant's contention that there was no probable cause for a preliminary injunction because the affidavits were insufficient is without merit since defendant relied upon G.S. 1A-1, Rule 56(e) to support his position, but that rule established the requirements for affidavits to support a summary judgment motion and therefore was not controlling in this action.

4. **Injunctions § 13.2— covenant not to compete—irreparable loss shown**

In an action to enforce a restrictive covenant prohibiting defendant from engaging in accounts payable auditing in competition with plaintiff, the plaintiff's affidavits and exhibits which suggested that defendant had access to and would use certain confidential information in his own accounts payable auditing were sufficient to support the trial court's finding of irreparable loss, as the dissemination of plaintiff's information would be harmful to its business.

5. **Master and Servant § 11.1— contract containing restrictive covenant—validity of assignments**

In an action to enforce a restrictive covenant in an employment contract, defendant's contention that assignments of the contract were invalid because

the contract was one for personal services, defendant had no notice of the assignments and he did not consent to them is without merit, since the assignments did not affect defendant's duties and obligations and affidavits tended to show that defendant had actual notice that the contract had been assigned to plaintiff.

6. Master and Servant § 11.1— restrictive covenants—requirements

In order for a restrictive covenant to be enforceable it must be in writing, entered into at the time and as a part of the contract of employment, based on valuable considerations, reasonable both as to time and territory embraced in the restrictions, fair to the parties, and not against public policy.

7. Master and Servant § 11.1— covenant not to compete—reasonableness of terms

A restrictive covenant prohibiting defendant from competing with plaintiff in "any area or areas from time to time constituting the Principal's or Associate's area of activity in the conduct of their respective businesses" for a period of two years after termination of employment was reasonable and not unduly vague, since confidential information given to defendant would be viable for two years; the covenant specifically restricted only businesses which would compete with plaintiff and thus was reasonable in light of the plaintiff's sole business of accounts payable auditing; and the contract made it clear that plaintiff operated in the southeastern area of the U.S. and named the states involved, thus making the territorial restriction clear.

8. Injunctions § 16— amount of bond discretionary

The setting of bond for damages resulting from a preliminary injunction is within the trial court's discretion and no appeal lies from this determination.

APPEAL by defendant from *Martin (Harry C.), Judge.* Order entered 21 November 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1978.

Defendant appeals from a preliminary injunction enjoining him from engaging in accounts payable auditing in competition with the plaintiff within the states of North Carolina, South Carolina, Georgia, Florida, Alabama and Tennessee, except for Memphis, for a period of two years from 17 October 1977. Defendant was not enjoined from engaging in general accounting activities. The preliminary injunction was based on the following facts supplied by the pleadings, affidavits and exhibits.

On 30 April 1974, defendant signed a "Sub-Associate Agreement" with Edward C. Aubitz after which defendant went to work in the Charlotte area as an accounts payable auditor. In this agreement, defendant was the "Sub-Associate" and Aubitz was the "Associate." Howard Schultz & Associates, Inc. was named as

"Principal." The Associate was authorized to conduct accounts payable auditing services within North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama and Mississippi. The agreement contained the following provision:

> "5. *Restrictive Covenant*: It is understood by the parties hereto that the Associate operates pursuant to a contract with the Principal. It is further understood that the Principal has developed techniques of auditing and is engaged in the business of conducting accounts payable invoice audits throughout the United States, and that the Principal has made available to the Associate, who in turn has made available to the Sub-Associate, the benefit of these techniques, the related goodwill, and the opportunity to engage in this service. By reason thereof, it is agreed that if this agreement shall not be terminated by the Associate during the initial term as set out herein, the Sub-Associate will not, for a period of two (2) years after the termination of this agreement, for any reason thereafter, engage, directly or indirectly, as principal, agent, employer, employee, or in any capacity whatsoever, in any business, activity, auditing practice, or any other related activities, in competition with the Principal's or Associate's business within any area or areas from time to time constituting the Principal's or Associate's area of activity in the conduct of their respective businesses, as of the date of said termination, unless the Principal and the Associate shall give written consent to the Sub-Associate for such activity. In addition to any other rights or remedies available to the Principal and the Associate for breach of the agreement contained in this paragraph, the Principal and the Associate shall also be entitled to enforcement by any remedy of injunction or ancillary relief, as well as for damages which may be caused them by said breach, and for reasonable attorneys' fees incurred in enforcement of this covenant."

An addendum to the agreement, signed by the defendant, stated that "[t]his covenant is not to be interpreted to hinder you from making a living in the general accounting field such as entering into a controllership, engaging in bookkeeping and financial report generating activities, or limit in any way your participation in regular financial auditing practice."

Defendant worked in the Charlotte area from 30 April 1974 to 17 October 1977 at which time he resigned from his position. During this period of time, the "Sub-Associate Agreement" was assigned by Aubitz to Ted E. Wisner who assigned it to Earl D. Barker who assigned it to the plaintiff, Howard Schultz & Associates of the Southeast, Inc., on 2 October 1975. Mr. Barker was the president of the plaintiff at the time of this assignment and continues to hold that office. Defendant alleges that he had no knowledge of these assignments and did not assent to them.

Subsequent to his notice of termination, the defendant told Mr. Barker that he was considering going into the accounts payable auditing business in the Charlotte area after his resignation. The affidavit of Mr. Barker tended to show that the defendant scheduled accounts payable audits with several of the plaintiff's clients for whom the defendant had previously done auditing work while employed by the plaintiff.

In response to the defendant's activities, the plaintiff filed a complaint alleging that the defendant was breaching the restrictive covenant agreement by competing with the plaintiff and that the plaintiff would suffer irreparable harm in that the defendant would use and reveal various trade secrets and other confidential information of the plaintiff. Plaintiff requested a preliminary injunction pending trial on the merits. On 21 November 1977, the trial court entered a preliminary injunction enjoining defendant from competing with the plaintiff. On 14 December 1977, the court issued a clarifying order, pursuant to North Carolina Rules of Civil Procedure Rule 60(a), setting forth the reasons for the injunction. Defendant appeals from the entry of this preliminary injunction.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Sydnor Thompson, Heloise Merrill and Francis O. Clarkson, for plaintiff appellee.

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

HEDRICK, Judge.

[1] Defendant assigns as error the clarifying order which sets forth the reasons for the preliminary injunction. Rule 65(d) of the

North Carolina Rules of Civil Procedure requires that a preliminary injunction order "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined." The clarifying order tracks the original order with the exception of the following language:

> "for the reason that the court is of the opinion that there is probable cause that plaintiff will be able to establish at the trial of this action that the covenant not to compete contained in the contract between the parties dated April 30, 1974 is enforceable against the defendant, that the defendant threatens to violate that covenant, and that there is reasonable apprehension of irreparable loss to the plaintiff unless injunctive relief is now granted."

Defendant contends that the original order is void because it does not comply with the requirements of Rule 65(d) and that the alterations to the original order, embraced in the clarifying order, are not within the ambit of Rule 60(a); thus the trial court lacked jurisdiction to clarify its order because notice of appeal had been filed.

In *Uptegraff Manufacturing Co. v. International Union*, 20 N.C. App. 544, 202 S.E. 2d 309, *cert. den.*, 285 N.C. 234, 204 S.E. 2d 24 (1974), this Court stated that a Rule 65(d) order which omits the reasons for its issuance is only irregular, not void; thus the order binds the parties until it is corrected. To set aside an irregular judgment, a motion must be made before the court rendering such judgment and not on appeal. *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). This rule is designed to allow courts to correct irregularities and to present the appellate court with all relevant facts on appeal. In the present case, the absence of a statement of the reasons for the injunction only renders the order irregular, not void, and should be corrected by the trial court and not on appeal.

[2] The question next presented is whether this correction can properly be made under a Rule 60(a) motion. Rule 60(a) provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party. . . ." Generally, no substantive changes

may be corrected by a 60(a) motion. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2854 (1973). The Third Circuit has held that Rule 60(a) "permits the correction of irregularities which becloud but do not impugn" the judgment. *United States v. Stuart*, 392 F. 2d 60, 62 (3d Cir. 1968). In the present case, the correction did not alter the effect of the order but did clarify the record for appeal. The defendant was not prejudiced by this correction because he was well aware of the facts in the case which would support the injunction. We, therefore, hold that the Rule 60(a) motion was proper to reform the order to comply with Rule 65(d).

[3] Defendant next assigns as error the entry of the preliminary injunction. In order to be entitled to a preliminary injunction the moving party must show "(1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation." *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E. 2d 154, 156 (1975). On appeal, the enjoined party bears the burden of showing that the trial court erred as there is a presumption that the judgment is correct. *Puett v. Gaston County*, 19 N.C. App. 231, 198 S.E. 2d 440 (1973). Neither the findings nor the conclusions of the trial court and the appellate court are binding upon the court at trial on the merits. *Board of Provincial Elders v. Jones*, 273 N.C. 174, 159 S.E. 2d 545 (1968).

Defendant contends that there was no probable cause for the injunction because the affidavits were insufficient. He cites Rule 56(e) of the North Carolina Rules of Civil Procedure to support this proposition but that rule is not controlling. Rule 56(e) establishes the requirements for affidavits to support a summary judgment motion which is a final order. Rule 65 does not establish such requirements. Furthermore, an injunction under Rule 65 is a temporary order pending trial; thus the affidavits need not meet as high a standard as those for a summary judgment ruling. 7 Moore's Federal Practice ¶ 65.04(3) (1975). In this case, the affidavits, exhibits and pleadings were more than sufficient to support the preliminary injunction.

[4] The defendant next contends that the plaintiff has shown no irreparable loss by virtue of his activities. He asserts that if he has violated the restrictive covenant, monetary damages are sufficient to compensate the plaintiff for its loss. Nevertheless, in *Forrest Paschal Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E. 2d 190 (1975), this Court held, on similar facts, that the defendant could be enjoined from competing with a former employer pending trial. The Court noted that the defendant utilized confidential information of the employer in the competing business. In the present case, Mr. Barker's affidavits and exhibits suggest that the defendant had access to and would use certain confidential information in his own accounts payable auditing. Those allegations were sufficient to support the trial court's finding of irreparable loss as the dissemination of the plaintiff's information would be harmful to its business.

[5] Defendant claims that the assignments of the "Sub-Associate Agreement" were invalid as it was a contract for personal services, he had no notice of the assignments and he did not consent to them. Normally, executory contracts for personal services are not assignable. *Atlantic and North Carolina Railroad Co. v. Atlantic and North Carolina Co.*, 147 N.C. 368, 61 S.E. 185 (1908). Nevertheless, personal service contracts may be assigned when the character of the performance and the obligation is not altered. *Munchak Corp. v. Cunningham*, 457 F. 2d 721 (4th Cir. 1972). In *Munchak*, the Fourth Circuit ruled that a basketball player's contract could be assigned and the restrictive covenant enforced. The Court saw no way in which the assignment of the basketball franchise and the player's contract to successive corporate owners would affect the duties and obligations of the player. In the present case, the affidavits tend to show that the assignments of the "Sub-Associate Agreement" did not affect the defendant's duties and obligations. Furthermore, Mr. Barker, in his affidavit, states that the defendant performed audits scheduled by the plaintiff, cashed checks drawn on the plaintiff and was visited by Mr. Barker in the course of his work. In addition, the defendant had been working for the plaintiff for over two years prior to his resignation. These factors support the trial court's conclusion that there was probable cause that the plaintiff would succeed on the issue of assignment at trial.

[6, 7] We now turn to the question of the validity of the restrictive covenant itself. In order for a restrictive covenant to be enforceable it must be "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *Asheville Associates, Inc. v. Miller*, 255 N.C. 400, 402, 121 S.E. 2d 593, 594 (1961). Defendant contends that the restrictive covenant is unenforceable because it is unreasonable in time, territory, and activity restricted, it is unfair, and it is against public policy. We hold otherwise. The time limit of two years is reasonable, in view of the nature of the plaintiff's business, because confidential information given to the defendant is viable for that period of time. The covenant, and the addendum, specifically restrict only businesses which compete with the plaintiff and thus the covenant is reasonable in light of the plaintiff's sole business of accounts payable auditing.

The territorial restraint is also reasonable and not unduly vague. The restrictive covenant does not give any geographic limit other than "any area or areas from time to time constituting the Principal's or Associate's area of activity in the conduct of their respective businesses, as of the date of said termination." Nevertheless, the contract, in an earlier section, establishes that the Associate operated in the southeastern area of the United States in the states of North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama and Mississippi. At the time of the defendant's termination these states, except Mississippi, also comprised the plaintiff's area of operation. We believe this contract is sufficient to support a preliminary injunction enforcing a restrictive covenant for this area. The facts presented fully support the plaintiff's contention that it operated in these states and that the defendant's attempts to compete were affecting the plaintiff's business in areas other than North Carolina. Defendant contends that the territorial restriction is vague in that it includes both the Principal's and the Associate's areas of business. Although the areas are not enumerated separately, we believe that the restrictive covenant can be enforced as to the Associate's area of business without altering or amending the contract. In *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961), it was stated that a court cannot reform the contract by reducing the

territory restricted. Nevertheless, if the parties have made divisions of the territory, a court can enforce the reasonable restrictions and refuse to enforce those which are not reasonable. In the present case, the geographic area of operation of the Associate and that of the Principal are set out specifically in other parts of the contract and are sufficiently distinct. Since the plaintiff seeks only to enforce the covenant as to the Associate's area of operation, the court may enforce that section without considering the validity of the Principal's territorial restriction. We further hold that this contract is fair and not against public policy.

[8] Defendant's last assignment of error contends that the $10,000 bond posted by the plaintiff is insufficient to cover his damages in the event the defendant succeeds at trial on the merits. The setting of bond is within the trial court's discretion and no appeal lies from this determination. *Bynum v. Board of Commissioners*, 101 N.C. 412, 8 S.E. 136 (1888).

We find that the trial court did not abuse its discretion in ordering a preliminary injunction. The evidence as presented in the pleadings, affidavits and exhibits was sufficient to support a finding of probable success at trial and irreparable loss if the preliminary injunction were not granted.

Affirmed.

Judges ARNOLD and WEBB concur.

FIRST NATIONAL BANK OF SHELBY, ADMINISTRATOR C.T.A. D.B.N. OF CHARLES E. DIXON ESTATE v. JANE GREENE DIXON, CONSTANCE DIXON BELL, JOYCE DIXON LEE, COLEAN DIXON McDANIEL, BENEFICIARIES NAMED IN THE WILL OF CHARLES E. DIXON, AND AMY JANE DIXON AND CHARLES E. DIXON, JR., MINORS AND AFTERBORN CHILDREN

No. 7727SC1071

(Filed 7 November 1978)

Executors and Administrators § 30; Taxation § 27— inclusion of life insurance proceeds in estate—estate and inheritance taxes—contribution by policy beneficiary

Where a decedent who purchased a policy of life insurance retained sufficient incidents of ownership therein to require the inclusion of the policy's pro-

ceeds in decedent's gross estate for federal estate taxes under 26 U.S.C.A. § 2042 and for N.C. inheritance taxes under G.S. 105-13, the personal representative of the estate is entitled to contribution from the policy beneficiary for her ratable share of the federal estate tax and N.C. inheritance tax imposed upon decedent's estate by reason of the inclusion of the life insurance proceeds (less marital deductions and any other applicable exemptions) in decedent's estate.

APPEAL by plaintiff from *Thornburg, Judge*. Judgment entered 29 November 1977 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 27 September 1978.

Plaintiff bank, in its capacity as administrator c.t.a. d.b.n. for the estate of Charles E. Dixon, brought this action for declaratory judgment upon certain questions of liability for federal estate taxes and North Carolina inheritance taxes. Charles E. Dixon died testate 24 November 1974. He was survived by his wife, his mother, and two daughters from a prior marriage. These persons, excepting his wife Jane Greene Dixon, were objects of specific devises and bequests in decedent's will. He was also survived by two minor children of his second marriage. These minor children were born after the will was executed and were not mentioned in decedent's will and so take as if by intestacy as afterborn heirs.

The residual estate of Charles E. Dixon, after the exception of the specific devises and bequests, was left to decedent's wife, Jane Greene Dixon. Decedent's wife was also the named beneficiary of two policies of life insurance purchased by decedent and having proceeds of a total value of $160,000.

The proceeds of these insurance policies were included in the gross estate of decedent for purposes of both federal and North Carolina taxation, as it had been determined that the decedent had retained sufficient incidents of ownership in the policies (evidenced by retention of the power to change the beneficiaries of the policies or a reversionary interest in the policies determined by actuarial means to be in excess of 5%) to require such inclusion under 26 U.S.C.A. § 2042 (I.R.C. 1954 § 2042) and N.C. G.S. § 105-13(2). Accordingly, the proceeds of the insurance policies (after adjustments for the applicable marital deductions and other exemptions) were responsible for the incurring of both federal estate and North Carolina inheritance taxes. The personalty in the estate is not sufficient to pay all of the taxes assessed

by reason of the insurance proceeds and the intestate share of the minor afterborn heirs would be substantially reduced if the tax burden were to fall solely on the residue of the estate. The decedent did not in his will indicate whether taxes were to be paid from any special fund; nor did decedent make any testamentary reference to the life insurance proceeds. The declaratory judgment proceeding was brought to determine whether Jane Greene Dixon was liable to the estate for any contribution for the taxes incurred by the insurance proceeds, and to determine the order in which the specific devises of realty would be abated to satisfy the taxes imposed. After a hearing before Judge Thornburg and after a determination among the various parties that the insurance proceeds were includable in the decedent's gross estate for tax purposes, Judge Thornburg found that the administrator was not entitled to contribution from Jane Greene Dixon for any of the tax imposed by reason of the insurance proceeds. An order to this effect was entered 29 November 1977, from which plaintiff appeals.

N. Dixon Lackey, Jr., for the plaintiff.

John D. Church, Guardian Ad Litem for Amy Jane Dixon and Charles E. Dixon, Jr., and C. Eugene McCartha, for Jane Greene Dixon, defendants.

MARTIN (Robert M.), Judge.

The question before us is: to what extent is the beneficiary of a life insurance policy liable for estate and inheritance taxes where the decedent who purchased the policy retained sufficient incidents of ownership therein to require the inclusion of the policy's proceeds in the decedent's gross estate for purposes of taxation? Plaintiff bank, as administrator for decedent's estate, contends that Jane Greene Dixon, as beneficiary of the life insurance policies in question, should pay the ratable portion of the taxes assessed against the estate by reason of the inclusion of the proceeds of these policies in the value of decedent's gross estate. Defendant Jane Greene Dixon contends that because of the provisions of the North Carolina Constitution, Article X, § 5 (prior to amendment of November 1977), and also because of N.C. G.S. § 58-213, N.C. G.S. § 58-206, and prior North Carolina case law, that she should not be liable for any tax on the insurance proceeds.

The afterborn minors, by their guardian *ad litem*, did not perfect or file a cross-appeal. However, because of the result we are compelled in law to reach, the interests of the afterborn minors will not be prejudiced. We do not agree with any of the contentions of the defendant Jane Greene Dixon and accordingly reverse the order of the trial court.

In answering the question before us, we first must determine whether the federal estate tax imposed by reason of life insurance proceeds being included in the gross estate is a debt of the estate as are the taxes imposed on the probate assets in the hands of the personal representative. Under most circumstances, the federal estate tax is a debt of the estate, and it has been left to the states to determine how that tax burden would be apportioned among recipients of property from the estate. *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106, 142 A.L.R. 1131 (1942), *Matter of Zahn*, 300 N.Y. 1, 87 N.E. 2d 558 (1949).

In North Carolina, as in most jurisdictions, absent a specific testamentary instruction to the contrary or a controlling apportionment statute, the ultimate burden of federal estate taxes levied on probate assets falls on the residuary estate. *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E. 2d 222 (1946); *Cornwell v. Huffman*, 258 N.C. 363, 128 S.E. 2d 798 (1962). However, in two areas federal legislation has superseded state apportionment practices in regard to federal estate tax: where life insurance proceeds are paid to beneficiaries other than the decedent's estate where the decedent possessed specified incidents of ownership in the policies, and also where property passes under a power of appointment where the nature of the power of appointment held by the decedent rendered the assets appointed includable in the decedent's gross estate. The common thread running between these two exceptions to the general rule (contained in 26 U.S.C.A. §§ 2206 and 2207 (I.R.C. 1954 §§ 2206 and 2207)) is that they govern assets which are includable for tax purposes in the decedent's estate, but are passing outside the hands of the estate's personal representative and without the supervisory jurisdiction of the probate court. *See*, Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 Col. L.Rev. 261, 287-288 (1955). See also, generally, Mertens, *Law of Federal Gift and Estate Taxation*, §§ 43.14-43.16; §§ 44.07-44.11.

Section 2002 of the Internal Revenue Code (26 U.S.C.A. § 2002) makes the personal representative of an estate (defined in 26 U.S.C.A. § 2203) primarily liable for the federal estate tax. Because life insurance proceeds do not usually pass through the hands of the personal representative, even though the value of such proceeds may be includable in the taxable estate, a means was provided by Congress for the personal representative to obtain ratable contribution from beneficiaries of life insurance policies under appropriate circumstances. 26 U.S.C.A. § 2206 (§ 2206 I.R.C. 1954, as amended) gives the personal representative of an estate the right to recover from beneficiaries the proportionate share of tax imposed on the estate where the proceeds were included in the estate by reason of retention of incidents of ownership in the policy by its purchaser. We do not find that this provision conflicts with North Carolina principles governing payment of estate taxes from the residue of the estate; however, to the extent that a conflict did exist, the federal statute would control. *See, e.g., Riggs v. Del Drago, supra.*

Although there have been no cases in North Carolina dealing with apportionment of federal estate tax liability under 26 U.S.C.A. 2206 (I.R.C. 1954 § 2206), there is an excellent discussion of the applicability of its parallel provision (26 U.S.C.A. § 2207 (I.R.C. 1954 § 2207)) in *Bank v. Wells*, 267 N.C. 276, 148 S.E. 2d 119 (1966). This case held that a recipient of property under the exercise of a general testamentary power of appointment was liable to the estate for the share of federal estate tax incurred by the inclusion of such property in the taxable estate, in proportion to the ratio such recipient's share bore to the entire taxable estate. Finding that this result was required by 26 U.S.C.A. § 2207, the Court quoted the same portion of *Riggs v. Del Drago, supra*, upon which we rely:

> . . . these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor. *Riggs v. Del Drago, supra* as quoted in *Bank v. Wells*, 267 N.C. 276, 284, 148 S.E. 2d 119, 124 (1966).

We find no state court contending the contrary where the question has been raised. *Marks v. Equitable Life Assurance Society of United States*, 135 N.J. Eq. 339, 38 A. 2d 833 (1944); *Priedeman v. Jamison et al*, 356 Mo. 627, 202 S.W. 2d 900, 36 AFTR 1624, 47-1 USTC ¶ 10,563 (1947); *In re Singer's Estate*, 363 N.Y.S. 2d 746, 80 Misc. 2d 1006, 75-1 USTC ¶ 13,050 (1975). *C.f.*, *Kintzinger v. Millin*, 254 Iowa 173, 117 N.W. 2d 68 (1962). Accordingly, we find that plaintiff bank may recover from defendant Jane Greene Dixon that proportionate share of federal estate tax incurred by reason of the inclusion of the proceeds (less appropriate deductions) of the two policies of life insurance purchased by the decedent in his gross estate, as provided by 26 U.S.C.A. § 2206 (§ 2206 1954 I.R.C.) and the regulations thereunder. To whatever extent, if any, that our holding in the case before us may conflict with *Craig v. Craig*, 232 N.C. 729, 62 S.E. 2d 336 (1950), as interpreted in *Cornwell v. Huffman*, 258 N.C. 363, 369, 128 S.E. 2d 798, 802 (1972), we disregard Craig as improvident and inconsistent with the controlling federal statute and with the better weight of authority and reasoning found in *Bank v. Wells, supra*. The authority on the point, although not cited to us by counsel in briefs or at argument, is abundant and persuasive.

A different problem is posed by the question of apportionment of North Carolina inheritance taxes. An *inheritance* tax differs from an *estate* tax, as was noted by the Missouri court in *Priedeman v. Jamison, supra*:

> . . . The inheritance tax of Missouri is a tax on the privilege of receiving or taking property rather than on the transfer of property at death. The incidence of the tax falls upon the recipient of the property. [Citations omitted.] . . .
>
> . . . An estate tax, however, is not a tax on what comes to the legatee or heir, but upon what is left by the decedent. The estate tax comes into existence before and is independent of the receipt of the property by the legatee or distributee. Id. at 631-632, 202 S.W. 2d at 903.

The North Carolina inheritance tax is similar to the Missouri inheritance tax in that they both are taxes upon the *receipt* rather than the *transfer* of a decedent's property. N.C. G.S. § 105-31 provides that all inheritance taxes must be paid upon all taxable transfers in order to discharge the lien on all property of the

estate. G.S. § 105-15 makes individual beneficiaries of the estate (devisees, legatees, etc.) primarily liable for the tax imposed on such taxable transfers. Although no North Carolina statute or case deals precisely with the question before us, we are constrained by equity and the example of our federal and sister state governments to hold that where proceeds of a life insurance policy are includable in a decedent's taxable estate by reason of G.S. § 105-13, a lien for taxes arises against the beneficiary of such insurance policy, and that the beneficiary is primarily liable for the taxes so incurred as provided by G.S. § 105-15. Therefore, the personal representative of an estate may proceed against the beneficiary of such insurance policy, or may retain such assets in the estate as would otherwise pass to the beneficiary and proceed under G.S. § 105-18 to obtain the ratable share of tax incurred by the estate by reason of the includable proceeds.

The portion of the North Carolina Constitution cited to us by the defendant and in effect in 1974 at decedent's death (N.C. Const. Art. X, § 5 (1971; am. 1977)) is designed to prevent creditors of an individual from reaching insurance proceeds paid to beneficiaries in the named classes after the death of such individual. The North Carolina inheritance tax is a tax on the *receipt* of property and recipients are primarily liable for the tax imposed. A decedent's estate is not a creditor of such decedent, nor is an inheritance tax an obligation of the decedent leaving inheritable property. Therefore, this section is not applicable to the case before us and will not relieve Jane Greene Dixon of liability for North Carolina inheritance tax on the insurance proceeds.

N.C. G.S. § 58-213 provides that "[n]o policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable . . ." to attachment, execution, or other process to pay a debt or liability of the payee employee. The proceeds of the policies in the case before us, although derived from group life insurance programs, were not paid to the decedent, but to his wife. No levy or execution of these proceeds is sought to satisfy any obligation of the decedent; therefore, this statute is not applicable to this case. The estate is not a creditor of the decedent; therefore, we do not find that G.S. § 58-206 bars the personal representative of a decedent's estate from recovering from beneficiaries a ratable share of the tax incurred by reason of insurance proceeds.

The case of *Park v. Carroll*, 18 N.C. App. 53, 196 S.E. 2d 40 (1973) is cited to us by all parties, and it is contended by defendant Jane Greene Dixon that this case is conclusive upon plaintiff's claim. We do not agree. Although there is much authority for the contention that federal estate taxes are debts of the estate, such a contention is premised upon the presence, in the hands of the personal representative, of all of the assets of the estate to which the personal representative may look for satisfaction of the tax imposed and for which he is primarily liable under 26 U.S.C.A. § 2002 (§ 2002 I.R.C.). The inequity of holding the personal representative liable for taxes on non-probate assets passing beyond his reach is apparent; therefore, an exception was carved out for life insurance proceeds and property passing under a power of appointment so that the personal representative could reach these non-probate assets for satisfaction of the tax their inclusion in the gross estate might incur. We distinguish *Park v. Carroll, supra*, and the line of authority it represents, on its facts, and hold that federal estate tax liability, incurred by an estate upon inclusion for tax purposes in the gross estate of those non-probate assets dealt with in 26 U.S.C.A. §§ 2206 and 2207, is not a debt of the estate but is a lien upon such assets in the hands of the recipients or beneficiaries. For this reason we do not need to consider the question of abatement of legacies and devises for satisfaction of tax liability imposed on this estate by reason of the included life insurance proceeds.

In summary, we find that the plaintiff bank, as administrator c.t.a. d.b.n. of the estate of Charles E. Dixon, is entitled to contribution from Jane Greene Dixon for her ratable share of the federal estate tax and North Carolina inheritance tax imposed upon the decedent's estate by reason of the inclusion of the life insurance proceeds (less marital deductions and any other applicable exemptions) in the decedent's estate under 26 U.S.C.A. § 2042 (I.R.C. 1954 § 2042) and N.C.G.S. § 105-13. The personal representative has broad powers to seek such contribution, *see, e.g.* Annotation 1 A.L.R. 2d 978; and he may do so as will best fulfill his fiduciary responsibilities.

The order of Judge Thornburg is vacated and the cause is remanded for entry of an order not inconsistent with this opinion.

Judges PARKER and HEDRICK concur.

JOHN H. HARMON v. LEEVESTER PUGH

No. 783SC60

(Filed 7 November 1978)

1. **Attorneys at Law § 7.1— contingent fee contract—scrutiny by court**

Contracts for contingent fees are closely scrutinized by the courts where there is any question as to their reasonableness, irrespective of whether made prior to the commencement of or during the attorney-client relationship.

2. **Attorneys at Law § 7.1— contingent fee contract—reasonableness—scrutiny by court**

Even though a contingent fee contract is found to have been entered into fairly and in good faith and without suppression of fact, it is subject to the scrutiny of the court as to its reasonableness.

3. **Attorneys at Law § 7.1— contingent fee contract—unreasonableness—recovery in quantum meruit**

The trial court did not err in determining that the fee provided for by a contingent fee contract for an attorney's services in collecting the proceeds of a life insurance policy without filing suit was unreasonable and in awarding the attorney an amount in quantum meruit.

APPEAL by plaintiff from *Rouse, Judge*. Judgment entered 16 August 1977 in Superior Court, CRAVEN County. Heard in the Court of Appeals 19 October 1978.

Plaintiff, an attorney, brought this suit seeking to recover approximately $7,400 under a contingent fee contract with defendant. Defendant answered, denying the material allegations.

The court entered the following judgment:

JUDGMENT

THIS CAUSE coming on to be heard and being heard before the Honorable Robert D. Rouse, Jr., Superior Court Judge, duly assigned and commissioned to preside at the August 1, 1977 term of Craven County Civil Superior Court, without a jury by consent and stipulation of the parties, and it appearing to the Court, and the Court FINDING AS A FACT:

1. Defendant's son, William J. Pugh, Jr., died of "natural causes" while serving with the United States Army in Germany on January 4, 1976.

2. At the time of his death, Defendant's son had in effect a life insurance policy with the MANUFACTURER'S LIFE INSURANCE COMPANY of Toronto, Canada. Defendant's son was the named insured in the policy and the defendant, Lee Vester Pugh, was the designated beneficiary. The policy contained certain terms pertinent to the case at bar;

a. The policy provided for the payment of $36,029.00 to the named beneficiary upon the filing of a claim by the beneficiary along with proof that the insured had expired as a result of "natural causes."

b. An additional $36,029.00 would be paid to the beneficiary upon the presentation of a claim by the beneficiary along with proof that insured expired as a result of "accidental causes."

c. The policy further provided an "incontestability clause" to be effective two years from the date of issue of the insurance policy. Claims upon policies filed within the first two years of their coverage remained subject to special investigation previous to disbursement of policy benefits by the insurance company.

3. Defendant notified the MANUFACTURER'S LIFE INSURANCE COMPANY of the death of William J. Pugh, Jr., their insured. Thereafter on April 9, 1976, the insurance company acknowledged defendant's notification and instructed the defendant to complete and forward certain documents in order to collect her claim; to wit, a Proof of Death Claimant's Statement, a Proof of Death Physician's Statement, or alternately, a copy of the insured's Death Certificate, and the insured's Life Insurance Policy for cancellation. As per instructions, Defendant completed and forwarded the necessary documents to the insurance company.

4. In late June, 1976, defendant became concerned about the status of her insurance claim. Upon inquiry, the insurance company explained that since defendant's son had died within the first two years of the coverage of his policy, and the "incontestability clause" had not taken effect, it was

necessary for the company to investigate the circumstances of the insured's death. The investigation was taking longer than is customary because the insurance investigators were having difficulty obtaining the insured's medical records and history. The fact that the insured had expired while in the military, and out of the country, made the investigation difficult.

5. Through mutual acquaintances, defendant informed the plaintiff, John H. Harmon, a duly licensed and practicing attorney in New Bern, N. C., that she had an insurance claim that she wanted to discuss with him. Plaintiff met with the defendant at defendant's residence on the 4th of July, 1976, and conferred with defendant about her claim with the insurance company. The parties did not discuss or negotiate an attorney fee arrangement at this initial conference.

6. On July 7, 1976, plaintiff returned to the residence of the defendant and presented her with two documents for her signature: (1) a medical authorization and (2) a paper entitled "CONTRACT." The contract acknowledged that the defendant was employing the plaintiff to handle an insurance claim with the MANUFACTURER'S LIFE INSURANCE COMPANY; authorized the plaintiff to take actions necessary to collect the policy; and provided for the plaintiff's fee. A contingent fee of 20 percent of any amount collected from the insurance company without the necessity of filing suit was established as plaintiff's fee. Should the claim require filing of a lawsuit, the plaintiff's fee was to be 33⅓ percent of any amount collected from the insurance company. Defendant executed both documents in the presence of plaintiff.

7. Plaintiff's tenure of employment began on July 7, 1976 and ended on July 31, 1976, with the delivery to the defendant of a check drawn on the account of MANUFACTURER'S LIFE INSURANCE COMPANY in the amount of $37,263.87, dated July 22, 1976 and payable to Lee Vester Pugh only. During the course of his employment the plaintiff rendered the following services:

a. Plaintiff made 5 or 6 trips to defendant's residence to discuss defendant's insurance claim. These trips include the intitial interview of July 4, 1976, the fee discussion of July 7, 1976, and the delivery of the check on July 31, 1976.

b. Plaintiff prepared two documents for defendant's signature, (1) a medical authorization to military personnel for procurement of medical records, (2) and the employment contract.

c. Plaintiff wrote two letters to the National Personnel Records in St. Louis, Missouri to obtain the medical history of Defendant's son.

d. Plaintiff wrote three letters to the insurance company in which he forwarded copies of the insured's medical history and autopsy. The autopsy confirmed the fact that the insured had expired from pneumonia.

e. Plaintiff made some fifteen telephone calls to various agencies and parties.

8. Plaintiff delivered the insurance check to the defendant on July 31, 1976, and made demand upon defendant for the payment of his fee in the amount of twenty percent of the money paid by the insurance company or approximately $7,400.00. Defendant refused to pay plaintiff's fee at that time and on subsequent occasions when plaintiff made demand for payment.

9. Plaintiff filed suit in the Craven County Superior Court praying the Court to award judgment against the defendant in the amount of $7,400.00 as compensation for services rendered.

AND UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That the plaintiff and defendant entered into a written contract, which defined the scope, nature, and compensation of plaintiff's employment on July 7, 1976:

2. That the contract was fairly and freely made;

3. That at the time defendant executed the contract, she had full knowledge of the effect of the contract and of all material circumstances relating to the reasonableness of the fee;

4. That the contract was made in good faith, without suppression or reservation of fact;

5. That at the time plaintiff and defendant entered into the contract and employment relationship, defendant had already filed documents required by the insurance company to perfect a claim for insurance benefits predicated upon the death of insured as a result of "natural causes"; that the insurance company had acknowledged defendant's claim, but was exercising an option reserved in the insurance policy, and was investigating the circumstances of its insured's death to determine if there were grounds to "contest or deny" the insurance claim;

6. That the insurance company was having difficulty obtaining medical information needed to determine the status of defendant's claim; that plaintiff provided valuable services to defendant by acquiring medical information required by the insurance company to determine if the claim of defendant was in any way "contestable"; that the medical information and autopsy forwarded to the insurance company stated that the insured had died of pneumonia, and satisfied the investigators that there were no grounds upon which to deny or contest defendant's claim; that upon arriving at the conclusion that defendant's claim was not contestable, the insurance company forwarded payment of the benefits as stated in the insurance policy;

7. That procurance of the medical information and autopsy by the plaintiff and the forwarding of those documents to the insurance investigators were services of a menial class, and did not require the exercise or expenditure of any special skill, diligence, or expertise upon the part of the plaintiff;

8. That since defendant's claim was paid as a result of the performance of a menial task by the plaintiff, and since the insurance company after investigation, never contested defendant's insurance claim, the contingent fee of $7,400.00 demanded by the plaintiff is excessive in proportion to the value of the services actually rendered by the plaintiff; that the contingent fee is so excessive as to be oppressive and unenforceable in this Court;

9. That plaintiff is entitled to compensation as can be ascertained in a quantum meruit; that the services rendered by the plaintiff have a reasonable value of $750.00.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of $750.00 with interest thereon from the 3rd day of August, 1976, together with the costs of this action to be taxed by the clerk.

/s/ ROBERT D. ROUSE, JR.
Hon. Robert D. Rouse, Jr.
Superior Court Judge Presiding

By Stipulation signed out of district and of the term—August 16, 1977.

/s/ ROBERT D. ROUSE, JR.

From the foregoing judgment, plaintiff appealed.

Chambers, Stein, Ferguson & Becton, by James E. Ferguson II, for the plaintiff.

Carter W. Jones and Ralph G. Willey III, for the defendant.

MARTIN (Robert M.), Judge.

The question presented for review is whether the facts found support the trial judge's legal conclusion that plaintiff's entitlement to compensation must be ascertained in quantum meruit.

Plaintiff did not except to the trial judge's findings of fact or contend by specific assignment of error that the evidence did not

support the findings of the trial judge. The sole assignment of error to the signing of the judgment presents the face of the record proper for review, but is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form.

[1] Contracts for contingent fees, especially, are closely scrutinized by the courts where there is any question as to their reasonableness, irrespective of whether made prior to the commencement of or during the attorney-client relationship. *Randolph v. Schuyler*, 284 N.C. 496, 201 S.E. 2d 833 (1964). "A contingent fee contract is always subject to the supervision of the courts as to its reasonableness." *Tonn v. Renter*, 6 Wis. 2d 498, 95 N.W. 2d 261 (1958); see, 1 Annot., 13 A.L.R. 3rd 701 (1974).

In *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1976), Justice Lake, speaking for the Court, states the rule in *Randolph v. Schuyler, supra*, as follows:

> "A contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary."

In the same case, Justice Lake states the rule governing a contract for a contingent fee, whether made during the existence of the attorney-client relationship or *prior* to its inception, as stated in *Casket Co. v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 383 (1921), 19 A.L.R. 391 (1921) as follows:

> "A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties; and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client."

[2, 3] The subject contract, even though found to have been entered into fairly and in good faith and without suppression of fact, is subject under the above cited cases to the scrutiny of the court as to its reasonableness. We hold that the findings of fact support the conclusions of law and the judgment entered. The judgment is regular in form and is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. WAYNE HAYWOOD BROOKS

No. 7829SC457

(Filed 7 November 1978)

1. **Arrest and Bail § 9.1; Criminal Law § 91.1— granting of continuance—revocation of appearance bond—custody in prison hospital**

Where the trial court granted defendant a continuance because subpoenas had not been served on defendant's witnesses and because defendant's illness and the medication it required impaired defendant's ability to assist counsel in preparing his defense, the trial court did not err in also revoking defendant's appearance bond and ordering him taken into custody in the prison hospital for safekeeping in order to insure that he would be both present and able to proceed with trial on the next date for which trial was set. G.S. 15A-534(f).

2. **Constitutional Law § 50; Criminal Law § 91.1— continuance granted—motion for speedy trial and to withdraw motion for continuance—findings required for trial to proceed**

Where the trial court granted defendant a continuance because defendant's witnesses had not been subpoenaed and because defendant's illness and the medication it required impaired defendant's ability to assist counsel in the preparation of his defense, the trial court erred in allowing the case to proceed to trial upon defendant's motion for a speedy trial and for leave to withdraw his prior motion for a continuance without evidence or findings that the impairments for which the continuance had been granted no longer existed.

APPEAL by defendant from *Collier, Judge*. Judgment entered 15 March 1978 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 20 September 1978.

The defendant was indicted for the felonies of breaking or entering, larceny, and robbery with firearms. Upon his pleas of not guilty, the defendant was found guilty on all charges. From judgment sentencing him to imprisonment for a term of thirty years, the defendant appealed.

The defendant was indicted on 9 March 1977, and counsel was appointed to represent him. Counsel for the defendant filed a motion to withdraw from the case on 9 March 1978. The motion was immediately allowed. The trial court appointed two other attorneys to represent the defendant on that date. Four days later, when the case was calendared for trial, counsel for the defendant filed a motion for a continuance. Additionally, the defendant filed a pro se motion for a continuance at that time. The motion of counsel was based on the grounds that counsel had not had sufficient time to prepare for trial, that the defendant was in poor health resulting in the need for his admission to a hospital and that, as a result, the defendant was unable to effectively assist counsel. The defendant's motion pro se indicated in part that his counsel had not had time to prepare his defense or subpoena witnesses and that the defendant had been on medication for a kidney and prostate infection at all times since the appointment of counsel. The defendant stated in his motion that:

> The drugs have some sort of side effects which make it impossible for the defendant to be able to use good reasoning and logic and also prevents him from making good and sound judgments. It also led him to be unable to think of all the persons who need to be subpoenaed for his trial defense. The defendant was also suffering a great deal of pain. The combination of the side effects and pain prevented the defendant from being able to adequately and effectively assist counsel towards preparing his trial defenses. . . . The defendant is still suffering much pain and is still under the influence of the drugs which are still causing him to be unable to think straight. Because of this, he is not capable of adequately and effectively assisting counsel in his own defense. And the defendant must continue to take the drugs for his infected kidneys and prostate gland or risk death.

The defendant also referred in his motion to a medical statement which was prepared by a physician and included in the record.

The physician's written statement indicated that the defendant had an enlarged prostate, chronic infection of the prostate gland and pyelitis or pus in the urine and should be admitted to a hospital for definitive treatment as early as convenient.

In ruling on the defendant's motions, the trial court recognized that it would be an embarrassment for the defendant's court-appointed counsel to go to trial on such short notice, that the defendant's witnesses had not been served with subpoenas and that various representations had been made concerning the defendant's health. Therefore, the trial court concluded that the motions for continuance should be allowed "in the interest of justice" and ordered the defendant's cases continued until the next term of criminal court. At the same time, the trial court revoked the defendant's bond and ordered that he be held for safekeeping in the hospital of Central Prison in Raleigh "so that they can examine him and treat him for his addiction to drugs, or for whatever his medical condition is."

On the same day the motions for a continuance were allowed, the defendant and his counsel signed and filed a motion for a speedy trial and to withdraw their previous motions for continuance. The motion by the defendant and counsel to withdraw prior motions stated that it "acknowledges that the issues are in all respects ready for trial," and requested the defendant's cases be recalendared for trial at that session of court. Although the record on appeal does not reflect a specific ruling by the trial court on this motion, the trial court allowed the immediate trial of the defendant's cases which resulted in this appeal.

At trial the State offered evidence tending to show that Dean Burgess locked the doors to a store he operated in Spindale, North Carolina, on the evening of 31 January 1977 and went home. The burglar alarm in the store went off later that night, and Burgess returned to the store. He entered the store alone, and a large man with a gun accosted him. The man forced Burgess to lie down at the back of the store and stole Burgess' wallet containing approximately $1,200. Burgess then heard the man calling out to someone in the front of the store. The two intruders carried on a short conversation, and the man in the front of the store told the other to kill Burgess. The man who had first accosted Burgess fired a shot at him but missed, and the two intruders fled.

The witness Burgess later identified the man who shot at him as Marlon Edwards and the voice he heard in the store as sounding like that of the defendant. Rodney Wiggins testified that he, Marlon Edwards and the defendant broke into the Burgess store on the evening in question. Wiggins stated that he left the store, however, when Burgess arrived.

The defendant presented evidence in the nature of alibi testimony. Tonya Huffman testified that she was present when the defendant checked into a motel room in Gastonia, North Carolina, on the evening in question. She further testified that she saw the defendant at the motel as late as 9:00 p.m. on that date.

Attorney General Edmisten, by Leigh Emerson Koman, for the State.

T. Eugene Mitchell for the defendant appellant.

MITCHELL, Judge.

[1] The appellant first assigns as error the order of the trial court granting his motion for a continuance but revoking his appearance bond and ordering him taken into custody in the prison hospital for safekeeping. In support of this assignment, the defendant contends that the order denied him his rights to the effective assistance of counsel, to compel attendance of witnesses in his behalf, and to due process and equal protection of law guaranteed by the Constitution of the United States and the Constitution of North Carolina. The defendant argues that the action of the trial court in revoking his appearance bond was intended to so burden his exercise of his constitutional rights as to force him to waive those rights and to proceed with trial although unprepared. We specifically reject this argument, as both the order and the remainder of the record on appeal are absolutely devoid of any evidence whatsoever tending to indicate any effort by the trial court to coerce or pressure the defendant into waiving any of his rights.

At the time it allowed the defendant's motions for a continuance, the trial court found that subpoenas had not been served upon the defendant's witnesses. This finding is supported by unserved subpoenas directed to several of the defendant's

witnesses, which are contained in the record on appeal. The trial court also indicated that it based its order granting the continuance in part upon representations by the defendant and his attorneys concerning his ill health and inability to assist counsel in preparing his defense. The representations which were then before the trial court relating to the defendant's ill health and inability to assist counsel are also included in the record on appeal. Having considered and made reference to these matters, the trial court found that the interests of justice required that a continuance be granted until the next criminal term of superior court in Rutherford County, and that the defendant's bond be revoked in order to insure that he would be able to proceed at that time.

The order of the trial court was in all respects proper pursuant to its authority under G.S. 15A-534(f), which provides for revocation of an order of pretrial release for good cause shown. The defendant had specifically indicated to the court that his sickness and the medication it necessitated directly impaired his mental capacity. The defendant's evidence additionally indicated that, absent hospitalization and definitive treatment, the condition might well continue to impair his mental ability beyond the next criminal term of superior court in Rutherford County. The trial court properly took this into account in deciding to revoke the defendant's bond. In determining the conditions of release or the propriety of revoking a defendant's bond, the trial court may consider not only the question of whether the defendant will appear for trial, but may also consider whether he will appear for trial in such mental and physicial condition as to be able to proceed. G.S. 15A-534(c) and (f). Had the defendant so chosen, he could, of course, have applied for an order setting forth new conditions of pretrial release after the trial court revoked his appearance bond. Upon such motion, the trial court would have been required to set new conditions of pretrial release. G.S. 15A-534(f). The trial court's order granting the defendant's motion for a continuance and revoking his appearance bond in order to insure that he would be both present and able to proceed with trial on the next date for which trial was set was without error.

[2] However, having determined from competent evidence that the interests of justice required that the defendant's case be continued in order that the defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effec-

tive assistance of counsel, the trial court erred in allowing the case to proceed to trial upon the defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance. No evidence was introduced before the trial court indicating that the defendant's impairments had subsided or no longer existed. Having determined that the interests of justice required a continuance, the action of the trial court in allowing the case to proceed to trial without evidence or findings that the impediments to those rights had subsided constituted a denial of those rights as well as the defendant's rights to due process of law and equal protection of the laws. Each of these rights is specifically guaranteed to every defendant by the Constitution of the United States and the Constitution of North Carolina. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, §§ 19 and 23.

The filing of the defendant's motion for a speedy trial and for leave to withdraw the prior motions for a continuance may not be held to constitute a waiver of those rights preserved by the original order of the court granting the continuance. Courts indulge every reasonable presumption against the waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Stokes*, 274 N.C. 409, 163 S.E. 2d 770 (1968). At the time the trial court granted the defendant's motion to withdraw his prior request for a continuance, which amounted to a waiver of a right found to exist by the trial court, the defendant indicated that he was under the influence of drugs and unable to assist counsel. This evidence tended to find support in the statement of the defendant's physician which was considered by the court. The trial court made no finding contrary to the unrebutted evidence that the defendant was unable to assist counsel in the preparation of his defense. The presumption against waiver of the fundamental rights protected by the trial court's first order was not rebutted or overcome. The trial court having correctly found and concluded that the interests of justice required a continuance, the same interests of justice required that the defendant's motion for speedy trial and to withdraw his prior motions be denied. For these reasons the trial court erred in permitting the case to go to trial, and the defendant must be and is granted a

New trial.

Judges MORRIS and ERWIN concur.

STATE OF NORTH CAROLINA v. RUSSELL SIDNEY CORRELL

No. 7827SC467

(Filed 7 November 1978)

1. Criminal Law § 71— shorthand statement of fact

In a homicide prosecution, a witness's testimony that defendant and his companion were laughing immediately after the shooting of the victims was competent as a shorthand statement of fact.

2. Homicide § 15.4— testimony that witness saw a murder—invasion of province of jury—harmless error

A witness's testimony that he "witnessed murder of motorcycle rider and girl" invaded the province of the jury and was erroneously admitted; however, its admission was harmless beyond a reasonable doubt where the jury, by its verdicts of not guilty on one charge and guilty of involuntary manslaughter on the other, rejected the witness's opinion and found that no murder had been committed.

3. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for second degree murder of two persons where it tended to show that defendant was carrying a pistol in his car when he encountered the two victims riding a motorcycle; defendant fired at the victims five or six times with an automatic pistol and killed them both; and defendant then drove away laughing.

4. Homicide § 21.9— involuntary manslaughter—sufficiency of evidence to support verdict

Even if the jury found that defendant acted in self-defense in firing his pistol at and killing a motorcycle driver, the evidence would support a verdict of involuntary manslaughter in the shooting death of a female passenger on the motorcycle where a State's witness testified that he saw the driver "falling over the bike and the bike started leaning over and the bullets hit the girl and she started falling backwards," and defendant testified that when he saw the two victims on the motorcycle beside his car, he got his gun, ducked down as far as he could in the car and started shooting with his hand above the window ledge, since the State's evidence would have allowed the jury to find that defendant negligently continued firing after the driver had fallen and the need for self-defense had passed, and defendant's testimony would have allowed the jury to find that defendant showed a heedless indifference to the rights and safety of others or a careless disregard of the consequences of his act.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 12 January 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 16 October 1978.

The defendant was charged in separate bills of indictment with the second degree murders of David Cramer, also known as Jack Nadulack, and India Payne. Upon his pleas of not guilty to each charge, the jury returned verdicts finding the defendant not guilty in the death of Cramer and guilty of the involuntary manslaughter of India Payne. From judgment sentencing him to imprisonment for a term of five years, the defendant appealed.

The State's evidence tended to show that David Cramer, who was generally known as Jack Nadulack, and India Payne were buying gasoline for Nadulack's motorcycle at a country store on 29 June 1977. Nadulack drove the motorcycle around the gas pumps as Payne paid for the gasoline. She then jumped onto the back of the moving motorcycle, and the two began to pull into the flow of passing traffic. They then slowed down and stopped beside a car driven by the defendant and containing another person. There were a few seconds of conversation between the occupants of the motorcycle and the occupants of the car followed by gunshots. The car then left at a high rate of speed, and the defendant and the other occupant appeared to be laughing.

When the Gaston County Life Saving Crew arrived, they found the bodies of Nadulack and Payne lying on the motorcycle. They moved Nadulack's body from the motorcycle and found a five-shot revolver underneath. The weapon was loaded with hollow point bullets which are a type of anti-personnel ammunition. It had not been fired.

Officer F. M. Dow of the Gaston County Police Department testified that he spotted a car similar to the one used in connection with the shooting shortly after the commission of that shooting. He followed the car to the home of the defendant's aunt. When Officer Dow stopped in front of the home, the defendant and Gary Teague came out. At that time the defendant said, "Fats was going to kill us and we shot him."

The defendant presented evidence tending to show that Nadulack had the reputation in the community of a dangerous and violent fighting man and often carried a handgun. The State stipulated that Nadulack was under indictment for several violent felonies including an assault with intent to kill on the defendant and the murder of one John Hastings. The defendant's evidence also tended to show that, after the death of Hastings, the defend-

ant began carrying a handgun for his own protection due to threats Nadulack had made against him.

Gary Teague testified that he was in the car with the defendant on the day of the shooting. While they were driving down a public road, Nadulack pulled up beside them on his motorcycle and pointed a pistol in the car window. The defendant slammed on brakes and Nadulack continued down the road. The defendant then took an alternate route and continued on his way. Later that day, having just entered onto a highway, the occupants of the car saw Nadulack leave the parking lot of a store on his motorcycle. He came straight toward them and forced them off the road. As the motorcycle came up beside the car on the driver's side, the defendant rolled down his window. Nadulack then said that the two of them were dead and produced a pistol. Teague ducked between the bucket seats of the car and did not see what happened, but he heard shots and the motorcycle falling against the car.

The defendant's testimony was essentially identical to Teague's with regard to events leading up to the shooting. The defendant testified that he pulled his pistol after seeing Nadulack produce a pistol. The defendant then ducked down into the car and held his pistol above the window ledge and began shooting. The defendant further testified that it was his intention "to shoot Nadulack and I had no intention of shooting anyone but him. I didn't know the second individual on the bike and didn't even know if it was male or female. My life was in danger and it didn't matter."

Other material facts are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney R. W. Newsom III, for the State.

W. J. Chandler for the defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission into evidence of certain conclusory remarks by the State's witnesses. In support of this assignment, the defendant contends the trial court erred in permitting a witness for the State to testify that the defendant and Teague were laughing immediately after the

shooting of Nadulack and Payne. The witness' statement that the two men were laughing was a shorthand statement of fact and a natural and instinctive inference drawn by the witness from his observations. As such, it was admissible. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); 1 Stansbury, N.C. Evidence (Brandis Rev., 1973) § 125.

[2] The defendant further contends that the admission of testimony by one of the State's witnesses that he "witnessed murder of motorcycle rider and girl" was error. This statement of the witness' opinion tended to invade the province of the jury and to embody a question of law, and its admission was error. However, the admission of this testimony was harmless beyond a reasonable doubt as the outcome of the case was clearly unaffected by the error. G.S. 15A-1443(a). By its verdicts of not guilty on one charge of murder and guilty of involuntary manslaughter on the other, the jury specifically rejected the witness' opinion and found that no murder had been committed. As the witness' expression of opinion was not accepted by the jury, the admission of that opinion into evidence was clearly harmless beyond all doubt and does not constitute reversible error. *Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975).

[3] The defendant next assigns as error the denial by the trial court of his motions to dismiss which were made at the close of the State's evidence and at the close of all of the evidence. As the defendant introduced evidence at trial, we need not consider the trial court's denial of the first motion. G.S. 15-173. With regard to the denial of the defendant's motion to dismiss made at the close of all of the evidence, we must determine whether the evidence considered in the light most favorable to the State was sufficient to support findings by the jury that the offense in question had been committed by the defendant. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975). When considered in the light most favorable to the State, the evidence reveals that the defendant was carrying a pistol in his car when he encountered Nadulack and Payne riding a motorcycle. He fired at them five or six times with an automatic pistol and killed both. He then drove away laughing. This evidence was sufficient to support the trial court's denial of the defendant's motion to dismiss.

[4] The defendant next assigns as error the trial court's instructions to the jury that it could find the defendant guilty of involuntary manslaughter in the death of India Payne. Although the defendant was charged with the murder in the second degree of India Payne, the trial court was required to instruct the jury as to any included crime of lesser degree than that charged if there was evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). Therefore, this assignment raises the issue of whether the record contains any evidence which would support a verdict of involuntary manslaughter in the death of India Payne. We think that it does.

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by *either* (1) an unlawful act not amounting to a felony or naturally dangerous to human life, *or* (2) a culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). The defendant argues that, as the jury found he acted in self-defense in killing Nadulack, his firing of the pistol was lawful and would not support his conviction of the crime of involuntary manslaughter. This argument overlooks the second half of the definition of involuntary manslaughter.

Although we cannot know the basis for the jury's verdict finding the defendant not guilty of the murder of Nadulack, we may assume for purposes of this appeal that the defendant is correct and the jury determined that his actions with regard to Nadulack constituted justifiable self-defense. The fact that a person's intentional act of self-defense against one individual may be justifiable and lawful does not give him license to engage in such lawful act of self-defense in disregard of its consequences to others. Assuming that the defendant acted in self-defense in firing his pistol, he might, nonetheless, be guilty of involuntary manslaughter if he performed this otherwise lawful act in a culpably negligent manner which proximately resulted in the death of India Payne.

In order for an act to be culpably negligent, it "must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v.*

Everhart, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1976). Here, one of the State's witnesses testified that, "I saw Mr. Nadulack falling over the bike and the bike started leaning over and the bullets hit the girl and she started falling backwards." The witness then observed the defendant drive off laughing. This testimony would have allowed the jury to find that the defendant negligently continued firing after Nadulack had fallen and the need for self-defense had passed.

Additionally, the defendant's own testimony was that he saw Nadulack and Payne on the motorcycle beside his car and "I got the .45, ducked down as far as I could in the car and started shooting. I had my hand above the window ledge." The defendant also testified that he did not intend to kill Payne. This evidence was sufficient to permit the jury to find that the defendant showed a heedless indifference to the rights and safety of others or a careless disregard of the consequences of his acts. It would also support a jury finding that the defendant unintentionally shot Payne resulting in her death. Therefore, there was evidence sufficient to support a verdict of guilty of involuntary manslaughter. The trial court did not err in instructing the jury with regard to involuntary manslaughter.

The defendant next assigns as error the trial court's instructions to the jury concerning the doctrine of transferred intent. As the jury found the defendant not guilty of any crime having intent as an element, any error concerning the doctrine of transferred intent was clearly harmless beyond any doubt.

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

No error.

Chief Judge BROCK and Judge HEDRICK concur.

JAMES E. SMITH v. AMERICAN RADIATOR & STANDARD SANITARY CORPORATION AND W. M. WIGGINS & CO., INC., AND INDUSTRIAL MAINTENANCE AND MECHANICAL SERVICE, INC.

No. 778SC704

(Filed 7 November 1978)

1. **Process § 13; Rules of Civil Procedure § 4— service on agent of foreign corporation—sufficiency of service**

Service of process upon defendant was valid where certified mail was addressed to defendant's process agent but was received by another person at defendant's address since G.S. 1A-1, Rule 4(j)(9)b does not require service by certified mail to be accomplished only by delivery of process personally to the addressee; and the return receipt, along with the affidavit of plaintiff's attorney, gave rise to an inference that the person who received the summons and complaint did so on behalf of defendant and that this person was of reasonable age and discretion so that he could receive mail for defendant.

2. **Limitation of Actions § 4.2— negligence action—faulty plumbing—three year period of limitation not enlarged**

Though the actions of defendant in altering plumbing while engaged as a contractor performing a portion of the construction of a textile plant where plaintiff was employed brought defendant within the provisions of G.S. 1-50(5), that statute did not extend the time within which plaintiff could bring an action against defendant for injuries sustained by plaintiff when a urinal exploded, allegedly the result of defendant's negligence in altering the plumbing, since G.S. 1-50(5) provides an outside limit of six years "after the performance or furnishing of such services and construction" of improvements to real property for the bringing of an action coming within the terms of that statute, but within that outside limit G.S. 1-52(5), the three year statute of limitation, continues to operate. Therefore, plaintiff's action against defendant was barred where plaintiff's injury occurred on 11 November 1972; plaintiff instituted his action on 10 November 1975; but the action against defendant was not instituted until plaintiff's amended complaint was filed on 1 September 1976, more than three years after the injury occurred.

APPEAL by defendant, Industrial Maintenance and Mechanical Service, Inc., from *Smith (David I.), Judge*. Order entered 18 July 1977 in Superior Court, LENOIR County. Heard in the Court of Appeals 26 May 1978.

Plaintiff instituted this action on 10 November 1975 to recover for personal injuries sustained by him on 11 November 1972 when a wall urinal which he had just used exploded upon flushing. The urinal was located in the rest room of a textile plant where plaintiff was employed as a guard. Plaintiff brought this ac-

tion originally only against American Radiator and Standard Sanitary Corporation and W. M. Wiggins & Co., Inc., alleging that American had manufactured and Wiggins had installed the urinal and alleging claims against each based on negligence and breach of warranty.

After receiving answers to interrogatories, plaintiff sought and received an order dated 1 September 1976 permitting him to amend his complaint to bring in Industrial Maintenance and Mechanical Service, Inc. as an additional party defendant. In his amended complaint plaintiff alleged that Industrial, as a contractor, had performed a portion of the construction work at the plant where plaintiff was employed, that in performing its portion of the contract Industrial had negligently removed an air chamber which had been placed in the plumbing system as a safety feature by the co-defendant, Wiggins, and that by so doing the plumbing system, and particularly the urinals, had been rendered unsafe. Plaintiff alleged that Industrial's negligence was a direct and proximate cause of the explosion and his resulting injuries.

In its answer to plaintiff's complaint, Industrial moved that plaintiff's action against it be dismissed because of insufficiency of service of process and pled the three year statute of limitations contained in G.S. 1-52 as a bar to plaintiff's action. Following a hearing, the court entered an order concluding that there was a valid service of process upon Industrial and that plaintiff's action against this defendant was not barred by the statute of limitation.

Defendant Industrial Maintenance and Mechanical Service, Inc. appeals from this order. Neither of the two original defendants is involved in this appeal.

Turner and Harrison by Fred W. Harrison for plaintiff appellee.

Barden, Stith, McCotter & Stith by Laurence A. Stith and F. Blackwell Stith for defendant appellant Industrial Maintenance and Mechanical Service, Inc., appellant.

PARKER, Judge.

[1] Appellant's first contention is that the trial court erred in its conclusion that there was a valid service of process. Pursuant to G.S. 1A-1, Rule 4(j)(9)b, plaintiff attempted service upon appellant

by certified mail, return receipt requested. The mail was addressed to "Mr. John E. Mickler, Process Agent, Industrial Maintenance & Mechanical Service." The certified mail receipt shows that process was received by Bill Ballyer. Appellant contends that service was defective because the summons and complaint were received by Bill Ballyer rather than by the addressee and process agent, Mr. John E. Mickler. We find the service valid.

Rule 4(j)(9)b does not require service by certified mail to be accomplished only by delivery of process personally to the addressee. The rule requires only that the 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." *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 438, 232 S.E. 2d 458, 459 (1977). The return receipt, along with the affidavit of plaintiff's attorney, gives rise to an inference that the summons and complaint were delivered to Bill Ballyer at the appellant's address, that Bill Ballyer received the summons and complaint on behalf of the appellant, and that Bill Ballyer was a person of reasonable age and discretion authorized to receive mail for the appellant. This inference creates a rebuttable presumption that the service is valid. *In re Cox*, 36 N.C. App. 582, 244 S.E. 2d 733 (1978). Appellant has made no attempt to rebut this presumption. Therefore, the service has not been shown to be defective merely because Bill Ballyer received the summons and complaint addressed to Mr. John E. Mickler. Appellant's first assignment of error is overruled.

Appellant's remaining assignment of error is directed to the trial court's conclusion that plaintiff's action against appellant is not barred by the statute of limitation. The immediate appealability of a pretrial order rejecting a party's contention that the action against him is barred by a statute of limitation may be subject to question. However, since appellant in this case was entitled to an immediate appeal from the court's order concluding that there was a valid service of process and that the court had therefore acquired jurisdiction over the appellant, G.S. 1-277(b), the entire case is before us, and we will consider plaintiff's assignment of error relating to its defense of the statute of limitation. *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E. 2d 108 (1967).

[2] Plaintiff's injuries occurred on 11 November 1972, and his cause of action to recover for those injuries accrued on that date. Plaintiff instituted this action against the two original defendants on 10 November 1975, within the three-year statute of limitation provided in G.S. 1-52(5) for actions to recover for injury to the person. However, this action was not instituted against the appellant until plaintiff's amended complaint was filed on 1 September 1976, more than three years after the injury occurred. Although plaintiff's action as to the appellant falls outside the three-year limit provided by G.S. 1-52(5), the trial court concluded that the limitation period applicable to plaintiff's claim against appellant is the period set forth in 1-50(5), which provides:

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

Appellant contends that G.S. 1-50(5) does not apply to it because it was not "performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property." We do not read the statute so narrowly. Admittedly, there is no allegation that appellant installed the urinal in question. The allegations of plaintiff's amended complaint do show, however, that appellant, while engaged as a contractor performing a portion of the construction of the Guilford National Textile Plant where plaintiff was employed, "removed and altered certain construction work and materials performed and placed upon the job by other contractors—including but not limited to an air chamber placed in the plumbing system by the codefendant (W. M. Wiggins & Co., Inc.)." According to plaintiff's allegations,

the alterations made to the plumbing system by the appellant caused the urinal to explode when it was flushed. These allegations are sufficient to show that appellant was "performing or furnishing the . . . supervision of construction or construction of such improvement to real property," as those words are employed in G.S. 1-50(5).

Having decided that appellant's activities bring it within the provisions of G.S. 1-50(5), the question remains as to the effect of that statute upon plaintiff's cause of action. Stated differently, the question is whether G.S. 1-50(5) serves to *extend* the time within which an action may be brought or whether it sets an outside limit within which the applicable statute of limitation, in this case the three year statute contained in G.S. 1-52(5) continues to operate. This question has not yet been decided by the appellate courts of this State. Necessarily, therefore, we turn for guidance to decisions by courts of other jurisdictions.

Statutes similar to, and in many cases identical with, our statute G.S. 1-50(5) have been adopted in a large number of jurisdictions. *See*, Comment, *Limitation of Action Statutes for Architects and Builders—Blueprint for Non-action*, 18 Cath. U.L. Rev. 361 (1969). Because of their unique manner of limiting actions, these statutes have been referred to as "hybrid" statutes of limitations, having potentially both a substantive and a procedural effect. On the one hand, the date of injury is not a factor used in computing the running of the time limitation. The statute thus acquires its substantive quality by barring a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period. On the other hand, the statute's operation is similar to that of an ordinary statute of limitations as to events occurring before the expiration of the prescribed time period. Whether in such case the statute is to be interpreted as replacing entirely the statute of limitation which would otherwise be applicable or is to be interpreted as operating in conjunction with such other statute, is the principal question presented by this appeal. Courts of other States which have confronted this problem have held that the two statutes should be interpreted as operating in conjunction with each other.

New Jersey has a statute, N.J.S.A. 2A: 14-1.1, which in all material respects is identical to our G.S. 1-50(5) except that the

time limit is set at ten years after the performance or furnishing of such services or construction instead of six years as provided in our statute. The New Jersey statute of limitation generally applying to all personal injury actions, N.J.S.A. 2A: 14-2, provides that action must be brought within two years after the date of the injury. Discussing the interplay of these statutes, the Supreme Court of New Jersey in *O'Connor v. Altus*, 67 N.J. 106, 335 A. 2d 545 (1975) said:

> As do many of its counterparts in other states, N.J.S.A. 2A: 14-1.1 impliedly incorporates the tort limitation act generally applying to all personal injury actions. See Comment, *supra* at 385-86. Hence, this state's two-year statute of limitations, N.J.S.A. 2A: 14-2, does operate to restrict the period in which actions can be initiated for accidents occurring within ten years after construction; but it does not serve to extend beyond ten years from the date construction was completed the time within which suit may be filed.
>
> For example, an action for personal injuries sustained by an adult in an accident occurring, say, five years after the completion of construction still must be brought within two years thereafter—or seven years after construction. This statute does not preserve the remedy, in that instance, for an additional five years or until the full ten years from construction has elapsed. As indicated, both the two-year and ten-year statutes are at work in that situation. The latter does not expand the two-year period of the personal injury statute. It simply provides that in any event the suit must be started within ten years of the construction, regardless of when the cause of action accrues. The two-year period of N.J.S.A. 2A: 14-2 controls to the extent that it "fits" within the ten years. So, with any injury to an adult occurring after the eighth year following construction, the action must be brought within whatever part of the ten-year span remains even though it is necessarily less than two years. In that circumstance the two-year period is "compressed" into some shorter period by operation of the ten-year statute. *But cf.* Comment, *supra* at 372. Had the legislature intended otherwise, it would likely have referred to an accident or accrual of a cause of action within ten years of construction rather than prohibiting the bringing of suit beyond that time.

67 N.J. at 122-23, 335 A2d at 553.

Virginia had a statute, Va. Code § 8-24.2 (subsequently amended and recodified as § 8.01-250), which was also in all material respects identical to our G.S. 1-50(5), except that the time limit was set at five years after the performance or furnishing of such services and construction instead of six years as provided in our statute. The Virginia statute of limitation generally applying to all personal injury actions, Va. Code § 8-24, provided that such actions must be brought within two years next after the right to bring the same shall have accrued. Discussing the Virginia statute § 8-24.2, the Supreme Court of Virginia in *Comptroller of Virginia ex rel Virginia Military Institute v. King*, 217 Va. 751, 232 S.E. 2d 895 (1977), said:

> That statute sets an outside limit within which the applicable statutes of limitation operate. Its purpose is not to extend existing limitation periods, such as the two-year period applicable to personal injury actions, but to establish an arbitrary termination date after which no litigation of the type specified may be initiated. *See O'Connor v. Altus*, 67 N.J. 106, 335 A.2d 545 (1975); *Federal Reserve Bank of Richmond v. Wright*, 392 F. Supp. 1126 (E.D. Va. 1975). We will assume, without deciding that the statute was correctly construed in *Federal Reserve Bank of Richmond* to require that actions arising from defective and unsafe condition of improvements to real property be brought within five years after the completion of construction, and is not fatally defective on constitutional grounds. *See Rosenthal v. Kurtz*, 62 Wis. 2d 1, 213 N.W. 2d 741, *reh. den.*, 62 Wis. 2d 1, 216 N.W. 2d 252 (1974).

217 Va. at 758, 232 S.E. 2d at 899.

Two Federal District Courts have agreed with the result reached by the Supreme Courts of New Jersey and of Virginia. *Federal Reserve Bank of Richmond v. Wright*, 392 F. Supp. 1126 (E.D. Va. 1975) (interpreting the Virginia statute), and *Grissom v. North American Aviation, Inc.*, 326 F. Supp. 465 (M.D. Fla. 1971) (interpreting the Florida statute, § 95.11(10), F.S.A. as it read prior to the 1974 amendment which substantially rewrote § 95.11; the Florida statute differs from N.C. G.S. 1-50(5) but the reasoning of the *Grissom* court is applicable here.)

Following the interpretation placed upon the statute by the Supreme Courts of New Jersey and Virginia, we hold that G.S. 1-50(5) is to be interpreted in conjunction with G.S. 1-52(5) so that both statutes may be given effect. So interpreted, G.S. 1-50(5) provides an outside limit of six years "after the performance or furnishing of such services and construction" of improvements to real property for the bringing of an action coming within the terms of that statute. Within that outside limit, G.S. 1-52(5) continues to operate and G.S. 1-50(5) does not serve to extend the time for bringing an action otherwise barred by the three year statute. In the present case, plaintiff's action against the appellant, Industrial Maintenance and Mechanical Service, Inc., was commenced more than three years after his action accrued, and the action as against this defendant is barred by G.S. 1-52(5).

We do not express an opinion on the constitutionality of G.S. 1-50(5) because that issue is not raised in this case. In cases in which that issue has been raised, courts of other jurisdictions considering statutes similar to G.S. 1-50(5) have arrived at conflicting conclusions. *Compare Fujioka v. Kam*, 55 Haw. 7, 514 P. 2d, 568 (1973); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E. 2d 588 (1967); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P. 2d, 143 (Okla. 1977); *Kallas Millwork Corporation v. Square D Co.*, 66 Wis. 2d 382, 225 N.W. 2d 454 (1975) *with Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W. 2d 918 (1970); *Reeves v. Ille Electric Company*, 551 P. 2d 647 (Mont. 1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A. 2d 662 (1972); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P. 2d 108 (1972). We hold only that the trial court erred in this case in failing to sustain the appellant's plea of the bar of the three year statute of limitations.

For the foregoing reason, the order appealed from is .

Reversed.

Judges HEDRICK and MITCHELL concur.

State v. Shook

STATE OF NORTH CAROLINA v. GILBERT M. SHOOK, JR.

No. 7812SC513

(Filed 7 November 1978)

1. **Constitutional Law § 31; Criminal Law § 5— mental capacity—motion for psychiatric fee denied—no error**

The trial court did not abuse its discretion in denying defendant's motion for payment of fees for a psychiatric examination to determine defendant's ability, at the time of his alleged confession made shortly after the shooting in question, knowingly and understandingly to waive his rights and make a voluntary statement since it was within the exercise of the court's discretion for him to find that a psychiatric examination 2½ years after the shooting incident would not materially assist defendant in showing his mental condition at the time of the incident. G.S. 7A-450(b).

2. **Criminal Law § 75.14— defendant's statement—no hearing on motion to suppress—evidence of voluntariness sufficient**

The trial court did not err in denying defendant's motion to suppress a statement made by defendant to police shortly after the shooting in question, though the court failed to hold a hearing on the motion, since defendant's psychiatric history was adequately before the court, and defendant showed no other evidence he would have offered to support his motion had a hearing been held; moreover, evidence was sufficient to support the court's conclusion that defendant's confession was voluntary where it tended to show that defendant was twice advised of his rights and asked if he had any questions; defendant said he understood and signed the waiver form; and defendant not only gave the officers a statement about the incident but also expressed his concern about the shooting victim.

3. **Criminal Law § 162— failure to object to evidence at trial—no consideration on appeal**

Defendant cannot complain on appeal about a witness's testimony concerning a prior shooting incident involving defendant since defendant did not object to the testimony at trial.

4. **Criminal Law § 75— defendant "fixing to sign" confession—evidence improperly admitted**

Though the trial court erred in allowing an officer to testify that defendant "was fixing to sign" a confession when his wife came in and stopped him, such error was not prejudicial in view of other evidence which tended to show that defendant willingly made the statement and indicated it was true.

5. **Criminal Law § 75.10— waiver of rights—opinion testimony improperly admitted**

Opinion testimony by an officer that defendant appeared to understand and know what he was doing in waiving his rights and making a statement was improperly admitted, but such evidence was not prejudicial in view of other competent evidence of defendant's understanding.

State v. Shook

APPEAL by defendant from *Godwin, Judge.* Judgment entered 17 January 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 September 1978.

Defendant was charged with shooting into an occupied building and assault with a deadly weapon with intent to kill inflicting serious injury. On 2 February 1976, prior to arraignment, the defendant moved to suppress an alleged oral confession. The motion was denied, the court ruling that it was not timely. Defendant was then arraigned, tried immediately, and convicted on both charges. This Court found no error, 31 N.C. App. 749, 230 S.E. 2d 702 (1976), but the Supreme Court ordered a new trial due to the violation of G.S. 15A-943(b) whereby the defendant may not be tried without his consent during the week following his not guilty plea at arraignment. 293 N.C. 315, 237 S.E. 2d 843 (1978).

On 3 January 1978 defendant moved for payment of fees for a psychiatric examination, arguing to the court that there was a serious question of his ability at the time of his alleged confession to knowingly and understandingly waive his rights and make a voluntary statement. The court asked whether a motion to suppress had been filed and defense counsel answered that it had not because he wanted the information from the psychiatric examination to be in the affidavit accompanying the motion to suppress. The motion for payment of fees for a psychiatric examination was denied. Defendant was then arraigned.

On 9 January 1978 defendant filed a motion to suppress the alleged oral confession. This motion was supported by the affidavit of defense counsel, which said: (1) that at the time of his arrest defendant asked to talk to a lawyer, but that he was questioned without being allowed to do so; (2) that during March 1975 defendant had been diagnosed as "acute brain syndrome" and had received psychiatric treatment; (3) that in September 1975 defendant was diagnosed as "psychosis with unspecified physical condition"; (4) that in November 1975 defendant was discharged from Dorothea Dix Hospital with a diagnosis of alcohol addiction and a notation of mild mental retardation; (5) that due to his mental condition, the interrogation impaired his judgment and reasoning, making a voluntary waiver of rights or voluntary statement impossible; and (6) that defendant's mental condition and his voluntary abuse of alcohol impaired his recollection of the shooting and interrogation.

On 12 January defendant filed a second motion for payment of fees for a psychiatric examination. The court heard this motion and denied it, then considered the motion to suppress and denied it without a hearing, on the ground that everything in the first trial through the time of arraignment was valid, including the denial of the motion at that time. In the alternative the court denied the new motion in its discretion.

At trial the State presented evidence that sometime after 12:45 a.m. on 27 July 1975, Robert Louis Johnson was inside the Charcoal Tavern when shots from outside the building struck him, resulting in his permanent paralysis. On 28 July two police officers took the defendant into custody. Officer Campbell testified that he advised defendant of his *Miranda* rights and that defendant then tried to talk about the incident, but Campbell asked him to wait until they got to the Law Enforcement Center. When they arrived, defendant was again advised of his rights and asked if he had any questions. Defendant said he understood his rights and signed the waiver form. He then made the alleged confession that was the subject of the motion to suppress.

The statement was typed, but according to Campbell's testimony defendant's wife arrived at the time he "was fixing to sign the statement" and told him not to sign anything, that she would get a lawyer. The statement was never signed. At trial Officer Cook read from his notes of defendant's statement:

> When I started up Gillespie Street, I spotted a car that I thought was a man's who pulled a gun on me about two weeks ago. When I seen the car at the Charcoal Diner, I went on home and got my .22 automatic rifle. My gun stays loaded at all times. I left my home with the gun and went back to the Charcoal Diner and was sitting in the parking lot waiting for him to come out. I waited and waited and never seen him come out. When I seen he didn't come out, I thought he was still inside, so everyone was leaving; I pulled up to the window about where the pool table is setting. I fired two or three times into the building. I fired through the passenger's side. I then left and went home. I then put the gun up and went back to the Crystal Drive-In and got up with a friend and went and got a six-pack of beer, came back to the Crystal Drive-In and then went home. I never told anyone what had happened.

Cook testified that the defendant read the statement after it was typed and said it was true. Cook was also allowed to testify over objection that at the time the defendant made the statement he appeared to understand his rights and know what he was doing.

Barbara Hubbard, who worked at the Charcoal Tavern, testified over objection about a shooting incident on 3 July 1975 involving Grady Yarborough and the defendant.

The defense presented no evidence. The defendant was convicted of both charges and sentenced to two 10-year terms to run consecutively, with credit on the first sentence for the time of his pretrial confinement. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Douglas A. Johnston, for the State.

Tye Hunter for defendant appellant.

ARNOLD, Judge.

[1] The defendant assigns error to the denial of his motion for payment of fees for a psychiatric examination. He acknowledges that our courts have held that there is no constitutional right to have an expert witness to aid in an indigent's defense, *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), and that the decision to allow or deny an indigent defendant's motion for fees for an expert witness is within the discretion of the trial judge. *Id.*; G.S. 7A-454. However, G.S. 7A-450(b) states that "[w]henever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation," and the defendant argues that under this section he was entitled to have his motion granted. Our Supreme Court has interpreted this statute to mean that such assistance need be provided "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977). The question, then, is whether the trial court properly applied this standard of "reasonable likelihood" in exercising its discretion by denying defendant's motion.

A discretionary order of the trial court will not be disturbed in the absence of abuse or arbitrariness. 1 Strong's N.C. Index 3d, Appeal & Error § 54. So it is not for us to determine whether the court *could* have ruled in defendant's favor, but whether it was *required* to do so. It appears from the record that defendant argued, at the hearing on the motion, the facts of his psychiatric history as set out in the affidavit in support of his motion to suppress. On those facts the judge was not required to grant the motion. It was within the exercise of his discretion for the court to find that a psychiatric examination 2½ years after the shooting incident would not materially assist the defendant in showing his mental condition at the time of the incident. Defendant refers us to *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), where the defendant was allowed fees for a second opinion after a state psychiatrist had pronounced him competent to stand trial, and argues that here he seeks only a first opinion. We note, however, that the purpose of the psychiatric examination in *Patterson* was to determine the defendant's mental condition at that time, the time he was to stand trial, not to establish a condition which might have existed 2½ years earlier. Here, defendant received psychiatric evaluation both four months before, and two and four months after, the shooting incident, and evidence of those diagnoses was before the judge when he ruled on the motion for fees. He quite reasonably may have concluded that such evidence, being closer in time to the shooting, was more probative of defendant's mental condition then than any current examination could be. The judge's ruling will stand.

[2] We next turn to defendant's assertion that his motion to suppress the statement he made to the police was improperly denied. The judge based his denial on two grounds, in the alternative: (1) he considered that everything in defendant's first trial in 1976, up to and including arraignment, was valid, so that the denial of defendant's motion to suppress made before the first arraignment remained in force; or (2) he denied defendant's new motion in his discretion. We agree with the trial judge that everything up to and including the first arraignment remains valid for this trial. *See State v. Farrell*, 223 N.C. 804, 28 S.E. 2d 560 (1944). That may not settle the matter, however. The motion to suppress at defendant's first trial was denied on the ground that it was not timely; this was not a ruling on the merits and did not bar defendant

from renewing his motion at the proper time. The trial judge was incorrect when he indicated that he thought the earlier arraignment "cut off the Court having to rule on the present motion." The defendant was entitled to have his motion considered on its merits.

We believe, however, contrary to defendant's arguments, that the merits of his motion were sufficiently considered. It is true that the motion was denied without a hearing. It is also true, however, that consideration of the motion immediately followed the hearing on defendant's motion for payment of fees, and at that hearing defense counsel argued defendant's psychiatric history. In addition, that history was set out in an affidavit in support of the motion to suppress. We find that defendant's psychiatric history was adequately before the court, and since defendant has not shown us any other evidence he would have offered to support his motion had a hearing been held, we find that the merits were sufficiently considered.

Nor would we reverse the trial judge's ruling on the motion. The defendant argues that his mental condition at the time of his arrest made it impossible for him to understandingly, knowingly waive his rights and make a voluntary statement. Lack of mental capacity, while an important factor in determining voluntariness, does not of itself render incompetent a voluntary confession. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961); *State v. Basden*, 19 N.C. App. 258, 198 S.E. 2d 494 (1973). The judge determined that the confession was voluntary, and evidence presented at trial supports that conclusion. Defendant was twice advised of his rights, and asked if he had any questions. He said he understood, and signed the waiver form. He not only gave the officers a statement about the incident, he expressed his concern. According to Officer Campbell: "Mr. Shook said he was sorry. . . . [H]e wanted to know if he could go out and make arrangements to see him, could he pay the hospital bill and asked me how bad was this man hurt." There is ample evidence in the record to support the judge's ruling on the motion.

[3] Defendant next objects to the admission of Barbara Hubbard's testimony about a prior shooting incident, alleging that it was irrelevant and prejudicial. We agree with the State that because defendant did not object to this testimony at the time it was admitted, he cannot now assign it as error. The record shows

that defendant objected to Ms. Hubbard's testimony that she had seen defendant at the Charcoal Tavern on 3 July, some three weeks prior to the shooting. He also objected and moved for *voir dire* when she testified that she knew a man named Grady Yarborough. There was then a bench conference and a conference in chambers about the content of Ms. Hubbard's testimony, after which the court announced that "the Court overrules the motion for voir dire hearing and will entertain and rule upon such objections as may hereafter be interposed by the Defendant." Defendant excepted to this, but failed to object during the remainder of Ms. Hubbard's testimony, which related to a shooting incident on 3 July involving Grady Yarborough and the defendant. "Where there is no objection . . . in the lower court . . . , appellant may not challenge the issues for the first time on appeal. . . ." 1 Strong's N.C. Index 3d, Appeal & Error § 24. *See Dale v. Dale*, 8 N.C. App. 96, 173 S.E. 2d 643 (1970); 4 Strong's N.C. Index 3d, Criminal Law § 162.

[4] Defendant argues that it was error for the court to allow Officer Campbell to testify that defendant "was fixing to sign the statement" when his wife came in and stopped him. We agree. A witness may not give his opinion of another person's intention. 1 Stansbury's N.C. Evidence § 129 (Brandis Rev. 1973). The State argues that "fixing to" indicates preparation, not intention, but we find that a meaningless distinction here. Unless defendant were actually in the act of beginning to sign, of which there is no indication, any "preparation" must have been mental and thus not visible for Officer Campbell's observation. However, even where the evidence wrongly admitted is possibly prejudicial, "the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury *probably* influenced thereby." 1 Strong's N.C. Index 3d, Appeal & Error § 48 (emphasis added). Defendant did not make such a showing here, and we believe that he could not in view of the other evidence that tended to show that defendant willingly made the statement and indicated it was true.

[5] Defendant is also correct in his contention that it was error for the court to admit Officer Cook's testimony that defendant appeared to understand and know what he was doing in waiving his rights and making a statement. What defendant understood "must be proved if at all by his actual responses, verbal or other-

wise, to the explanations given him of his rights." *State v. Patterson, supra* at 566, 220 S.E. 2d at 610. Opinion testimony by the officer is unacceptable. Nevertheless, here, as in *Patterson*, there is other competent evidence of defendant's understanding. Officer Campbell testified: "We read him his rights and asked him if he had any questions. He said he understood it and signed it." Also: "Mr. Shook indicated he understood his rights." Officer Cook testified that defendant signed the advisement of rights form, and that when the statement was typed: "I read it to him. Then I asked him if it was true. He said yes, sir." The admission of the testimony complained of, though error, was not prejudicial.

We have considered all of defendant's arguments, and have found no prejudicial error in the trial.

No error.

Judges VAUGHN and WEBB concur.

McKINNEY DRILLING COMPANY v. NELLO L. TEER COMPANY, DUKE UNIVERSITY, EZRA MEIR ASSOCIATES, INC. AND THE PERKINS & WILL PARTNERSHIP

No. 7721SC1014

(Filed 7 November 1978)

Contracts § 15— contractor not in privity with consulting engineer—no recovery for negligent inspection

A contractor, not in privity with a consulting engineer, could not recover against the consulting engineer for negligent inspection; rather, the contractor could recover only upon a showing of bad faith conduct on the part of the consulting engineer.

APPEAL by plaintiff from *Long, Judge*. Judgment entered 3 October 1977 in the Superior Court, FORSYTH County. Heard in the Court of Appeals 20 September 1978.

Plaintiff is a caisson subcontractor responsible for drilling and excavating for foundation caissons for a construction project on Medical Science Building 1-C at Duke University. The defendant, Ezra Meir Associates, Inc. (Meir), is an engineering subcon-

tractor responsible for on-the-site inspections and supervision to assure that the caisson foundations excavated by plaintiff meet the weight bearing capacity requirements called for in the plans and specifications of the construction project.

The dispute between plaintiff and defendant arose when plaintiff had excavated the following designated caissons to their respective elevations above sea level: caisson G-12 to 359 feet; G-13 to 360 feet; H-11 to 357 feet; H-12 to 363 feet; H-13 to 362 feet. These were the elevations at which plaintiff's crew experienced drill rig refusal. Plaintiff insists that the plans and specifications do not require excavation to a particular elevation once weight bearing specifications have been met. The plaintiff contends that the above elevations met the requirements of the plans and specifications which called for 10 ton (20,000 lb.) weight bearing capacity. Nevertheless, upon the advice of defendant, Meir, who had inspected the caissons, the general contractor, Nello L. Teer, instructed the plaintiff to continue excavations to elevations of 353 to 358 feet. The general contractor presented to Duke, on behalf of the plaintiff, a claim for $8,968 additional compensation for the cost of the additional manual excavation. The supervising architect Perkins & Will Architects, Inc., pursuant to provisions of the contract between Teer and McKinney giving the architect final authority to determine the requirements of the plans and specifications, denied the request for additional compensation.

The construction project plans designated the duties of the defendant as follows:

> "An inspector of an approved independent testing laboratory approved by the Architect, shall examine each caisson shaft hole after the excavation has been carried to refusal, and he shall determine from his inspection whether to drill a test hole to verify the soundness of the base rock or whether to continue the excavation deeper into the rock. Cost of such inspections shall be paid for by the Contractor."

The specifications for the caissons called for in the project plans and incorporated by reference into the Teer-McKinney contract, were as follows:

> "All caisson foundation piers are designed for bearing value of 20,000 pounds per square foot. Every caisson must pene-

trate into the triassic rock a minimum of 2'00" until a bearing capacity of 20,000 pounds per square foot is reached. No caisson shall be poured until it has been inspected under the direct supervision of the Architect's representative."

The project plans included the following reference to tasks which the caisson subcontractor should be prepared to perform:

"Caisson contractor can expect some hand excavation in the bell portion of the caisson and is to include this in his base bid. Any bell excavation by hand in rock shall be included in the base bid. Any rock to be excavated in the shaft area of caissons will be included in the base price."

Plaintiff initiated this action 22 August 1975 against Meir for tortious interference with the performance of the contract between plaintiff and the general contractor. Defendant, Meir, moved for summary judgment on the grounds that the alleged negligence of defendant is insufficient to sustain a cause of action for tortious interference with contract. From the trial court's granting of defendant's motion for summary judgment and the entering of the order dismissing plaintiff's cause of action, plaintiff appeals.

Hudson, Petree, Stockton, Stockton, and Robinson, by Dudley Humphrey and Jackson N. Steele, for plaintiff appellant.

Joyner and Howison, by Edward S. Finley, Jr., for defendant appellee.

MORRIS, Judge.

The appellant and appellee agree that the crux of the question before this Court is whether McKinney can maintain a cause of action against Meir grounded on negligent performance of its contract with the general contractor, Nello L. Teer, to supervise the excavation caisson shafts. McKinney seeks to recover for the expense of manual excavation in the bell portion of the caisson which he argues exceeded the requirements called for in the plans and specifications of the construction project. For purposes of this appeal we can assume that Meir was negligent in its interpretation of test data.

Plaintiff conceded in his helpful brief and oral argument that he found no North Carolina cases on point. He, nevertheless, urges this Court to adopt the position taken by the courts of some other jurisdictions: that a contractor, not in privity with a consulting engineer, may recover against the consulting engineer for negligent inspection. *See e.g., United States v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958); *Normoyle-Berg & Assoc. v. Village of Deer Creek*, 39 Ill. App. 3d 744, 350 N.E. 2d 559 (1976); *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973); *see generally* Annot., 65 A.L.R. 3d 249 (1975).

The defendant in an equally helpful brief and argument urges this Court to follow the North Carolina precedent established in employment contract cases that tortious interference with the performance of a contract is cognizable only as an intentional tort. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954). In the alternative, defendant argues that the cases supporting plaintiff's cause of action are distinguishable because, unlike in those cases cited, this defendant did not have final authority to determine compliance with the contract. Such authority lay ultimately in the architect in this case.

We do not consider the numerous cases concerning interference with employment contracts as apposite. Though the complaint is couched in terms of interference with contract, the issue is clearly whether, in the absence of contractual privity, McKinney may recover from Meir for negligent performance of its contract with Teer. The question is one of duty. "Whether there is a duty owed by one person to another to use care, and, if so, the degree of care required, depends upon the relationship of the parties one to the other." *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 140, 146 S.E. 2d 53, 60 (1966). A contract may give rise to such a duty. *Id.* The requirement of privity, however, has been discarded in products liability cases based on negligence. *Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967). Nevertheless, North Carolina preserves the privity requirement in actions based on breach of warranty. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). The privity requirement has been somewhat relaxed in cases where advertising to the ultimate consumer provided a sufficient link with the manufacturer to establish an express warranty running to that ultimate consumer, especially on products for intimate bodily use or human

consumption. *Tedder v. Bottling Co.*, 270 N.C. 301, 154 S.E. 2d 337 (1967). Nevertheless, the privity requirement remains viable in North Carolina. *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E. 2d 766 (1973), *cert. den.*, 284 N.C. 258, 200 S.E. 2d 659 (1973); *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 195 S.E. 2d 45 (1973), *cert. den.*, 283 N.C. 393, 196 S.E. 2d 275 (1973). These cases have held fast to the privity requirement in the face of mounting criticism. Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1009 (1960).

The rejection of the privity requirement in finding liability in an architect or supervising engineer has followed the same course as the abolishment of privity in products liability cases throughout the country. Courts have been much less willing to discard the privity requirement when there is economic loss rather than personal injury. *See generally* Note, Architect Tort Liability, 55 Cal. L. Rev. 1361 (1967).

The North Carolina cases finding liability for negligent performance of a contractual duty in the absence of privity of contract have been limited to actions for personal injury or property damages. *See e.g., Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951) (automobile damaged because of negligent highway paving); *Jones v. Otis Elevator Co.*, 234 N.C. 512, 67 S.E. 2d 492 (1951) (personal injury from fall in elevator shaft); *McIntyre v. Monarch Elevator & Machine Co.*, 230 N.C. 539, 54 S.E. 2d 45 (1949) (personal injury from fall in elevator shaft). We note that this action is not brought on the basis of third party beneficiary in contract. *See e.g., Potter v. Carolina Water Co.*, 253 N.C. 112, 116 S.E. 2d 374 (1960) (breach of contract with city to maintain sufficient water pressure in fire hydrant). We have been cited to no North Carolina decisions and have found none allowing recovery for loss of profits to a third party injured from the negligent breach of contract.

There is North Carolina precedent which remains controlling in this matter because of our courts' continued adherence to the privity doctrine in cases outside the scope of products liability or in cases not involving personal injury or property damage. *Durham v. Engineering Co.*, 255 N.C. 98, 120 S.E. 2d 564 (1961). The *Durham* case involved an action by the City of Durham against an electrical contractor and his surety. The contractor and

surety denied breach of contract and filed a cross-action against the supervising engineers, alleging that if the contract was not properly performed it was due to the negligent supervision of work by the engineers. The contract forming the basis of this action was between the city and the electrical contractor. The supervising engineer's duties were outlined in the contract between the electrical contractor and the city. The contract stated that the supervising engineer ". . . shall decide the meaning and intent of any portion of [the] specifications or of the plans . . ." and ". . . shall have the final decision on all matters of dispute involving the character of the work. . . ." *Id.*, 255 N.C. at 102, 120 S.E. 2d at 567. The Court then concluded:

> "We hold that, with respect to the interpretation of the meaning and intent of the plans and specifications, as well as to the authorization that additional work not expressly authorized in the contract but which the Engineers may deem necessary to the fulfillment of the terms of the contract and the proper completion of the job, which authority is expressly granted to the Engineers in the contract, together with their decision on all matters of dispute involving the character of the work, compensation for extra work, etc., the Engineers in making such decisions under the terms of the contract would be acting in the capacity of arbitrators and could not be held liable in damages to either party to the contract in the absence of bad faith. [Citations omitted.]" 255 N.C. at 102 and 103, 120 S.E. 2d at 567.

Therefore, we hold, on the authority of *Durham*, that the defendant Meir cannot be held liable for negligence in the absence of privity of contract. Plaintiff's sole right to relief would be based on bad faith conduct of Meir. In so holding, we note that the *Durham* Court refused to impose a duty of due care on the supervising engineer running to persons not a party to the contract, even though he had authority "tantamount to a power of economic life or death" over the contractor. *Contra, United States v. Rogers & Rogers*, supra, 161 F. Supp. at 135-136. Similarly, the Fourth Circuit, citing *Durham*, has refused to find liability against a supervising architect in the absence of bad faith. *Ballou v. Basic Construction Co.*, 407 F. 2d 1137 (4th Cir. 1969); *see also Blecick v. School Dist. No. 18*, 2 Ariz. App. 115, 406 P. 2d 750 (1965). It is especially appropriate on the facts of this case to impose liability

only upon a showing of bad faith. Meir has a contractual obligation to Teer to assure that the caisson excavation complies with the minimum specifications called for in the construction plans. Meir should not be unnecessarily burdened with fear of liability for requiring work *exceeding* plan specifications. Negligent failure to perform his primary contractual duty with the general contractor could result in a defective foundation and possible extensive liability. Furthermore, McKinney could not have relied on performing its contract by excavating only to the point of drill rig refusal. As quoted above, the plans specify that the caisson contractor could expect manual excavation. In the absence of bad faith, plaintiff is sufficiently protected by submitting the dispute to the architect for resolution. The architect occupies the position of an arbitrator to resolve disputes concerning the requirements of the construction plans. *Durham v. Engineering Co., supra.*

We note that defendant denominated his motion which was granted in the trial court as one for summary judgment pursuant to G.S. 1A-1, Rule 56. He moved that the court grant judgment in his favor as a matter of law in that "Plaintiff has failed to state a claim for tortious interference with the performance of its contract." Although in the form of a motion for summary judgment, the test is the same as on a motion to dismiss under G.S. 1A-1, Rule 12(b)(6). *See* 6 J. Moore, Federal Practice, ¶ 56.02[3] (2d ed. 1971); 10 Wright and Miller, Federal Practice and Procedure: Civil § 2713. "The test on a motion to dismiss for failure to state a claim is whether the pleading is legally sufficient" to state a cause of action. 6 J. Moore, Federal Practice at p. 56-28. We find that plaintiff's complaint fails sufficiently to allege bad faith on the part of the defendant Meir. Therefore, the trial court's order dismissing the third cause of action is

Affirmed.

Judges MITCHELL and ERWIN concur.

J. COLQUITT JACKSON, PETITIONER v. STANWOOD CORPORATION (FORMERLY CHADBOURN, INC.), A CORPORATION, RESPONDENT

No. 7726SC936

(Filed 7 November 1978)

Corporations § 32— dissent from corporate charter amendment—request for payment for shares—failure to petition for appointment of appraisers in apt time

Where a preferred corporate shareholder properly dissented from an amendment of the corporate charter which removed the dividend preference from his shares and made them noncumulative and thereafter sought payment from the corporation for the fair value of his stock, the thirty day period for negotiating the fair value of the shares provided by G.S. 55-113(d) and (e) began on the date the amendment to the corporate charter was effected, not at the end of the twenty day period after the date of the amendment vote in which he was allowed by G.S. 55-113(b) to make demand for payment, and the sixty day period during which the shareholder could petition for the appointment of appraisers under G.S. 55-113(e) began to run at the end of the thirty day negotiation period. Furthermore, the shareholder lost his right to payment for his shares where he did not file his petition for the appointment of appraisers within sixty days after the thirty day negotiating period had ended.

APPEAL by petitioner from *Baley, Judge.* Judgment entered 29 June 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 August 1978.

This is an action in which a corporate shareholder dissented from a plan of corporate reorganization and thereafter sought payment from the corporation for the fair value of his stock. The petitioner, J. Colquitt Jackson, was the owner of 1,500 shares of the respondent corporation's $.46⅔ Cumulative Convertible Preferred Stock, Junior, Series A, $10 par value, on 30 April 1975. On that date he was notified that a special meeting of the shareholders of the respondent corporation was to be held, at which meeting the shareholders would vote on an amendment to the respondent's corporate charter. The amendment would reorganize the respondent corporation and require the exchange of each of the petitioner's shares of preferred stock for 1.3 shares of common stock and cancel all rights, preferences and accrued dividends of the preferred stock.

By letter dated 24 May 1975, the petitioner notified the respondent that he objected to the amendment and would vote his shares of preferred stock against the amendment and the plan

of reorganization it contained. The special shareholders' meeting was held on 11 June 1975, and the petitioner, by proxy, voted against the amendment. The amendment to the respondent's charter was passed by the shareholders, however, and was filed with the Secretary of State on 12 June 1975.

The petitioner gave notice to the respondent corporation on 17 June 1975 that he demanded payment of the fair value of his 1,500 shares of preferred stock in accordance with the provisions of G.S. 55-113(b). Following this written demand by the petitioner, the respondent and the petitioner were unable to agree upon the fair value of the petitioner's shares of preferred stock. The petitioner filed a petition on 29 September 1975 commencing this special proceeding and requesting an appraisal of his shares in accordance with the provisions of G.S. 55-113(e). The respondent corporation then moved for summary judgment on the ground that the petition was not filed within the time allowed by G.S. 55-113(e). From the trial court's order granting summary judgment for the respondent and dismissing the action, the petitioner appealed.

Bailey, Brackett & Brackett, P.A., by Terry D. Brown, for petitioner appellant.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., and N. K. Dickerson III, for respondent appellee.

MITCHELL, Judge.

The petitioner assigns as error the act of the trial court in granting summary judgment for the respondent and dismissing the petition. In support of this assignment, the petitioner contends that he filed his petition for appraisal of his 1,500 shares of preferred stock within the sixty-day period provided in G.S. 55-113(e). We do not agree.

Article 8 of the North Carolina Business Corporation Act provides shareholders of a corporation who dissent from certain fundamental changes in the corporation's organization or structure the right to demand and receive payment from that corporation for the appraised value of their shares. G.S. 55-99 through 55-113.1. When a preferred shareholder, such as the petitioner, objects to an amendment to the corporate charter which would

reduce the dividend preference of his shares or make them noncumulative, G.S. 55-101(b) grants him the rights of an objecting shareholder enumerated in G.S. 55-113. An objecting shareholder possessed of the rights enumerated in G.S. 55-113 may give the corporation written notice that he objects to the proposed amendment. This notice may be given either prior to or at the shareholders' meeting during which the vote on the amendment is taken. G.S. 55-113(b). Provided the shareholder votes against the amendment, he may make written demand on the corporation, within twenty days after the date on which the vote was taken, for payment of the fair value of his shares. G.S. 55-113(b). When the amendment to the charter is effected, the objecting shareholder becomes entitled to be paid by the corporation the fair value of his shares as of the day to the date on which the vote of the shareholders was taken. G.S. 55-113(b).

Although the shareholder becomes entitled to payment on the date the amendment is effected, he and the corporation must agree upon the fair value of the shares before payment can be made. In order that an agreement may be reached between the parties as to the fair value of the shares, a thirty-day negotiation period is provided, which commences when the amendment is effected and the shareholder becomes entitled to payment. G.S. 55-113(d) and (e).

If, after the thirty-day negotiation period has run, the parties remain unable to agree upon the fair value of the shares, the shareholder is granted an additional sixty days in which to file a petition in superior court seeking the appointment of three disinterested appraisers to determine the fair value of the shares. G.S. 55-113(e). If the shareholder fails to file the petition within the prescribed sixty days, he loses his right of payment.

In the case *sub judice*, the petitioner was a preferred shareholder who made timely written objection to an amendment which was to remove the dividend preference from his shares and change them from cumulative to noncumulative. The petitioner voted against the amendment. On 12 June 1975, the day after the vote of the shareholders, the amendment became effective. Five days later, on 17 June 1975, the petitioner made written demand upon the respondent corporation for payment of the fair value of his shares. These actions were clearly sufficient to entitle the petitioner to payment.

By his assignment of error, however, the petitioner has raised the issue of whether he lost his right to payment by failing to file a petition for the appointment of appraisers within the prescribed sixty-day period. The sixty-day period for filing a petition for the appointment of appraisers began at the end of the thirty-day negotiation period. Therefore, in determining when the sixty-day filing period ended, it is necessary to first determine when the thirty-day negotiation period began and ended. The statute clearly indicates that the thirty-day negotiation period began on the date upon which the petitioner became *entitled* to payment for his shares. G.S. 55-113(d). He became *entitled* to payment on the day upon which the amendment to the charter was *effected*. G.S. 55-113(b).

The parties stipulate that the amendment to the charter of the respondent corporation was *effected*, in accordance with the express provisions of the charter amendment, on 12 June 1975, the date upon which the amendment was filed with the Secretary of State. On 17 June 1975, the petitioner made written demand upon the respondent corporation for payment of the fair value of his shares. Having made the written demand of 17 June 1975, the petitioner became entitled to payment. The specific and unambiguous language of the statute caused this entitlement to relate back to and commence on 12 June 1975 when the amendment to the corporate charter was *effected*. G.S. 55-113(b).

The thirty-day negotiation period began to run at the time the petitioner became *entitled* to payment when the amendment to the corporate charter was *effected* on 12 June 1975. As 12 July 1975 fell on a Sunday, the thirty-day negotiation period expired on 13 July 1975. G.S. 1-593. At the conclusion of the thirty-day negotiation period, the sixty-day period during which the petitioner could file a petition for the appointment of appraisers began to run. This sixty-day filing period concluded on 11 September 1975. The petitioner failed to file his petition for the appointment of appraisers on or before this date. Instead, he filed his petition eighteen days later on 29 September 1975. No petition having been filed during the sixty-day period provided by statute, the petitioner's right of payment under G.S. 55-113 was extinguished.

The petitioner contends, however, that we should look past the literal meaning of the statute in order to effectuate the

overall intent of the legislature. The petitioner argues that the legislature intended the thirty-day negotiation period begin at the end of the twenty-day period in which the shareholder may make demand for payment and not at the time the amendment to the charter is effected and the shareholder becomes entitled to payment. However, when the language of a statute is clear and unambiguous, courts must give it its plain and definite meaning. *Lutz v. Board of Education*, 282 N.C. 208, 192 S.E. 2d 463 (1972). As the legislature has clearly and formally expressed its will through the statute in question, we are without power to superimpose conditions or limitations upon the statute and may not alter its clear meaning under the guise of construction. *Utilities Comm. v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977); *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974); *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643 (1965).

For the reasons previously stated herein, the petitioner's petition for appointment of appraisers was not timely filed. The entry by the trial court of summary judgment in favor of the respondent must be and is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

GREGORY POOLE EQUIPMENT CO., INC. v. J. HOWARD COBLE, SECRETARY OF REVENUE STATE OF NORTH CAROLINA

No. 7710SC862

(Filed 7 November 1978)

1. Taxation § 31.1— limitation of local sales tax—exemption from State sales tax

The limitation of local sales tax by G.S. 105-467(1) to sales "subject to" the State sales tax refers not to those transactions for which a State sales tax is actually assessed, but to any transaction described in G.S. 105-164.4(1) without regard to whether the transaction might be exempted or excluded from taxation by G.S. 105-164.13. Thus, an exemption from the State sales tax does not preclude the assessment of a local sales tax.

2. Taxation § 31.1— sale of used equipment accepted as trade-in—exemption from State sales tax—subjection to local sales tax

Where used equipment was accepted by a vendor as a trade-in on the sale of new equipment, and the 3% State sales tax was paid on the sale of the new equipment but the sale was exempt from the local sales tax under G.S. 105-467(1) because the equipment was delivered to the purchaser outside the taxing county, the vendor's subsequent retail sale of the used equipment to a purchaser in the taxing county was subject to the local sales tax even though it was exempt from the State sales tax under G.S. 105-164.13(16), since the sale of the used equipment was not exempt from the local sales tax unless the local sales tax had been paid on the sale of the new equipment.

Judge WEBB dissenting.

APPEAL by plaintiff from *Godwin, Judge.* Order entered 28 September 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 15 August 1978.

Plaintiff instituted this action by complaint filed 26 July 1976 seeking to recover a refund for an alleged overpayment of sales tax resulting from defendant's erroneous interpretation of the pertinent statute, G.S. § 105-467. The defendant in answer admitted the essential facts recited in the plaintiff's complaint but asserted that its assessment of sales tax to the plaintiff's sales was in accordance with the North Carolina General Statutes. On 11 July 1977 the parties stipulated to the following facts:

The plaintiff, a Delaware corporation qualified to transact business in North Carolina, is engaged in the business of selling industrial equipment and machinery. Prior to June, 1971, the plaintiff accepted certain used machinery in partial payment on the purchase price of new machinery sold to purchasers outside Wake, New Hanover, and Beaufort Counties. The plaintiff paid a 3% sales tax on the machinery sales as required by G.S. § 105-164.4(1), but did not pay the local sales tax in the three above counties since the equipment was sold and delivered to purchasers outside their borders. During the period beginning 1 June 1971 and ending 31 May 1974, the plaintiff sold the used equipment previously taken in trade to purchasers within Wake, New Hanover, and Beaufort Counties. The plaintiff failed to pay state or local sales tax on these sales.

On 14 November 1975 the defendant audited the plaintiff's books and determined that the above sales of used machinery were subject to local sales tax. The defendant then notified the

plaintiff of its assessments of additional local sales tax, penalties, and interest. Soon thereafter a hearing was conducted at which the defendant affirmed the assessment of tax and interest but eliminated the penalty charged. Pursuant to the defendant's determination, on 17 November 1975 the plaintiff paid to the defendant $65,433.53, and immediately filed for refund of tax in the amount of $10,859.24 plus interest.

On the basis of these facts each party filed a motion for summary judgment. On 28 September 1977 the trial court entered judgment in which it found facts as stipulated and concluded "[t]hat Plaintiff is not entitled to a refund of taxes and interest remitted to Defendant on the sales price of used equipment taken in trade." From the entry of summary judgment in favor of the defendant, the plaintiff appealed.

Poyner, Geraghty, Hartsfield & Townsend, by Thomas L. Norris, Jr., and Curtis A. Twiddy, for the plaintiff appellant.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks and Associate Attorney Marilyn R. Rich, for the State.

HEDRICK, Judge.

The sole question raised on this appeal appeared in the parties' Stipulation of Facts as follows:

> Are retail sales of used tangible personal property subject to the local government sales tax when such property, having been accepted in trade by the vendor as a credit or part payment on the sales price of new property that was exempt from local sales tax under the provisions of G.S. 105-467 by virtue of delivery to a purchaser at a point outside the taxing county by the vendor or his agent or by a common carrier, is sold at retail and delivered to the purchaser within the taxing county in which the taxpayer has a place of business?

The trial court answered this question in the affirmative.

North Carolina General Statute § 105-164.4(1) imposes a retail sales tax of 3% of the sales price of any article of tangible personal property sold at retail in this State. Among the exemp-

tions and exclusions from the sales tax provided in G.S. § 105-164.13 appears the following:

> Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article.

G.S. § 105-164.13(16).

The imposition of a local sales tax is authorized by G.S. § 105-467 with the following limitations:

> The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:
>
> (1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1);
>
> . . .
>
> The exemptions and exclusions contained in G.S. 105-164.13 . . . shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article. A taxing county shall have no authority, with respect to the local sales and use tax imposed under this Article to change, alter, add to or delete . . . any exemptions or exclusions contained in G.S. 105-164.13, or which are elsewhere provided for.
>
> . . . However, no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent, or by a common carrier.

G.S. § 105-474 expresses the legislative intent that the provisions relevant to the state sales tax "shall be applicable to this Article [authorizing a local sales tax] unless such provisions are inconsistent with the provisions of this Article."

The plaintiff first points out that the 3% state sales tax was paid on the sale of the new equipment for which the used equipment was accepted in trade, and thus, the exemption embodied in G.S. § 105-164.13(16) applied to the later sale of the used equipment. On this basis plaintiff argues that since the sale of the used

equipment was not charged with the 3% state sales tax under the provisions of G.S. § 105-164.4(1), the express terms of G.S. § 105-467(1) prohibit the imposition of a local sales tax on the same transaction. The plaintiff refers to the language of G.S. § 105-467(1) authorizing a local sales tax on sales of articles "now subject to" the 3% state sales tax, and argues that it permits the imposition of a local sales tax only if a state sales tax is *collected* and *paid* on the transaction.

[1] The defendant responds that adoption of the plaintiff's interpretation of G.S. § 105-467(1) would reduce the language in the same section concerning exemptions and exclusions to mere surplusage. We agree. If the legislature had intended that the payment of local sales tax be required only when the 3% state sales tax was paid, it need not have included the assurance that the same exemptions and exclusions are applicable. We think the limitation of local sales tax to sales "subject to" the state sales tax refers not to those transactions for which a state sales tax is actually assessed, but to any transaction described in G.S. § 105-164.4(1) without regard to whether the transaction might be exempted or excluded from taxation by the operation of G.S. § 105-164.13. Thus, the plaintiff's exemption from state sales tax does not preclude the assessment of a local sales tax.

[2] According to G.S. § 105-467, the exemption from state sales tax applicable to the plaintiff's sale of used equipment applies "with equal force and in like manner to the local sales . . . tax." With respect to the state sales tax, this exemption is not available to sales of used articles previously accepted in trade for new articles *unless* the previous sales of new articles was taxed. Applying this exemption "in like manner" to the local sales tax it must be construed to require the payment of local sales tax on the previous sale of new articles in order for the exemption to be available. The plaintiff stipulated that it paid no local sales tax in Wake, New Hanover and Beaufort Counties on the previous sale of new equipment because the equipment was delivered to purchasers outside those counties. Thus, in our opinion the exemption contained in G.S. § 105-164.13(16) and applicable to local sales tax by G.S. § 105-467 is not available to the plaintiff in its sales of used equipment.

Our conclusion finds support in a recent administrative ruling promulgated by the Secretary of Revenue. In Sales Tax Ruling

191 the Secretary confronted the question whether the exemption with which we are concerned applied to the sale of used articles which were taken in trade for new articles sold and delivered to purchasers outside North Carolina. The Secretary opined that since no state sales tax was paid on the out-of-state sale of new articles, the exemption was not available to the vendor when it later sold the used articles. The hypothetical presented in the ruling supposed and purported to resolve the same problem regarding the state sales tax as we face regarding the local sales tax. Its application to the case at hand is supported by the legislative declaration that "administrative interpretations made by the Commissioner of Revenue with respect to the North Carolina Sales and Use Tax Act . . . may be uniformly applied in the construction and interpretation" of the statutes pertaining to the local sales tax. G.S. § 105-474.

We hold that the trial court correctly entered summary judgment in favor of the defendant. The judgment appealed from is affirmed.

Affirmed.

Judge MORRIS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I respectfully dissent from the majority opinion. G.S. § 105-467 which allows counties to impose a sales tax says:

> The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:
>
> (1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1);

In this case no tax may be imposed by the State on the sale of the property in question. Since the State may impose no tax, I believe the counties may impose no tax.

HAZEL H. PRITCHARD v. FIRST-CITIZENS BANK AND TRUST COMPANY, A BANKING CORPORATION, JOHN G. PRITCHARD, T. W. PRITCHARD, JR., AND SARA P. HERNDON, EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF T. W. PRITCHARD, AND JOHN G. PRITCHARD, INDIVIDUALLY AS LEGATEE UNDER THE WILL OF T. W. PRITCHARD

No. 7726SC685

(Filed 7 November 1978)

Executors and Administrators § 23— widow's year's support—computation of "net income"

"Net income" as used in G.S. 30-31 providing for a widow's year's allowance is to be computed after deducting all federal and state income taxes attributable to the income received by the decedent during the three years preceding his death, since the Legislature by this statute intended the widow to receive an allotment not exceeding one-half of the income which would probably have been actually received by and available to her deceased husband for the support of his family had he lived an additional year.

APPEAL by individual defendant, John G. Pritchard, from *Griffin, Judge.* Order entered 21 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 May 1978.

This is a proceeding under G.S. Ch. 30, Art. 4, for allotment of a year's allowance for Hazel H. Pritchard, the surviving spouse of T. W. Pritchard, who died testate on 15 June 1975. By his will and codicil thereto the decedent bequeathed his automobile and all personal property in his home to his wife, Hazel H. Pritchard, he bequeathed the sum of $2,000.00 to a friend, and he devised and bequeathed the remainder of his estate to the trustees of an inter vivos trust which he had created in 1968. The trust instrument, as amended in 1973, provides that after the grantor's death the trustees shall pay from income the sum of $18,000.00 per year to or for the benefit of the grantor's wife and directs the trustees to use such additional amounts of income or principal as they shall determine adequate to provide for her comfortable support. Upon the death of grantor's wife, the remaining properties in the trust are to be divided among three of the grantor's children, all of whom are adults. The trustees of the trust are First Citizens Bank & Trust Company and the three children. The same parties are also the executors under testator's will and codicil.

On 31 December 1975, Hazel H. Pritchard filed her petition with the Clerk of Superior Court for allotment of the year's allowance provided for under G.S. Ch. 30, Art. 4. She alleged that the estate of her deceased husband is not insolvent, that the personal estate of which he died possessed exceeds $1,000,000.00, and that the average annual net income of the deceased for the three years next preceding his death was $40,000.00. An order dated 12 July 1976 was entered by the Assistant Clerk of Superior Court finding that the material allegations of the petition are true and adjudging that the petitioner is entitled to a year's allowance for her support for one year after the death of her husband. The order commanded the Sheriff to summon a Magistrate and two persons qualified to act as jurors to assign to the petitioner her year's allowance. The Magistrate and the two Commissioners thus summoned filed their report on 22 July 1976 assigning the sum of $40,640.00 as the widow's year's allowance. As result of an objection filed by the executors, the matter was referred back to the Commissioners, who, after a further hearing, filed their report with the Clerk on 17 February 1977 again assigning the sum of $40,640.00 to the widow "as a sufficiency of decedent's estate for her support for one year from decedent's death, according to the estate and condition of the decedent."

The executors excepted to the report of the Commissioners on the ground that the sum assigned exceeds one-half of the decedent's average annual net income for the three years prior to his death. In this connection the executors pointed out that it appears that the sum allotted by the Commissioners was arrived at by using the figure shown as "adjusted gross income" on the Federal Income Tax returns for the decedent for the three years prior to his death. The three year average of this figure was $81,289.00, one-half of which is $40,644.50, which is approximately the amount which the Commissioners awarded. The executors contended that the "net income" referred to in G.S. 30-31 should be computed by deducting the amount of Federal and State income taxes. The three year average net income of the decedent remaining after deducting income taxes was $57,260.00, one-half of which is $28,630.00, and the executors contended that the year's allowance should be a sum not greater than that amount.

The executors also contended that they had advanced to the petitioner $61,236.14 in cash and had distributed to her household

goods and an automobile in the aggregate value of $15,100.00, making total distributions to her of $76,336.14, and they asked that these advances be allowed as a credit against the year's allowance.

The Clerk of Superior Court approved the report of the Commissioners and ordered the executors to pay petitioner the sum of $40,640.00 for her year's allowance. Upon appeal by the executors, the Judge of Superior Court confirmed the order of the Clerk. From this order, John G. Pritchard, one of the ultimate beneficiaries of the trust, appealed.

Francis O. Clarkson, Jr., and William B. Webb, Jr., for petitioner appellee.

F. T. Miller, Jr., and James W. Allison for defendant appellant.

PARKER, Judge.

G.S. 30-31 provides that the total value of all allowances for year's support allotted under the procedure provided for in Part 3 of Article 4 of G.S. Chapter 30 "shall not in any case exceed the one half of the average annual net income of the deceased for three years next preceding his death." The question presented by this appeal is whether the words "net income" in this context mean income remaining after deducting Federal and State income taxes. We hold that they do, and accordingly we reverse the order appealed from.

Absent any statutory definition of the words "net income" as those words are used in G.S. 30-31, we look to the history and purpose of the statute to ascertain their meaning. The purpose of the larger allowance authorized by Part 3 of Article 4 of G.S. Chapter 30 appears to be to provide the surviving spouse of a solvent decedent with a level of support commensurate with the support which he or she would have had from the deceased spouse during the first year after the spouse's death had the death not occurred. The statute, G.S. 30-31, is designed to permit the allowance to the surviving spouse of a solvent decedent of an amount sufficient to maintain for a period that standard of living to which he or she had been accustomed, thereby avoiding the hardship which an immediate and drastic reduction in income would entail. This interpretation of the purpose of the statute is borne out by its history.

The first statute authorizing a widow's year's allowance enacted in North Carolina provided for a much more limited sort of support. The statute was enacted in 1796 because, so the statute recited, "under the present existing laws, it is in the power of the administrator to expose to sale the whole crop and provisions of the deceased, and thereby deprive the widow of the means of subsistance for herself and family" 1796 N.C. Session Laws, ch. 469. Before the granting of letters of administration, the widow was permitted to "use so much of the crop, stock and provisions then on hand, as may be absolutely necessary for the support of herself and her family." When letters of administration were granted, the widow could petition the court to appoint one justice of the peace and three freeholders to allot "such part of the crop, stock and provisions as they may conceive necessary and adequate for the support of the widow and family, for the space of one year." The measure of the allotment was the necessities of the widow and her children. This was emphasized by Chief Justice Ruffin in his explanation of the purpose of the widow's year's allowance:

> [T]he purpose was to make provision for the pressing wants of the widow, personally, and to enable her at that mournful juncture, to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time were allowed for selecting suitable situations for them. That was the sole object of the law, and not to give to the widow an additional interest in the personal estate of the husband, in the nature of a distributive share, transmissible to her executor.

Kimball v. Deming, 27 N.C. 418, 419 (1845).

The present two-tiered system was instituted by the Legislative Session of 1868-69 when the widow was given the right to a minimum year's allowance of $300, Session Laws of 1868-69, ch. 93, s. 10, with the alternative right, upon a showing by application to the Superior Court that the estate of the decedent was not insolvent and was worth more than $2000, *Id.*, s. 22, to the allotment of an allowance, "sufficient for the support of herself and her family according to the estate and condition of her husband," which allowance was not to exceed "the one half of the annual net income of the deceased for the three years next preceding his death." *Id.*, s. 24. The larger allowance was no longer limited to the provision of the family's bare necessities,

but was set at a level which would allow the widow to receive during the first year of her widowhood that level of support which she had been accustomed to receiving from her husband. The formula prescribed for computing the maximum larger allowance has remained unaltered except that the word "average" was added to the statute, G.S. 30-31, before the words "annual net income" when the General Statutes were recodified in 1943, thereby making the statute conform to the interpretation already given it by our Supreme Court in *Holland v. Henson*, 189 N.C. 742, 128 S.E. 145 (1925).

In our opinion, the Legislature by this statute intended the widow to receive an allotment not exceeding one-half of the income which would probably have been actually received by and available to her deceased husband for the support of his family, had he lived an additional year. Accordingly, we hold that net income in G.S. 30-31 means "take home pay" or "after-tax income," because this is the only income that is "netted," that is truly available for family support purposes in a real sense, as any employee whose earnings are subject to withholding can testify. We hold, therefore, that "net income" in G.S. 30-31 is not "adjusted gross income," as the petitioner appellee submits and as the trial court apparently held, but rather is to be computed after deducting all federal and state income taxes attributable to the income received by the decedent during the three years preceding his death.

It must be emphasized that the formula in G.S. 30-31 serves only to calculate the *maximum* allowance which may be assigned and does not represent an amount which must be assigned. The only requirement laid down by G.S. 30-31 is that the allowance be, within the maximum limit specified, "a value sufficient for the support of plaintiff according to the estate and condition of the decedent." In some cases, this amount could be considerably less than the statutorily prescribed maximum.

Appellant also contends that the trial court erred in not directing that the amounts already advanced by the executors to the petitioner be credited against her year's allowance. This matter cannot be resolved on the present record. The record on appeal contains no indication as to whether or not the petitioner has dissented from her husband's will. However, the briefs of both

parties indicate that she has filed a dissent. Whether under G.S. 30-1 she has a right to dissent is a question which, so far as we have been informed, may not yet be determined. If she has effectively dissented, she is entitled to receive her year's support in addition to the amounts she will otherwise be entitled to receive from her husband's estate. *Bank v. Melvin*, 259 N.C. 255, 130 S.E. 2d 387 (1963). If she has not effectively dissented, the year's allowance shall "be charged against the share of the surviving spouse" under the will. G.S. 30-15. In any event, the executors will be entitled to credit on their accounting for the value of the property and cash distributed by them to the widow, and at this juncture it cannot be determined whether that credit should properly be applied against the amount she is entitled to receive as her year's support or against the amount she will otherwise be entitled to receive from her husband's estate.

The order appealed from is reversed and this matter is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges HEDRICK and MITCHELL concur.

OPAL A. HARRIS AND HUSBAND, FRED J. HARRIS; FRANCES A. SOMERS AND HUSBAND, DWIGHT N. SOMERS; R. DOUGLAS ASHLEY AND WIFE, FERNE S. ASHLEY; MILLARD F. ASHLEY AND WIFE, MARY J. ASHLEY; CAROLYN A. DEZERN AND HUSBAND, ROBERT L. DEZERN v. JAMES E. ASHLEY AND WIFE, MAYBELLE ASHLEY

No. 7723SC890

(Filed 7 November 1978)

1. Partition § 12; Descent and Distribution § 2— partition by exchange of deeds—purported conveyance to husband and wife—no estate by entirety

Where a wife owned land as a tenant in common, and the tenants exchanged deeds for the purpose of partitioning the land, a partition deed purporting to convey an estate by the entirety to the wife and her husband only severed the unity of possession and gave each tenant his separate share of the land and conveyed no interest in the land to the husband. Therefore, the husband's only interest in the land was a 1/3 interest which he took by intestate

succession upon the death of the wife, and his purported conveyance of the land conveyed only that interest.

2. Betterments § 1.1— reasonable belief as to ownership

Respondents had a reasonable belief that they were the sole owners of property so as to permit them to recover for betterments where a partition deed to the male respondent's father and mother in fact conveyed no interest to the father, the father believed he had become a tenant by the entirety by the partition deed and the owner of the fee upon the mother's death, the father gave respondents a warranty deed to the property, and although respondents knew the father had reserved a life estate in the property, they misunderstood the meaning of a life estate and thought it was only a privilege to live on the land with no responsibilities.

3. Betterments § 3— amount of recovery

Respondents who placed improvements on land under the mistaken belief that they were the sole owners were entitled to recover the amount by which the improvements enhanced the value of the land, not the amount they spent on the improvements. Furthermore, the trial court erred in basing its finding as to the value of improvements on certain expenditures, such as light bulbs, fuses, cutting hay, and others, which could not be considered improvements at all.

4. Betterments § 3— deduction of rents and profits

The trial court properly deducted rents and profits resulting from respondents' use of land from the amount recovered by respondents for betterments.

APPEAL by petitioners and respondents from *Crissman, Judge.* Judgment entered 1 August 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 25 September 1978.

Petitioners filed suit seeking a partition sale of a certain tract of land. Petitioners are five married couples, and one member of each couple is a child of J. F. and the late Bessie P. Ashley. Respondents are the sixth child and his wife. Bessie P. and J. F. Ashley received a quitclaim deed to the property purporting to make them tenants by the entirety in 1938 when a larger tract of land was partitioned by an exchange of quitclaim deeds among the heirs of Bessie Ashley's father. Bessie P. Ashley died in 1965. In 1975 J. F. Ashley gave to respondents a general warranty deed for the entire tract, subject to a retained life estate in J. F. Ashley and his present wife, Flossie.

Petitioners allege that they are tenants in common with respondents; that each petitioning Ashley child is entitled to a 1/9

interest; and that respondent James Ashley is entitled to a 4/9 interest (1/9 received at his mother's death plus his father's 1/3 conveyed by deed). Because of the nature of the land, making it difficult to divide in kind, petitioners seek a partition sale. The land is subject to a deed of trust made by respondents in favor of J. F. and Flossie Ashley.

Respondents answer that they own the entire tract in fee simple pursuant to the general warranty deed, and counterclaim in the alternative for $10,207.22 spent on improvements to the land. Petitioners in reply seek an accounting for rents and profits from use of the land.

The trial court found as fact improvements costing $8,633.28 and profits in the amount of $2,629.69 and entered judgment for respondents in the amount of the cost of improvements less the profits. The judge ordered a partition sale subject to the reserved life estate and the deed of trust, the proceeds after satisfaction of the deed of trust to be distributed 1/9 to each petitioning Ashley child and 4/9 to respondents. Petitioners and respondents appeal.

Max F. Ferree, P. A., by George G. Cunningham, William C. Gray, Jr., and Russell G. Ferree, for petitioner appellants.

Vannoy, Moore and Colvard, by J. Gary Vannoy, for respondent appellants.

ARNOLD, Judge.

Petitioners contend that the trial court erred in failing to make findings of fact as to what interests petitioners and respondents own in the land. The court found as fact

> 4. That there is a genuine issue as to what interest the petitioners and the respondents own in said land.

and then ordered a partition sale and

> 3. That the Commissioners distribute the proceeds from said sale after paying expenses of said sale and satisfying the deed of trust herein referred to as follows: one-ninth interest to each of the petitioners; and four-ninths interests to the respondents.

We agree with respondents that by the form of its entry of judgment the trial court correctly found the interests to be as peti-

tioners had alleged, each petitioning couple owning a 1/9 interest and respondents a 4/9 interest in the land.

[1] An exchange of deeds among tenants in common for the purpose of partitioning a tract of land serves only to sever the unity of possession and give each tenant his separate share of the land. It cannot create a new estate by the entirety. *Combs v. Combs*, 273 N.C. 462, 160 S.E. 2d 308 (1968); *Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530 (1959); *Scott v. Moser*, 31 N.C. App. 268, 229 S.E. 2d 222 (1976). The 1938 quitclaim deed naming Bessie P. and J. F. Ashley as grantees created no interest in J. F. Ashley. At Bessie Ashley's death in 1965 he took by intestate succession a 1/3 interest in the tract, G.S. 29-14(2), and each child took a 1/9 interest, G.S. 29-15(2), 29-16(a)(1). This 1/3 interest in J. F. Ashley was all he was able to convey to respondents in 1975. Petitioners and respondents are tenants in common, with their respective shares as indicated by the trial court.

[2] Petitioners argue that respondents should not be allowed any recovery for improvements because they could not have had a reasonable belief that they were the sole owners of the property. Respondents contend that they should be allowed to recover the enhancement in value of the land, rather than just the cost of the improvements, and that the profits from the land should not have been a set-off against their recovery since the profits were due solely to the improvements they made.

"[O]ne who in good faith enters into the possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to permanent improvements placed on the land by him. . . ." *Rogers v. Timberlake*, 223 N.C. 59, 61, 25 S.E. 2d 167, 168 (1943). *See* G.S. 1-340. In order to recover, the improver must have had a bona fide belief in the validity of his title, and that belief must have been reasonable. *Rogers v. Timberlake, supra.* Petitioners here assert that because respondent admitted in his testimony that he knew of the reserved life estate, he could not have had a bona fide reasonable belief that he was the fee simple owner. The trial court, by allowing respondents to recover, implicitly found otherwise, and we believe the record supports that finding. J. F. Ashley, respondents' grantor, received a deed naming him as

grantee; there is no indication that he knew of the legal rule making that grant to him ineffective. It may reasonably be inferred that J. F. Ashley believed he had become a tenant by the entirety in 1938, and the owner of the fee in 1965. This belief he passed along to his son, the respondent, along with a general warranty deed for the entire tract. Asked by interrogatory

> 2. Did you believe, prior to making these improvements and expenditures, that you were the sole owner of this property?

respondent answered yes, and to the next question

> 3. If so, upon what facts did you base this belief?

respondent answered:

> 3. I received a deed from my father and was told by him that he could convey this property.

Although respondent testified that he knew of the reserved life estate, it appears from his testimony as a whole that he misunderstood the meaning of a life estate, apparently seeing it as a privilege to live on the land with no responsibilities. He made numerous expenditures on the property, ranging from making house repairs to replacing the light bulbs. "They needed the light bulbs and I thought it was my place to buy them. I thought I was obligated to buy it because I owned the property, they were not supposed to have to pay for anything." There is evidence that respondent in good faith believed that he alone owned the land. The right to betterments is an equitable doctrine, *Wharton v. Moore*, 84 N.C. 479 (1881), and equity will permit respondents to recover here for improvements according to the proper measure of damages.

[3] The trial court found that respondents spent $8,633.28 on "improvements" and awarded respondents that amount of damages. First of all, the court used the wrong measure of damages. The improver is entitled to recover the amount by which he has enhanced the value of the property. *Rogers v. Timberlake, supra; Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921). The fact that respondents sought to recover only the cost of improvements does not affect this rule. "It is well-settled law in North Carolina that a party is entitled to the relief which the allegations in the pleadings will justify. [Cite omitted.] It is not

necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled." *East Coast Oil Co. v. Fair*, 3 N.C. App. 175, 178, 164 S.E. 2d 482, 485 (1968). G.S. 1A-1, Rule 54(c); 10 Strong's N.C. Index 3d, Pleadings § 7.

Secondly, it is noted that the court improperly based its findings as to the amount spent on "improvements" on certain expenditures, such as light bulbs, fuses, cutting hay, and others, which could not be considered improvements at all. Evidence as to the enhancement of value is sketchy and conflicting. The case must be remanded for further determination as to the amount, if any, by which the improvements enhanced the value of the property.

[4] Although respondents argue that there should be no set-off for rents and profits they received, we believe that the trial court properly deducted for such rents and profits. Also, respondents are entitled to recover only 5/9 of the enhancement less profits. The sales price of the property will presumably be increased by any enhancement found, and respondents will, on partition, receive a proportionate fraction of that increase.

Petitioners correctly contend that the trial court erred by requiring satisfaction of the deed of trust executed by respondents in favor of J. F. Ashley and Flossie Ashley to be paid prior to distribution of the sale proceeds. The deed of trust is only an encumbrance against respondents' interest and petitioners' interest is not subject to the deed of trust. Satisfaction of the deed of trust must come from respondents' share of the proceeds.

The judgment appealed from is

Affirmed in part;

Reversed and remanded in part.

Judges MITCHELL and WEBB concur.

LEO H. TART, PLAINTIFF v. DERL WALKER AND DERL WALKER & SONS ENTERPRISES, DEFENDANT

No. 7710SC1077

(Filed 7 November 1978)

Patents § 1— patent infringement disguised as contract breach—federal court proper forum

Where plaintiff alleged that defendant violated a partnership dissolution agreement by continuing to manufacture a farm implement, the trial court properly determined that the action involved patent infringement and the federal courts had exclusive jurisdiction, notwithstanding plaintiff's arguments that (1) the complaint did not expressly allege a patent infringement, and (2) even if the complaint did raise some patent questions, a state court was the proper forum for suit on a contract concerning a patent, since the face of the complaint alone does not determine whether there is subject matter jurisdiction, and where a contract in no way expands upon the obligations created by the patent law, the proper jurisdiction for suit on that contract is the federal courts.

APPEAL by plaintiff from *Godwin, Judge*. Order entered 28 September 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 27 September 1978.

Plaintiff and defendant were the members of a partnership formed to manufacture a farm implement. Plaintiff's complaint alleges that since dissolution of the partnership defendant has continued to manufacture the implement, in violation of their agreement. Defendant moved for dismissal for lack of jurisdiction over the subject matter, on the ground that alleged patent infringement is involved, and that federal courts have exclusive jurisdiction of patent actions. Defendant's motion was granted and plaintiff appeals.

Huggard & Sullivan, by John P. Huggard, for plaintiff appellant.

William L. Powell, Jr. for defendant appellee.

ARNOLD, Judge.

Plaintiff relies on the wording of his complaint to support his contention that this is a simple breach of contract action, with jurisdiction in the state courts. The complaint states in pertinent part:

4. The plaintiff and defendant entered into a partnership agreement dated January 1, 1973. On the same date a second agreement was entered into. The second agreement granted the partnership the right to manufacture a farm implement designed and invented by the plaintiff.

5. The second agreement mentioned in paragraph No. 4 above specifically stated that should the partnership dissolve, then the right to manufacture the farm implement designed and invented by the plaintiff would revert to the plaintiff his heirs and assigns.

6. On December 21, 1974, the plaintiff and defendant entered into a dissolution agreement which was to dissolve and terminate the partnership's agreement mentioned in paragraphs numbered (4) and (5) above. This agreement specifically states that the farm implement designed and invented by the plaintiff and the right to manufacture said implement would rest with the plaintiff solely.

7. That from the 21st of December, 1974, to present, the defendant has breached his contract and continued to manufacture the farm implement designed and invented by the plaintiff much to the financial detriment of the plaintiff.

Defendant, filing his motion to dismiss, attached to it a copy of the dissolution agreement of 21 December, and he argues that paragraph 5 of that agreement mandates exclusive federal jurisdiction. That paragraph reads as follows:

5. It is also agreed that Leo H. Tart was the inventor of a harvesting machine patented under patent number 3393009, registered in the United States Patent Office, and which is now protected by patent law from infringement, and that said patent shall be the sole possession of Leo H. Tart; that Derl G. Walker will not infringe upon any valid patent right of Leo H. Tart.

From the face of the complaint it is not clear which agreement it is that plaintiff alleges has been breached. "His contract" in paragraph 7 might refer to either the formation agreement of 1 January 1973 or the dissolution agreement of 21 December 1974. However, defendant averred in his motion to dismiss that the sub-

ject matter of the complaint is breach of the dissolution agreement, and the record does not show that plaintiff has ever contradicted this assertion. Accordingly, we accept that it is the dissolution agreement which is the subject matter of this action. Paragraph No. 5 of the dissolution agreement specifically refers to "patent number 3393009" and to plaintiff's "valid patent right."

G.S. 1A-1, Rule 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Under Rule 12(b)(1) the question of subject matter jurisdiction may be raised by motion or by responsive pleading. Defendant properly raised the question by motion in the case before us.

Title 28, § 1338(a) of the United States Code gives federal courts exclusive jurisdiction of "any civil action arising under any Act of Congress relating to patents. . . ." This exclusive federal jurisdiction is made possible by Art. I, § 8(8) of the United States Constitution. In support of his position that federal jurisdiction is not invoked, plaintiff makes two arguments. First, he contends that this action does not "arise under any act of Congress relating to patents" because the complaint does not expressly allege a patent infringement. Second, he argues that even if the complaint does raise some patent questions, a state court is the proper forum for suit on a contract concerning a patent.

We reject plaintiff's contention that it is the face of the complaint alone which determines whether there is subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted. In our view, matters outside the pleadings, such as the contract attached to defendant's motion in the case at bar, may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter. *See* Barron and Holtzoff, Federal Practice and Procedure, § 352, p. 340.

The United States Supreme Court in *Odell v. Farnsworth Co.*, 250 U.S. 501, 503, 39 S.Ct. 516, 63 L.Ed. 1111, 1113 (1919), said that "[t]o constitute a suit under the patent laws the '*plaintiff* must set up some right, title or interest under the patent laws . . . .'" (Emphasis added). And earlier, in *Pratt v. Paris Gas Light*

& Coke Co., 168 U.S. 255, 259, 18 S.Ct. 62, 64, 42 L.Ed. 458, 460 (1897), the court had said that a patent case calling for federal jurisdiction arises "when the plaintiff *in his opening pleading* . . . sets up a right under the patent laws as grounds for a recovery." (Emphasis added). The language of these cases seems clear, but we believe there is a fundamental distinction between them and the case at bar that defeats plaintiff's argument.

In these cases, as well as in the many other federal patent jurisdiction cases we have examined, the contracts sued on had aspects other than patent infringement. In *Odell* the action was for royalties on a contract that concerned patents; in *Pratt*, the plaintiff had sued in assumpsit to recover the price of a patented machine. In the case at bar, however, the contract imposes no obligations other than those created by the patent law itself. It was only through careful and selective draftsmanship that plaintiff avoided the allegation of patent infringement. In fact, plaintiff's choice of words in pleading does not conform to the attached contract as evidenced by a comparison of paragraph 6. of the complaint and paragraph 5. of the dissolution agreement. According to the complaint, the agreement gave to plaintiff the sole "right to manufacture said implement," whereas in fact the agreement only purported to protect plaintiff's "patent number 3393009" from infringement. We do not believe that the Supreme Court meant that a plaintiff, by calling a patent infringement something else, could avoid federal jurisdiction. On the narrow facts of this case we find plaintiff's first contention without merit.

We reject plaintiff's second argument for the same reasons. It is true that by the weight of authority state court jurisdiction is upheld where the suit is on a contract even though the issue of infringement is the main issue. 167 ALR 1129. However, we have examined the cases collected in the ALR annotation, *id.*, and others, and have determined that in all those cases there was some aspect to the contract other than mere patent infringement. This distinction is implicitly recognized at 167 ALR 1135: "If the complaint sets forth only what appears to be a claim of infringement, . . . the jurisdiction of the federal courts is obvious if the principle is adhered to that jurisdiction depends on the complaint. The situation may be reversed by a setting forth of the . . . contract *and reliance upon some restrictive clause in it*." (Emphasis added.)

While it is true that the suit before us concerns a contract, the only possible issue is whether defendant infringed "any valid patent right" of plaintiff. "A suit on a contract not to infringe a patent is beyond state court jurisdiction if the contract does not materially modify the federal cause of action for infringement. . . ." 60 Am. Jur. 2d, Patents, § 416, at 552. This was the result reached in *Buffalo Specialty Co. v. Gougar*, 26 Colo. App. 523, 144 P. 325 (1914), where the court said: "If the action is, indeed, a direct means of recovering for infringements of the patents . . . , and the written obligation does not materially modify such right of action or add to the legal rights of the plaintiff . . . in such recovery, . . . then it would seem that this action should be held to be, in fact, based upon an infringement of the patents, rather than a collateral action on the written obligation." *Id.* at 532, 144 P. at 327-28.

In summary, we find that where a contract in no way expands upon the obligations created by the patent law, the proper jurisdiction for suit on that contract is the federal courts. This decision does not conflict with *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647 (1945), cited to us by both parties. In the *Coleman* case, the suit was for tortious interference with patent rights and for the collection of royalties, a clearly distinguishable situation.

The order of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

ARNOLD WACHACHA v. ANNA MAY ROBINSON WACHACHA

No. 7830DC27

(Filed 7 November 1978)

1. Divorce and Alimony § 24.3— child support—construction of order

The trial court did not err in concluding that a provision of a separation agreement and consent judgment requiring the husband to continue to furnish adequate support for his minor child "when it is no longer necessary" for the husband to furnish support to the wife was intended by the parties to provide for continued child support payments in the event of the wife's death or remarriage.

2. Divorce and Alimony § 19.4— motion to reduce alimony and child support—change of circumstances—earning capacity—no bad faith effort

The evidence was insufficient to support the court's denial of plaintiff husband's motion for a reduction in alimony and child support payments required by a consent judgment on the ground that plaintiff's change in circumstances was voluntarily effected by him in disregard of his marital and parental support obligations where it tended to show that plaintiff gave up his $15,000 per year job as recreation director of the Cherokee reservation in order to return to college to complete his undergraduate degree in recreation, with the expectation of employment at a higher salary in a different locale after he obtained his degree; plaintiff returned to college and arranged to meet his alimony and child support obligations from his income under the GI bill; plaintiff was concerned about mounting financial obligations, decided not to return to school, and took a job with a construction company at a salary well below that which he received while employed as a recreation director; after separation of the parties, plaintiff purchased a new car; and after entry of the consent judgment, plaintiff purchased a mobile home and a motorcycle.

APPEAL by plaintiff from order of *Leatherwood, Judge.* Order entered 5 August 1977 in Superior Court, GRAHAM County. Heard in the Court of Appeals 16 October 1978.

Plaintiff-husband brought this divorce action in 1976. A consent judgment was entered on 8 October 1976 decreeing the bonds of matrimony between the parties to be dissolved. Custody of the parties' minor child was awarded to defendant-wife. A separation agreement, executed by the parties on 6 April 1975, was incorporated by reference and made a part of the consent judgment. The separation agreement provided for alimony and child support payments to be made by plaintiff-husband in the amount of four hundred dollars per month.

On 17 February 1977, plaintiff-husband filed this motion in the cause, seeking a modification of the consent judgment. Plaintiff-husband's motion sought a reduction in the alimony and support payments from four hundred to two hundred dollars per month and modification of his visitation rights with respect to the parties' minor child. The motion was heard before Judge Leatherwood on 4 August 1977. After hearing the testimony of both plaintiff-husband and defendant-wife and considering the evidence presented, the court entered an order modifying the visitation provisions of the consent judgment but denying modification of the alimony and support provisions. The court's order found as a fact that plaintiff-husband had failed to show a material change of

circumstances justifying his motion for reduction in the alimony and support provisions inasmuch as the changes in his circumstances had been voluntarily effected by him in disregard of his marital and parental obligations.

Holt, Haire & Bridgers, by Ben Oshel Bridgers for plaintiff.

McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr., for defendant.

BROCK, Chief Judge.

[1] The separation agreement executed by the parties contained the following provision: "If and when it is no longer necessary for the party of the first part [the husband] to pay for the support of the party of the second part, [the wife] it is understood and agreed between the parties hereto that he, the said party of the first part will furnish adequate support for his minor child sufficient to retain the standard of living to which he had been accustomed. . . ." Plaintiff-husband challenges the conclusion in the court's order that this phrase "was intended by the parties and does refer to the possibility that the defendant herein might in the future remarry or die."

Although the provision in question was included in the separation agreement executed on 6 April 1975, it was incorporated by reference into the consent judgment of 8 October 1976 and made an integral part thereof. A consent judgment is a contract between the parties thereto and should be construed as any other contract. *Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425 (1971). It is a cardinal rule of contract interpretation that when there is no clear apparent meaning to be discerned from a contract provision, a court, in seeking to ascertain the intent of the parties, must focus on all the surrounding circumstances at the time the contract was made. 4 Williston on Contracts, § 618, p. 716 (3d ed. 1961). The court, in this instance, properly concluded that the provision in question was ambiguous in that the parties' agreement gives no guidance as to what is meant by the phrase, "when it is no longer necessary." After examining the circumstances surrounding the entry of the consent judgment, particularly the fact that defendant-wife was employed at a salary of $11,200.00 per year at that time, the court concluded that the intent of the parties was to provide for continued child support

payments in the event of defendant-wife's death or remarriage. The court's interpretation is not unreasonable in light of the evidence presented. We thus find no merit in plaintiff-husband's first assignment of error.

Modification of support and alimony provisions contained in a judgment may only be obtained as provided for in G.S. 50-13.7 and G.S. 50-16.9 upon, "a showing of changed circumstances by either party or anyone interested." These statutes have been construed to require a showing of a substantial change in circumstances. *See Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140 (1969). Plaintiff-husband assigns error to the court's conclusion in this instance that he failed to show a substantial change in either his own or the circumstances of defendant-wife. He also assigns error to the court's finding on the related issue that any change in his circumstances was voluntarily effected by him in disregard of his marital and parental obligations.

[2] The trial court's conclusion that the change in plaintiff-husband's circumstances was voluntarily effected by him in disregard of his marital and parental obligations is denominated in the court's order as a finding of fact. What is designated by the trial court as a finding of fact, however, will be treated on review as a conclusion of law if essentially of that character. 5 C.J.S., Appeal and Error, § 1454, p. 578. "The label of fact put upon a conclusion of law will not defeat appellate review." *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E. 2d 600, 604 (1946). The determination that a husband's change in circumstances has been voluntarily effected by him in disregard of his marital and parental obligations justifying imposition of the earnings capacity rule is a conclusion of law based on the factual findings in the particular case, and our review of the court's order will proceed on that basis.

When a court concludes as a matter of law on the basis of the evidence presented that a husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child, the court may base an alimony and/or child support award on the individual's ability to earn as distinguished from his actual income. *Bowes v. Bowes*, 287 N.C. 163, 214 S.E. 2d 40 (1975). Similarly, a court may refuse to modify a support and/or

alimony award on the same grounds. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971). In *Bowes*, Justice Copeland reviewed the cases in which the earnings capacity rule had been applied and concluded that the basic issue to be determined is whether, "the husband, by reducing his income, [is] primarily motivated by a desire to avoid his reasonable support obligations?" *Id.* at 173, 214 S.E. 2d at 46. In *Sguros v. Sguros*, 252 N.C. 408, 114 S.E. 2d 79 (1960), the Court held that under the circumstances disclosed so long as the husband acted in "good faith" in accepting employment that resulted in the reduction of his income, application of the earnings capacity rule was improper. In *Bowes*, Justice Copeland went on to conclude that before applying the earnings capacity rule, "the finder of the fact must have before it *sufficient evidence* of the proscribed intent." *Id.* at 173, 214 S.E. 2d at 46. (Emphasis added.)

The evidence in the present case showed the following: Plaintiff-husband, subsequent to the date on which the consent judgment was entered, voluntarily gave up his $15,000 per year job as director of recreation on the Cherokee reservation. He did so with the intention of returning to college to complete his undergraduate degree in recreation with the expectation that by obtaining a degree he would become eligible for employment at a higher salary as a recreation director in a different locale. Plaintiff-husband did return to college and arranged to meet his support and alimony obligations from his income under the GI bill. While he was a student at Western Carolina University, plaintiff-husband failed two of his courses. Concerned about mounting financial obligations, plaintiff-husband decided not to return to school and instead took a job with a construction company at an annual salary well below that which he enjoyed while employed as recreation director. While still enrolled as a student, plaintiff-husband declined an offer of employment with another construction company because of transportation difficulties. After the separation of the parties, plaintiff-husband purchased a new car, and subsequent to the entry of the consent judgment, he purchased a mobile home and a motorcycle.

We do not think the evidence summarized above is sufficient to support the court's conclusion that plaintiff-husband's change of circumstances was voluntarily effected by him in disregard of his marital and parental support obligations. As the cases dis-

cussed above correctly observe, the court's conclusion underlying imposition of the earnings capacity rule must be based on evidence that tends to show the husband's actions resulting in the reduction of his income were not taken in "good faith." Evidence of intent such as "bad faith" generally can be proven, if at all, only by circumstantial evidence. *See* Stansbury, N.C. Evidence, § 83, p. 254 (Brandis Rev. 1973). The circumstantial evidence presented in this instance, however, does not offer support for the court's conclusion. We therefore vacate the order appealed from and remand this case for rehearing. Having vacated the order it is not necessary to consider appellant's assignment of error to the court's finding that no change in defendant-wife's circumstances had been shown.

Vacated and remanded.

Judges HEDRICK and MITCHELL concur.

STATE OF NORTH CAROLINA v. TOMMY MAYBERRY

No. 7824SC503

(Filed 7 November 1978)

1. Assault and Battery § 16.1— assault with firearm on law enforcement officer—instruction on nonfelonious assault not required

In a prosecution for assault with a firearm upon a law enforcement officer in the performance of his duties, the trial court did not err in failing to instruct the jury on the lesser offense of nonfelonious assault since the State's uncontroverted evidence tended to show that defendant pointed a shotgun in the direction of the sheriff and was weaving back and forth; the sheriff was in the performance of his duties of investigating the alleged crime of assault with intent to commit rape; defendant had been previously arrested by the sheriff and therefore knew he was a law enforcement officer; and the sheriff informed defendant that the law had him surrounded.

2. Criminal Law § 112.6— insanity—evidence insufficient to require instruction

The trial court properly declined to instruct the jury with regard to the defense of insanity where a psychiatrist and sheriff could give no opinion as to whether defendant knew what he was doing at the time of the alleged crimes and testimony by defendant's mother that defendant was "wild crazy," "booze sick," and that he "didn't have no sense" was conclusory in nature and did not bear upon the issue of whether, at the time of the crimes charged, defendant

was capable of knowing the nature and quality of his acts or of distinguishing between right and wrong in relation to such acts.

3. **Assault and Battery § 14.6— assault on law enforcement officer—proof of intent**

In order to return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, the jury is not required to find that defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself.

4. **Criminal Law § 104— motion for nonsuit—contradictions in evidence disregarded**

Defendant's contention that his motion for nonsuit should have been granted because the evidence was contradictory is without merit, since, in passing upon a trial court's denial of a motion for nonsuit, the State's evidence is considered in the light most favorable to it and deemed true with all inconsistencies or contradictions therein disregarded.

APPEAL by defendant from *Howell, Judge.* Judgment entered 3 October 1977 in Superior Court, AVERY County. Heard in the Court of Appeals 26 September 1978.

The defendant was indicted for the felonies of assault on a female with intent to commit rape and assault with a firearm upon a law enforcement officer in the performance of his duties. Upon his pleas of not guilty to each charge, the jury returned verdicts of guilty. From judgment sentencing him to imprisonment for terms of ten years and five years respectively, with the sentences to run concurrently, the defendant appealed.

The State's evidence tended to show that on 6 February 1977, the defendant lived with his mother who was eighty-three years of age. On that date, the defendant returned to their home after having been gone for the weekend. The defendant's mother smelled liquor on his breath and noticed that his eyes looked red and wild, unlike anytime she had noticed them before. The defendant took a drink from a bottle of liquor and began to talk in loud and angry tones. His mother mentioned calling the rescue squad, and the defendant reacted by pulling their telephone off the wall. He then grabbed his mother and threw her into a chair telling her that he was going to rape her. The defendant shoved his mother toward a bedroom and threw her on the bed. He pulled her dress up to her arms and her pants down to her knees. The defendant's mother then asked him to get some water. The

defendant went to the kitchen, and his mother ran from the home and to her daughter's home nearby.

Shortly thereafter, Howard Beverly Daniels, Sheriff of Avery County, and three deputies arrived at the defendant's home. Three of the law enforcement officers went to the front of the home and knocked on the door. No one answered the door, but the defendant later walked from behind the house with a shotgun in his hands. The Sheriff, who had arrested the defendant on previous occasions, took cover and told the defendant that the law had him surrounded. The Sheriff directed the defendant to put down the gun and to come and talk with him. The defendant then walked toward the Sheriff with the gun pointed in his direction. While walking toward the Sheriff, the defendant weaved with the gun from side to side. As the defendant came within reach, the Sheriff grabbed the gun.

The defendant offered evidence tending to show that he had gone to Tennessee for the weekend. While there he consumed a large amount of alcohol. The defendant recalled passing a fire station in Tennessee on 6 February 1977, but remembered nothing else until he awoke in jail on 7 February 1977.

Dr. Michael Feldman, a psychiatrist testifying for the defendant, stated that he had examined the defendant but could not give an opinion as to the defendant's state of mind or ability to determine right from wrong at the time of the crime charged due to the defendant's alleged amnesia. Dr. Feldman further testified that the ingestion of alcohol could have affected the defendant's mental state, and that the defendant had the possibility of losing control and being unable to distinguish between right and wrong if under severe emotional stress or the influence of alcohol or drugs.

Attorney General Edmisten, by Associate Attorney Sarah L. Fuerst, for the State.

Joseph W. Seegers for the defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to instruct the jury with regard to a possible verdict of

nonfelonious assault. The defendant contends that nonfelonious assault is a lesser included offense of the offense of assault with a firearm upon a law enforcement officer in the performance of his duties in violation of G.S. 14-34.2. The defendant further contends that the lesser included offense was supported by the evidence.

Both G.S. 15-169 and 170 allow a conviction of a lesser included offense of the crime charged when there is evidence tending to show that the defendant may be guilty of such lesser offense. However, the trial court should instruct the jury on a lesser included offense "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." *State v. Lampkins*, 286 N.C. 497, 506, 212 S.E. 2d 106, 111 (1975) (citations omitted), *cert. denied*, 428 U.S. 909, 49 L.Ed. 2d 1216, 96 S.Ct. 3220 (1976).

The State's uncontroverted evidence in this case tended to show that the defendant pointed a shotgun in the direction of the Sheriff and was weaving back and forth. This evidence would permit the jury to infer that the defendant pointed the gun at the Sheriff. The uncontroverted evidence of the State also indicated that the Sheriff was in the performance of his duties of investigating the alleged crime of assault with intent to commit rape. The State's evidence also indicated that the defendant had been previously arrested by the Sheriff and, therefore, knew he was a law enforcement officer. Additionally, the Sheriff informed the defendant that the law had him surrounded.

No evidence before the trial court tended to indicate that the defendant did not know that the Sheriff was a law enforcement officer or that he was acting in the performance of his duties. No evidence of a lesser included offense having been presented, the trial court correctly declined to instruct the jury with regard to any lesser included offense.

[2] The defendant next assigns as error the failure of the trial court to instruct the jury with regard to the defense of insanity. The defendant contends that the defense of insanity was properly raised and was supported by the evidence. We do not agree.

A defendant is considered to be legally insane and may avail himself of the defense of insanity when he was laboring under a disease or deficiency of mind or a defect of reason at the time of

the alleged act which rendered him incapable of knowing the nature and quality of his acts or incapable of distinguishing between right and wrong in relation to such acts. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974). Further, a defendant is presumed sane, as insanity is not a natural or normal condition. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). "In the absence of any evidence whatever tending to rebut this presumption, . . . it is not incumbent upon the trial judge to instruct the jury with reference to [insanity]." *State v. Jones*, 293 N.C. 413, 426, 238 S.E. 2d 482, 490 (1977).

The psychiatrist called to testify by the defendant stated that he could not give an opinion as to the state of mind of the defendant at the time of the alleged crime. His additional testimony that the defendant "had the possibility of losing control" was of no real probative value, as the same could be said of any person. The Sheriff testified that the defendant reminded him of a mentally disturbed person, but specifically testified that he did not know if the defendant knew what he was doing. The defendant's mother testified that the defendant was "wild crazy," "booze sick" and that he "didn't have no sense." This testimony by the defendant's mother was entirely conclusory in nature and did not bear upon the issue of whether, at the time of the crime charged, the defendant was capable of knowing the nature and quality of his acts or of distinguishing between right and wrong in relation to such acts. The evidence of these witnesses, even if believed in its entirety, was inadequate to overcome the presumption of sanity. The trial court properly declined to instruct the jury with regard to the defense of insanity.

[3] The defendant also assigns as error the failure of the trial court to instruct the jury that, before they could return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, they must find the defendant possessed a specific intent beyond the intent to commit the unlawful act itself. This assignment is without merit. In order to return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself. *See State v. Matthews*, 231 N.C.

617, 58 S.E. 2d 625, *cert. denied*, 340 U.S. 838, 95 L.Ed. 615, 71 S.Ct. 24 (1950).

[4] The defendant additionally assigns as error the failure of the trial court to allow his motion for judgment of nonsuit as to the charge of assault with a firearm upon a law enforcement officer in the performance of his duties. In support of this assignment, the defendant contends that his motion should have been granted due to the fact that the evidence was contradictory. In passing upon a trial court's denial of a motion for judgment of nonsuit, the State's evidence is considered in the light most favorable to it and deemed true with all inconsistencies or contradictions therein disregarded. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). When viewed in this light, the evidence before the trial court provided a reasonable basis upon which the jury might find that the defendant had committed the crime charged. The motion was properly denied.

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

No error.

Judges MORRIS and ERWIN concur.

In re Kirkman

IN THE MATTER OF THE ESTATE OF JOHN C. KIRKMAN, SR., DECEASED

No. 7714SC939

(Filed 7 November 1978)

1. **Wills § 61— notice of dissent—sufficiency in question—jurisdiction of court**

The executor-appellant's contention that, because there was nothing at issue in the estate to be decided, the trial court was without jurisdiction when he entered his initial order finding that notice of a widow's dissent to her deceased spouse's will had been properly filed is without merit, since the issue of the sufficiency of the widow's notice of dissent was properly before the court.

2. **Wills § 61— notice of dissent—specific allegations not required**

The executor-appellant's assertion that he was denied due process of law in that the notice of dissent filed by the widow contained no specific allegations which he could deny by way of an answer is without merit, since, under G.S. 30-2(a), an individual who chooses to dissent from the will of his or her spouse need only file such dissent with the clerk of superior court, and the giving of such notice is sufficient to alert the executor with respect to the intentions of the dissenting spouse and afford him ample opportunity to prepare for a hearing on the question of the spouse's statutory right to dissent.

3. **Wills § 61— dissent—constitutionality of statutory procedure**

The executor-appellant's contention that the procedure set forth in G.S. 30-1 for determining whether a surviving spouse has the right to dissent is so vague and uncertain as to be unconstitutional is without merit, since estimates of value of amounts passing under the will to the surviving spouse subject to a contingency and the amounts which must be subtracted from the decedent's gross estate to determine his net estate can be reasonably ascertained by the use of aids such as tax tables and expert witnesses.

APPEAL by executor from *McKinnon, Judge.* Order entered 22 June 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 August 1978.

This is an appeal by the executor of the estate of John C. Kirkman, Sr., who died on 12 December 1974. Kirkman was survived by his spouse, Minnie H. Kirkman, and by three children from a previous marriage. Both John C. Kirkman, Sr. and Minnie H. Kirkman had been married previously, and their respective, prior spouses had died. There were no lineal descendants of this second marriage.

On 31 December 1974, John C. Kirkman's will was probated in common form, and his son Thomas L. Kirkman was appointed executor pursuant to the terms of the will.

On 19 May 1975, within 6 months of the date on which Thomas Kirkman qualified as executor, Minnie H. Kirkman filed a notice of her intent to dissent from the will of John C. Kirkman, Sr. as provided for by G.S. 30-1. On 7 July 1975, Minnie H. Kirkman filed an application with the executor requesting that her year's allowance be distributed to her. On 22 September 1975, she filed a petition in a special proceeding, requesting a larger widow's allowance under G.S. 30-27. The executor filed an answer to the petition denying the allegations in it. On 5 November 1975, Minnie H. Kirkman filed and served on the executor a proposed stipulation of valuation of the estate of John C. Kirkman, Sr. to be used in determining her right to dissent from his will. At the same time she served notice on the executor of a hearing on a motion to have the court appoint one or more disinterested persons to establish such a valuation in the event the parties could not agree on a stipulated valuation. On 12 November 1975, Minnie H. Kirkman took a voluntary dismissal of her petition for a larger one year allowance.

Upon motion by the executor for removal of the case from the clerk of superior court, Judge Edwin S. Preston, on 19 November 1975, heard arguments of counsel and entered an order in the estate file. Judge Preston's order recited that the case was before him by consent of the parties and that the court was hearing the matter both as to the estate file and the special proceeding file. Judge Preston's order concluded that Minnie H. Kirkman had sufficiently preserved her right to dissent from the will by filing her notice of dissent on 19 May 1975, and that G.S. 30-1 empowered the clerk of superior court to appoint one or more disinterested persons to establish a valuation of the estate. The matter was remanded to the clerk, who, on 20 January 1976, entered an order appointing A. William Kennon as the disinterested person to establish a valuation of the estate for the purpose of determining Minnie H. Kirkman's right to dissent from the will. This order was appealed to superior court, which issued an order on 5 March 1976 affirming the clerk's order appointing A. William Kennon.

On 14 October 1976, A. William Kennon filed his report establishing a valuation of the estate. After conducting a hearing on the report, James Leo Carr, Clerk of Superior Court, entered an order on 24 November 1976 making findings of fact with

respect to valuation of the estate and concluded as a matter of law that Minnie H. Kirkman was entitled to dissent from her deceased husband's will. On 2 December 1976, the executor filed notice of appeal to superior court from this order of the clerk.

On 24 February 1977, the executor served a series of interrogatories on Minnie H. Kirkman. On 22 March 1977, objections to the interrogatories were filed on grounds that they pertained to issues and factual conclusions "heretofore litigated . . . and established by both the clerk of superior court and superior court judges presiding therein all as shown and set forth in the case on appeal of the Honorable James Leo Carr, Clerk of the Superior Court. . . ." On 19 May 1977, counsel for the executor served a calendar notice of a hearing on the appeal of the clerk's order of 24 November 1976. On 25 May 1977, counsel for the executor filed and served a notice of hearing on a motion to compel answers to the interrogatories and a motion for summary judgment. The motion for summary judgment was filed on 25 May 1977 with supporting affidavits.

On 9 June 1977, a hearing was held in superior court before Judge Henry A. McKinnon. The court ruled that the motion for summary judgment was improper and denied it. The court then proceeded to hear the matter on the executor's appeal from the clerk's order of 24 November 1976 finding that Minnie H. Kirkman was entitled to dissent from the will. After conducting a *de novo* hearing on the issue, including hearing the testimony of a consulting actuary, the court entered an order affirming the clerk's order of 24 November 1976. From this order of the court, the executor took a timely appeal.

Nancy Fields Fadum for the executor-appellant.

E. C. Harris and John C. Randall for the appellee.

BROCK, Chief Judge.

[1] The executor-appellant contends that the court was without jurisdiction when Judge Preston entered his initial order on 19 November 1976 finding that the notice of dissent had been properly filed. On that basis, he contends the 9 June 1977 order of Judge McKinnon finding that Minnie H. Kirkman was entitled to

dissent from the will is void because it was based on the initial proceeding of 19 November 1976 in which the court lacked jurisdiction.

Appellant contends the court lacked jurisdiction in the first proceeding because there had been no pleadings and there was nothing at issue in the estate to be decided. Appellant further contends that there was an unwarranted assumption of jurisdiction by the court when Judge Preston recited in his order that the matter was before the court by consent of the parties as to both the estate and the special proceeding file, since the widow had earlier taken a voluntary dismissal of her special proceeding petition. We find this assignment of error to be without merit. Judge Preston's order clearly reveals that the issue of the sufficiency of the widow's notice of dissent was properly before the court at the time. Since the widow had taken a voluntary dismissal of her special proceeding petition, that proceeding alone would have been insufficient to support the court's assumption of jurisdiction. But the reference in Judge Preston's order to the special proceeding file as a basis for jurisdiction is mere surplusage because there was clearly an adversary issue with respect to the estate proceedings supporting the court's assumption of jurisdiction.

[2] The executor-appellant also asserts that he was denied due process of law in that the notice of dissent filed by the widow contained no specific allegations which he could deny by way of an answer. Under G.S. 30-2(a), an individual who chooses to dissent from the will of his or her spouse need only file such dissent with the clerk of superior court. The giving of such notice is sufficient to alert the executor with respect to the intentions of the dissenting spouse and afford him ample opportunity to prepare for a hearing on the question of the spouse's statutory right to dissent. In *Union National Bank of Charlotte v. Easterby*, 236 N.C. 599, 73 S.E. 2d 541 (1952), the Court, interpreting the similar dissent statute then in effect, observed that the right of a widow to dissent was given by law, and that, in the exercise of such right, *she is not required to assign any reason therefor.*" 236 N.C. at 602, 73 S.E. 2d at 543. (Emphasis added.)

Appellant's assertion that the court lacked jurisdiction in the 19 November 1976 proceeding because notice of the hearing and an opportunity to be heard was not given to certain devisees of

real property under the will is equally without merit. The only authority cited by appellant in support of his assertion is *Hoke v. Trust Co.*, 207 N.C. 604, 178 S.E. 109 (1935). The holding in *Hoke* was that the executor did not have the right to bring an action with respect to the real property titled in the name of the deceased which had been devised under the will. That principle is not applicable to this proceeding, however, where the action was brought against the executor.

[3] In assignments of error numbers 1 through 16, the executor-appellant raises the issue of the constitutionality of the procedure set forth in G.S. 30-1 for determining whether or not a surviving spouse has the right to dissent. Appellant asserts that because its terms are so vague and uncertain that persons of common intelligence must necessarily guess at its meaning and differ as to its application, the statutory procedure violates due process of law. The determination of whether or not a surviving spouse has the right to dissent involves the computation of three figures: (1) the aggregate value of the provisions under the will for the benefit of the surviving spouse; (2) the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator; and (3) the intestate share of the surviving spouse. The first and second figures can be computed with relatively little difficulty in most cases. In this instance, however, the testator's will provided for the spouse to receive income from a trust fund in the amount of $2000 per calendar quarter with a possible increase in that amount contingent upon percentage fluctuations in the Consumer Price Index. Computation of the second figure can also be difficult in situations when the testator's will gives a trustee discretion to invade the principal of a trust established for the benefit of the surviving spouse. Computation of the third figure, the intestate share of the surviving spouse, necessarily involves computing the value of the decedent's net estate as well because the intestate share provided by satutute is a percentage of the net estate. Appellant points out the difficulties inherent in computing that figure, *e.g.*, determining the amount of estate taxes due, the amount of contingent claims against the estate, and the costs of administration, all of which must be subtracted from the decedent's gross estate to determine the net estate from which the surviving spouse's intestate share must be computed.

Although we are not unsympathetic with the difficulties inherent in the statutory procedure provided for determining the right of dissent, we do not believe the procedure is constitutionally infirm. We cannot conceive of a procedure for determining the right of a surviving spouse to dissent which would not involve at least some of the difficulties inherent in the present statute. Although estimates of value of amounts passing under the will to the surviving spouse subject to a contingency and the amounts which must be subtracted from the decedent's gross estate to determine his net estate may be difficult to make and subject to dispute, estimates can be derived from the use of aids such as tax tables and expert witnesses. Values computed by the use of such aids cannot be more than estimates. We think however, that the values which must be determined under the statutory procedure can be *reasonably ascertained* by the use of such methods and that the procedure is not, therefore, constitutionally invalid. *See Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E. 2d 790 (1977), *cert. granted*, 294 N.C. 183, 241 S.E. 2d 518 (1978). We do not believe the procedure set forth in the statute authorizing dissent by a surviving spouse approaches that level of arbitrary governmental action necessary to support a claim of denial of due process.

We have examined the other assignments of error argued by the appellant and find them to be without merit.

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

ELIZABETH KAY McLEAN v. DR. PAUL SALE

No. 7730SC1037

(Filed 7 November 1978)

Insane Persons § 1; Physicians, Surgeons and Allied Professions § 11— wrongful certification to mental hospital—sufficiency of evidence

Plaintiff's complaint was sufficient to state a claim for relief against a medical doctor for wrongful certification of plaintiff for admission to a mental hospital where it alleged that defendant certified that he had examined plain-

tiff pursuant to G.S. 122-58.4 and found her to be mentally ill and imminently dangerous to herself or others when in fact defendant had not made an examination of plaintiff.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 12 September 1977 in Superior Court, SWAIN County. Heard in the Court of Appeals 21 September 1978.

This is an appeal from a summary judgment entered against the plaintiff in an action seeking damages for wrongful commitment to a mental institution.

Plaintiff alleged in her verified complaint the defendant is a duly licensed medical doctor practicing in Swain County; on 3 December 1976, defendant completed and signed a QUALIFIED PHYSICIAN EXAMINATION AND EVALUATION form concerning plaintiff, the form being attached to the complaint as Exhibit "1"; defendant stated in the form that he had examined plaintiff on 3 December 1976 at 11:50 a.m. and recommended plaintiff be admitted to Broughton Hospital; defendant did not examine plaintiff on 3 December 1976, or at any other time, and has never examined plaintiff; plaintiff was committed to said hospital where she remained until discharged 7 December 1976; defendant knew his signing of the exhibit would cause plaintiff to be committed to Broughton Hospital; plaintiff has suffered mental anguish and compensatory and punitive damages by reason of defendant's actions.

Defendant has not filed an answer. Defendant filed motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Upon the hearing of defendant's motion in Haywood County, the court had before it the verified complaint; Exhibit "1," the certificate of the defendant; petition for involuntary commitment dated 3 December 1976 and sworn to by Linda H. Dills; custody order of William G. Burrett, magistrate, dated 3 December 1976 at 11:45 a.m.; officer's return on custody order showing it to be received 3 December 1976 and executed by taking the respondent (plaintiff herein) into custody at 1:05 p.m. on 3 December 1976 and presenting her to qualified physician for examination at 1:10 p.m., same date; notice of hearing dated 7 December 1976; QUALIFIED PHYSICIAN EXAMINATION AND EVALUATION certificate

signed and sworn to on 7 December 1976; CERTIFICATE OF DISCHARGE; dismissal order in proceeding signed 9 December 1976 by district court judge.

Judge Griffin treated the motion to dismiss as a motion for summary judgment under Rule 56, North Carolina Rules of Civil Procedure. He found facts and dismissed plaintiff's action.

Roberts, Cogburn and Williams, by Max O. Cogburn, Jr., for plaintiff appellant.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff's verified complaint was properly considered as an affidavit. *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). Facts asserted by the plaintiff must be accepted as true in considering defendant's motion. *Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974). The record must be considered in the light most favorable to the plaintiff in passing upon defendant's motion for summary judgment. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

Considering the record in this case with these principles in mind, we hold there are material questions of fact for a jury and that plaintiff's complaint states a claim upon which relief can be granted. The judgment must be reversed.

Before summary judgment may be had, the record must affirmatively show that not only would the moving party be entitled to judgment from the evidence before the court, but it must also show there can be no other evidence from which a jury could reach a different conclusion as to a material fact. *Goode v. Tait, Inc.*, 36 N.C. App. 268, 243 S.E. 2d 404 (1978).

The holdings in *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954); *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E. 2d 529 (1976); and *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860 (1957), have been ably argued by counsel. These authorities are not controlling on the facts of the case before this Court. Plaintiff's suit is not bottomed on what defendant *stated* in his certificate.

In brief, plaintiff alleges: (1) defendant had a statutory duty to examine her before issuing plaintiff's Exhibit "1"; (2) defendant failed to make the required examination and thus violated the duty to plaintiff; (3) plaintiff suffered damages as a result of defendant's breach of duty. The evidence before the court tended to show that plaintiff was not mentally ill or imminently dangerous to herself or others. She was examined by a medical doctor at Broughton Hospital on 7 December 1976 at about two o'clock, three days after she was taken into custody. She was released on the same day from the hospital and the commitment proceedings dismissed 9 December 1976.

N. C. Gen. Stat. 122-58.4 reads in part: "The qualified physician *shall* examine the respondent as soon as possible . . .." (Emphasis added.) The statute imposes a positive duty on the defendant to make the examination before signing the certificate. This statute further reads: "If the *physician* finds that the respondent is mentally ill . . . and is imminently dangerous to himself or others . . . the law-enforcement officer *shall* take the respondent to a community mental health facility . . . pending a district court hearing." (Emphasis added.) It is the finding by the physician in his certificate that directly results in the restraint of respondent (here, plaintiff). No further hearing is held by the clerk of superior court as formerly required by statute. Before the 1974 revision of Chapter 122 of the General Statutes, the clerk was required to have at least an informal hearing after receiving the physician's certificate of examination and evaluation. The respondent was entitled to notice, to be present and offer evidence. If the clerk was then satisified confinement was required, he could issue the order of commitment. N.C. Gen. Stat. 122-46 (repealed 1973 N.C. Sess. Laws).

It is noted in *Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E. 2d 209 (1970), the Court held failure of the certifying physician to verify his certificate under oath was a sufficient violation of N.C.G.S. 122-59 to hold the confinement based upon that certificate deprived plaintiff of her liberty without legal process and sustained plaintiff's claim for false imprisonment. The defendant Sale's actions are within the holding in *Samons*.

It is the purpose of the statute that only mentally ill persons in need of restraint be deprived of their liberty. This can only be assured by the doctor making the required examination before ex-

ecuting the certificate. An intentional or negligent violation of this duty cannot be the subject of immunity. The physician is not communicating when he fails to make the examination. Plaintiff's action is not one of libel.

Plaintiff's complaint is sufficient to place defendant on notice of a claim for damages for negligent or intentional breach of his statutory duty. Pretrial discovery procedures provide defendant with ample means of more precise and detailed investigation of plaintiff's alleged cause.

Litigants are no longer bound to fit their causes within the ancient "forms of action." By adopting the Rules of Civil Procedure, North Carolina has avoided the spectre of the "forms of action [ruling] us from their graves." F. Maitland, The Forms of Action at Common Law 2 (1954).

The following jurisdictions hold liability of a physician can be established with respect to his wrongful certification of a person to an institution for treatment of the mentally ill. *Miller v. West*, 165 Md. 245, 167 A. 696 (1933); *Warner v. Parker*, 139 App. Div. 207, 123 N.Y.S. 725 (1910); *Kleber v. Stevens*, 39 Misc. 2d 712, 241 N.Y.S. 2d 497 (1963); *Williams v. LeBar*, 141 Pa. 149, 21 A. 525 (1891); *Daniels v. Finney*, Tex. Civ. App., 262 S.W. 2d 431 (1953). *See also, Benjamin v. Havens, Inc.*, 60 Wash. 2d 196, 373 P. 2d 109 (1962). For a discussion of physician's liability in wrongful certification for admission to mental institutions, *see* 48 N.C.L. Rev. 412 (1970).

Article I of the North Carolina Constitution (1971), Section 18 of the DECLARATION OF RIGHTS, states: "[E]very person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

The summary judgment is reversed.

Reversed and remanded.

Chief Judge BROCK and Judge CLARK concur.

MILDRED J. LILES v. ALTON R. MYERS T/A MYERS BROTHERS T/A BRENTWOOD GRILL

No. 7710DC1044

(Filed 7 November 1978)

Uniform Commercial Code § 28— promissory note as negotiable instrument—plaintiff's failure to show she was holder

A promissory note sued upon by plaintiff was a negotiable instrument since it contained an unconditional promise by defendant to pay a sum certain in currency and no other promise, order, obligation or power given by him, was payable to the order of plaintiff at a definite time, and was signed by the defendant as maker; therefore, prior to being entitled to a judgment against the defendant, plaintiff was required to establish that she was holder of the note at the time of this suit, and for failure to establish this essential element of her claim, she was not entitled to summary judgment. G.S. 25-3-104.

APPEAL by defendant from *Winborne, Judge*. Judgment entered 24 October 1977 in District Court, WAKE County. Heard in the Court of Appeals 22 September 1978.

The plaintiff brought this action seeking to recover $3,200 which she alledged was owed her by the defendant on a promissory note. By her complaint, the plaintiff alleged that she sold the defendant certain items of restaurant equipment on 12 December 1974. In consideration of that sale, the defendant agreed to pay the plaintiff $4,000. Of that sum, $500 was to be paid at the time of the sale, and the remainder, or $3,500, was to be paid according to the terms of a promissory note. The plaintiff's complaint indicated that $800 had been paid pursuant to the note. The plaintiff further alleged that she had demanded payment on the note from the defendant, but he had failed to pay and was justly indebted to her in the amount of $3,200 plus interest. The plaintiff sought to recover that amount from the defendant for his default on the note.

The defendant answered, admitting that he purchased certain items of equipment from the plaintiff for $4,000 but denying all other allegations. The defendant additionally alledged in his answer that the plaintiff had been fully paid for the equipment either in cash or as credit for property which the plaintiff had no right to convey, and that an accord and satisfaction had been reached on the matters set forth in the complaint.

The plaintiff moved for summary judgment and submitted an affidavit in support of her motion. Her affidavit essentially restated certain allegations previously set forth in her verified complaint. The defendant submitted an affidavit in opposition to the plaintiff's motion. He alleged in his affidavit that the plaintiff did not own all of the equipment which she had purported to sell him and which her complaint alleged she had sold him. The defendant further stated in his affidavit that he had not received all of the items of equipment alleged in the complaint and did not owe the plaintiff the amount she sought to recover.

At the hearing on the plaintiff's motion for summary judgment, the trial court allowed a prior motion by the plaintiff to amend her complaint and affidavit to reflect payment of $300 on the note instead of $800 as previously indicated. The trial court then denied the defendant's motion to present oral testimony and granted summary judgment in favor of the plaintiff. The defendant appealed.

Stephen T. Smith for plaintiff appellee.

T. Yates Dobson, Jr. and James W. Narron for the defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the trial court's entry of summary judgment for the plaintiff and contends that the plaintiff failed to show that she was entitled to judgment as a matter of law. We agree.

The plaintiff attached a photocopy of the note in question to her complaint and incorporated it therein by reference. The copy of the note reveals that it contains an unconditional promise by the defendant to pay a sum certain in currency and no other promise, order, obligation or power given by him. It is payable to the order of the plaintiff at a definite time and was signed by the defendant as maker. The promissory note is, therefore, a negotiable instrument. G.S. 25-3-104. As such, it may be freely transferred by supplying the necessary endorsement and delivering the instrument to the transferee. G.S. 25-3-202.

Prior to being entitled to a judgment against the defendant, the plaintiff was required to establish that she was holder of the

note at the time of this suit. *Schindler v. Ag Aero Distributors, Inc.*, 502 S.W. 2d 581 (Tex. Civ. App. 1973). *See generally* 12 Am. Jur. 2d, Bills and Notes, § 1188, pp. 212-14, and cases referred to therein. This element might have been established by a showing that the plaintiff was in possession of the instrument and that it was issued or endorsed to her, to her order, to bearer or in blank. G.S. 25-1-201(20). It is essential that this element be established in order to protect the maker from any possibility of multiple judgments against him on the same note through no fault of his own. If such proof were not required, the plaintiff could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor. Thereafter, the holder in due course could bring suit upon the note and possibly also obtain a judgment against the defendant. *See, e.g.*, G.S. 25-3-602. Requiring proof that the plaintiff is the holder of the note at the time of her suit reduces the possibility of such an inequitable occurrence.

The requirement that this plaintiff prove her status as a holder of the note is distinguishable from a requirement that she allege that status in her pleadings. In *Deloatch v. Vinson*, 108 N.C. 147, 12 S.E. 895 (1891), *followed in Thompson v. Johnson*, 202 N.C. 817, 164 S.E. 357 (1932), the plaintiff sought to recover on a bond. The defendant answered the plaintiff's complaint and alleged "that he is informed and believes that the plaintiff is not the owner of the bond described in his complaint, and was not the owner thereof at the commencement of this action." This pleading by the defendant was held to be an "illogical pleading" which was "not allowed by The Code." The Court continued by stating that the "payee or endorsee of a note is the *prima facie* owner and holder. The allegation that he is so is unnecessary, and if the defendant defends upon the ground that the plaintiff is not such owner, he should set up facts showing title in some one else." 108 N.C. at 148, 12 S.E. at 896. The Court additionally pointed out that defendants in such cases could protect themselves against unjustifiable claims by exercising the right to "demand strict proof."

The Court in *Deloatch* indicated that it relied upon citations taken from Bliss on Code Pleading in reaching its holding. We distinguish *Deloatch* from the case *sub judice* on the ground that *Deloatch* deals with the technical requirements of code pleading

rather than with the proof required to establish entitlement to judgment as a matter of law within the meaning of G.S. 1A-1, Rule 56(c). Although the pleadings in a particular case may be sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted, they may, nonetheless, be insufficient to entitle the party as a matter of law to a judgment in his favor.

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the defendant was entitled to demand strict proof of this element. *See Schindler v. Ag Aero Distributors, Inc.*, 502 S.W. 2d 581 (Tex. Civ. App. 1973) *and* 12 Am. Jur. 2d, Bills and Notes, § 1188, pp. 212-14. By his answer denying the allegations of the complaint, the defendant demanded such strict proof. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. As the record on appeal fails to reveal that the note itself or any other competent evidence was introduced to show that the plaintiff was the holder of the note, she has failed to prove each essential element of her claim sufficiently to establish her entitlement to summary judgment.

Summary judgment is to be entered if, but only 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 judgment as a matter of law." G.S. 1A-1, Rule 56(c). Taking every allegation in the plaintiff's complaint and affidavit as true, the plaintiff has failed to establish an essential element of her claim for relief. She has, therefore, failed to show that she is entitled as a matter of law to judgment. The granting of summary judgment in favor of the plaintiff was erroneous.

The defendant additionally contends that his answer and affidavit presented the trial court with a genuine issue of material fact with regard to the affirmative defense of failure of consideration, which made the entry of summary judgment for the plaintiff erroneous. Although we find this contention correct, our prior analysis and holding make its detailed consideration unnecessary.

For the reasons previously set forth, the judgment of the trial court must be and is

Reversed and the cause remanded.

Judges MORRIS and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES DIAL

No. 7816SC525

(Filed 7 November 1978)

1. Assault and Battery § 8— assault with intent to kill—self-defense

An assault with intent to kill is justified under the doctrine of self-defense only when the defendant is in actual or apparent danger of death or great bodily harm at the hands of the person he assaults.

2. Assault and Battery § 15.7— felonious assault—insufficient evidence of self-defense

The trial court in a felonious assault prosecution did not err in failing to instruct on self-defense where defendant testified that, immediately before his pistol fired, the victim told him that she "had an ice pick and that she was going to get me a hold" and that she was going to "mark" him, that he did not see the ice pick and the victim never produced an ice pick, that the victim made no motion toward him, and that he got out his pistol "to scare her to leave out or something or another," the pistol fired, and he did not intend to shoot the victim, since the testimony did not show that defendant was in actual or apparent danger of imminent death or great bodily harm, and it indicated that he did not act with an intent to defend himself from an attack but that he accidentally and unintentionally fired his pistol.

3. Assault and Battery § 15.7— defense of home—instruction not required

The trial court in a felonious assault case did not err in failing to instruct the jury as to defendant's right to use force in defense of his home or to evict a trespasser where defendant testified that he did not intentionally shoot the victim, since defendant thus could not have shot the victim with the intention of evicting a trespasser.

4. Criminal Law § 122.2— instructions urging jury to agree—no reduction of burden of proof

The trial court's additional instruction after the jury had begun its deliberations that "it is your duty to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions" did not reduce the State's burden of proof from proof beyond a reasonable doubt to proof "as you can agree without violating your conscientious convictions."

State v. Dial

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 24 February 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals 28 September 1978.

The defendant was indicted for the felony of assault with a deadly weapon with intent to kill inflicting serious injury. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of ten years, the defendant appealed.

The State's evidence tended to show that on 24 September 1977 Gladys Mae Locklear, the prosecuting witness, accompanied the defendant to the home of her niece. After they arrived, the prosecuting witness noticed the outline of a gun on the defendant's left pocket. The defendant drank two beers while in the home. At one point, the defendant pulled the prosecuting witness up to dance, but she pushed away from him. The defendant stated that the two of them could not get along together and left the niece's home.

Later that evening, the prosecuting witness went to her home. She was awakened that night by the sound of a car in her driveway. When she got up and went to the front door to find out who was driving the car, she was met by the defendant. As the defendant came into her home, she noticed the handle of a gun protruding from his pocket. He asked her to get into his car and, when she did, carried her to his home. There the defendant took the prosecuting witness inside and began talking to her in angry tones. He then pushed her down on the couch in his living room. The prosecuting witness pushed the defendant back and said, "I'm not no pushover." The defendant then stood up and shot the prosecuting witness in the face.

The defendant's evidence tended to show that he met the prosecuting witness on 24 September 1977 at her niece's home. The two of them argued, and the defendant left and went to his home. Shortly thereafter, the prosecuting witness came to his home and said that she was sorry. The two then drank beer, played records and danced. They later began to argue again, and the prosecuting witness told the defendant that she, "had an ice pick and that she was going to get me a hold" and that she was going to "mark" him. The defendant then pulled out his pistol and

"tried to scare her to leave out or something or another, and it just fired off and shot her."

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

Terry R. Hutchins for the defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to instruct the jury concerning the law of self-defense. The trial court is required to charge on self-defense, even without a special request, when there is some construction of the evidence from which a reasonable inference could be drawn that the defendant assaulted the victim in self-defense. *State v. Goodson*, 235 N.C. 177, 69 S.E. 2d 242 (1952); *State v. Lewis*, 27 N.C. App. 426, 219 S.E. 2d 554 (1975), *cert. denied*, 289 N.C. 141, 220 S.E. 2d 799 (1976). An assault with the intent to kill is justified under the doctrine of self-defense only when the defendant is in actual or apparent danger of death or great bodily harm at the hands of the person he assaults. *State v. Anderson*, 230 N.C. 54, 51 S.E. 2d 895 (1949).

[2] The defendant testified that immediately before the pistol fired, the prosecuting witness told him that she "had an ice pick and that she was going to get me a hold" and that she was going to "mark" him. The defendant also testified, however, that he did not see the ice pick, and that the prosecuting witness never produced it. When the defendant was questioned about any threatening gestures by the prosecuting witness toward him, he indicated she had made no motion at all.

This evidence constitutes at most a verbal threat to use force. These threatening words did not in themselves give rise to actual or apparent danger of imminent death or great bodily harm. There was no evidence that words were accompanied by any manifestation of a present ability to carry them out or of an intent to carry them out immediately. There was, therefore, nothing apparent to the defendant which would have reasonably led him to believe that he was in danger of imminent death or great bodily harm. As there was no evidence tending to show that the defendant was in actual or apparent danger of imminent

death or great bodily harm, there was no evidence tending to show he acted in self-defense. Therefore, the trial court properly declined to instruct the jury on the law of self-defense.

In addition, the defendant's own unequivocal testimony negates the possibility that the shooting of the prosecuting witness was in self-defense. He stated that he did not see the ice pick and that the prosecuting witness never produced an ice pick. He further stated that she made no motion towards him, and that he got his pistol in an attempt "to scare her to leave out or something or another," and that he did not intend to shoot her. The defendant's testimony, if taken as true, did not indicate that he acted with the intent to defend himself from an attack which he felt would cause him death or bodily harm. Instead, his testimony specifically indicated an unintentional and accidental firing of the pistol. The jury was given proper instructions as to the law of accident and misadventure by the trial court. An additional instruction concerning the law of self-defense would not have been supported by the evidence and was properly omitted from the instructions to the jury.

[3] The defendant next assigns as error the failure of the trial court to instruct the jury as to his right to order the prosecuting witness from his home and as to the degree of force he might justifiably use to remove her from his home if she did not leave voluntarily. In certain cases, a defendant may justify an intentional assault on the ground that it was made in an effort to defend his home from attack or to evict trespassers. *State v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142 (1945). In this case, however, the defendant specifically denied that he intentionally shot the prosecuting witness. If he did not shoot her intentionally, he could not have shot her with the intention of evicting a trespasser. Instead, the shooting would have been accidental. Therefore, the evidence did not require an instruction concerning the defendant's right to use force in defense of his home or to evict a trespasser.

[4] The defendant next assigns as error instructions by the trial court to the jury, after the jury had begun its deliberations in the case. Those instructions included the statement that: "I don't want you to consider that I am trying to force or coerce you in any way to reach a verdict, but it is your duty to reconcile your

differences and reach a verdict if it can be done without any surrender of one's conscientious convictions." The defendant contends that the quoted portion of the instructions lessened the burden of proof which the State was required to bear from that of proof beyond a reasonable doubt to proof "as you can agree without violating your conscientious convictions." We do not agree. The instructions of trial courts to juries must be read contextually, and an excerpt will not be held prejudicial if a reading of the instructions in their entirety leaves no reasonable ground to believe that the jury was misled. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). A reading of the trial court's instructions in this case makes it clear that the trial court merely encouraged the jurors to agree upon a verdict if they could do so in good conscience and did not alter the burden of proof. This practice has long been approved. *Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154 (1896); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

The defendant having received a fair trial free from prejudicial error, we find

No error.

Judges MORRIS and ERWIN concur.

BOARD OF TRANSPORTATION v. LIONEL W. PELLETIER AND WIFE, MYRTLE M. PELLETIER; JAMES PAUL LEWIS AND WIFE, NANCY W. LEWIS; GEORGE W. SALTER AND WIFE, CELESTINE SALTER

No. 773SC1072

(Filed 7 November 1978)

Boundaries § 1; Deeds § 26 — Torrens deed — general and specific descriptions — specific description controlling

In an action to condemn property in order to enlarge a bridge where two families claimed ownership to a portion of the tract sought to be condemned, the trial court properly determined that the metes and bounds description in one family's Land Registration Certificate was controlling, the disputed property was included in that metes and bounds description, and the further reference in the Certificate to "Tract No. 2" of the Jelser Proceeding was inserted merely for the purpose of identifying generally the property that was more specifically described by metes and bounds.

Board of Transportation v. Pelletier

APPEAL by defendants James Paul Lewis and Nancy W. Lewis from *Browning, Judge*. Judgment entered 22 August 1977 in Superior Court, CARTERET County. Heard in the Court of Appeals 27 September 1978.

On 31 October 1974 the Board of Transportation instituted an action to condemn certain property located in Carteret County in order to enlarge a bridge that crossed Oyster Creek. By answers duly filed both the Lewises and Pelletiers claimed ownership to a portion of the tract sought to be condemned. A trial was had before Judge Browning to determine who owned the disputed property.

The evidence introduced at trial is summarized as follows:

Prior to 1932, a wooden bridge crossed Oyster Creek. A bridge replacing the wooden bridge was built by the State in 1932. In order to shorten the length needed to span Oyster Creek, an area on both sides of the creek was filled in between 1923 and 1932. The 1932 bridge extended across Oyster Creek connecting these two landfills. The land in dispute in the present case is the area that was filled in on the north side of Oyster Creek.

Defendant Pelletier bases his claim of ownership to the disputed land on Land Registration Certificate #1191 dated 1 April 1960. This certificate was issued to Rudolph Pelletier in Special Proceeding #1418 entitled "*Rudolph Pelletier v. Carlton J. Taylor, et al.*," instituted on 26 September 1958 and represents a partial decree of registration of certain lands therein described pursuant to the provisions of Chapter 43 of the North Carolina General Statutes. The tract of land pertinent to the present case was described in the certificate as follows:

> In Davis Township, Carteret County, North Carolina, particularly described as follows:
>
> BEGINNING at the intersection of the center line of U.S. Highway 70 and the waters of the North side of the Oyster Creek; runs thence along the center line of U.S. Highway 70 the following courses and distances; North 31-50 East, 280 feet; North 41-50 East, 126 feet; North 73-25 East, 372 feet; North 72-30 East, 1403 feet; and North 49-00 East, 430 feet, to a point thence North 58-30 West, 2490 feet to a point;

thence South 20-00 West, approximately 2350 feet to the north side of the waters of Oyster Creek; and thence down the waters of the Oyster Creek to the center of U.S. Highway 70, the point of BEGINNING; containing 80 acres, more or less; being Tract No. 2 of the division in "*Jelser et al. vs. Newby et al.*," Special Proceeding No. 415.

Rudolph Pelletier transferred the land registration certificate to Lionel W. Pelletier, the defendant in the present case, on 26 January 1972.

Defendants Lewis claim they own the disputed property through adverse possession for more than thirty years and under color of title for seven years.

After hearing all the evidence, the trial judge made detailed findings and conclusions, including the following:

> That the beginning point called for in the metes and bounds description in Defendant Pelletier's certificate of title is located at the intersection of the center line of U.S. Highway #70 and the waters of the north side of the Oyster Creek as the same existed at the time of the filing of S.P.D. 1418 in September 1958, and as shown on Pelletier's Exhibit #2 and from said beginning point the boundaries of the lands owned by Lionel W. Pelletier incorporates all of the lands being condemned by the Plaintiff as described in the petition filed herein.
>
> That the map referred to in said description contained in the Pelletier Registered Certificate as Tract #2 of the Division in *Jelser v. Newby et al.*, Special Proceeding #415, refers to a tract of land as it existed on April 4, 1923 . . .
>
> That the intent of the parties to S.P.D. #1418 was to create a beginning point at the intersection of the center line of U.S. Highway 70 and the waters of the north side of Oyster Creek as the same existed in 1958 and 1960 and the parties did not intend to create a beginning point at the intersection of said highway and the north shore of Oyster Creek as it existed on April 4, 1923, and as shown on the map referred to in said description. That the northern line of

Oyster Creek as it existed on April 4, 1923 was not readily visible or apparent when the Pelletier certificate #1191 was issued.

. . .

That the lands being taken by the Plaintiff herein are owned by the Defendant, Lionel W. Pelletier, by virtue of his Registered Certificate #1191 of record in Registered Land Title Book 3A, page 653, Carteret County Registry, said certificate being issued pursuant to the provisions of Chapter 43 of the General Statutes entitled "Land Registration Act."

Except for the fact that the land in dispute is a part of the registered title of the Defendants Pelletier, the Defendants Lewis would be the owners of the disputed property by adverse possession for more than thirty (30) years and adverse possession under color of title for more than seven (7) years. Title by adverse possession cannot ripen as to land registered under the provisions of the Land Registration Act, General Statutes of North Carolina, Section 43-21.

From the judgment decreeing defendant Pelletier to be the owner of the disputed property, defendants Lewis appeal.

Taylor and Marquardt, by Nelson W. Taylor III, for defendant appellants James Paul Lewis and Nancy W. Lewis.

Beaman, Kellum, Mills & Kafer, by James C. Mills, for defendant appellee Lionel W. Pelletier.

HEDRICK, Judge.

Defendants Lewis agree that the land in dispute is embraced within the metes and bounds description contained in Pelletier's Registered Land Certificate. They bottom their claim, however, on the fact that the disputed land is not included in "Tract No. 2 of the division in '*Jelser, et al. vs. Newby, et al.*,' Special Proceeding No. 415." Defendants Lewis realize that their claim must fail if the disputed land was in fact intended to be covered by the description in the land certificate.

In construing a deed description it is the function of the court to determine the true intent of the parties as embodied in

the entire instrument. *Franklin v. Faulkner*, 248 N.C. 656, 104 S.E. 2d 841 (1958); *Hardy v. Edwards*, 22 N.C. App. 276, 206 S.E. 2d 316, *cert. denied*, 285 N.C. 659, 207 S.E. 2d 753 (1974). "The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby. But if the intent is not apparent from the deed resort may be had to the general rules of construction." *Sugg v. Greenville*, 169 N.C. 606, 614, 86 S.E. 695, 699 (1915). It is generally recognized in this jurisdiction that a specific description will prevail over a general description. Where there is a specific description of land, other words intended to describe generally the same lands, will not be allowed to vary or enlarge the specific description. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968); *Lee v. McDonald*, 230 N.C. 517, 53 S.E. 2d 845 (1949). This rule is derived from the proposition that an additional general description, such as a reference to the source of title, when contrasted with the specific description "can only be considered as an identification of the land described in the boundary," *Midgett v. Twiford*, 120 N.C. 4, 6, 26 S.E. 626, 627 (1897), or "as a further means of locating the property." *Baltimore Building & Loan Association v. Bethel*, 120 N.C. 344, 345, 27 S.E. 29 (1897). *See also, Lewis v. Furr*, 228 N.C. 89, 44 S.E. 2d 604 (1947).

In the instant case, we believe the true intent of the parties can be ascertained by looking no further than the four corners of the instrument. The Land Registration Certificate contains a detailed metes and bounds description precisely locating the boundaries of the property. The further reference in the description to Tract No. 2 in the Jelser Proceeding was inserted merely for the purpose of identifying generally the property that is more specifically described by metes and bounds. The trial judge correctly held that the controlling description was the metes and bounds description and that the disputed property was included therein.

The cases cited and relied upon by defendants Lewis, *Nash v. Wilmington and Weldon Railroad Co.*, 67 N.C. 413 (1872) and *Hayden v. Hayden*, 178 N.C. 259, 100 S.E. 515 (1919), are clearly distinguishable on their facts. In each of the cited cases the instrument being construed contained two conflicting specific descriptions rather than a specific description and a general description, as in the present case.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. EDDIE COLUMBUS DEBERRY

No. 7819SC586

(Filed 7 November 1978)

1. **Criminal Law § 46.1— evidence of flight—remoteness**

In a prosecution for armed robbery, the trial court properly admitted testimony that defendant fled the courtroom when the case first came on for trial some six months after defendant's arrest, since remoteness goes only to the weight and not to the admissibility of the evidence of flight.

2. **Criminal Law § 86.7— defendant's criminal record—limiting instructions**

Although it would have been the better practice for the court to have given a requested limiting instruction on evidence of defendant's criminal record at the time the request was made and in conjunction with the admission of the evidence, defendant was not prejudiced by the court's failure to give the limiting instruction at that time where the court did give a proper limiting instruction in its charge to the jury.

3. **Criminal Law § 96— allowance of motion to strike—failure to instruct jury not to consider answer**

Where the trial court promptly allowed a motion to strike a witness's unresponsive answer, defendant was not prejudiced by the court's failure to instruct the jury not to consider the unresponsive answer.

4. **Criminal Law § 138— armed robbery—sentence and recommendation**

The trial court did not abuse its discretion in sentencing defendant upon his conviction of armed robbery to a term of not less than 30 nor more than 40 years and in recommending that he "serve this sentence at hard labor without the benefit of parole, commutation, work release or community leave."

APPEAL by defendant from *Albright, Judge.* Judgment entered 1 March 1978 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 19 October 1978.

Defendant was indicted for armed robbery, convicted by a jury, and setenced to 30 to 40 years.

State's evidence tended to show that Alvin Mason was operating his taxi at about 9:30 p.m. on 6 February 1977 when

defendant robbed him of over $8,000 in cash while holding a straight razor to Mason's throat. Shortly after defendant was arrested, Mason identified him from a lineup. Approximately $7,000 was found in defendant's home, and Mason identified certain silver certificates and $100 bills among the cash recovered as being his.

Defendant's evidence tended to show that he was at his sister's home at the time of the robbery and that a friend named Calvin came to defendant's home on the night of the robbery and paid defendant to permit him to hide the money in defendant's home.

Other pertinent facts will be stated below. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Charles H. Dorsett, for defendant appellant.

ERWIN, Judge.

Defendant presents four arguments on this appeal. After having carefully examined them, we conclude that defendant received a fair trial, free of prejudicial error.

[1] First, he contends that it was error to allow testimony that he had fled the courtroom in July 1977, when the case first came on for trial. Defendant remained at large until January 1978. He argues that the evidence of flight has "doubtful probative value" and that the escape occurred some six months after his arrest, making the evidence too remote and prejudicial. Defendant cites *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972), for the proposition that while an accused's flight is admissible as evidence of guilt, such flight must have occurred shortly after the crime's commission to render such evidence admissible. We do not, however, construe that case as rendering inadmissible evidence of defendant's flight herein. In *Self*, the flight occurred 16 days after the offenses.

We do not quarrel with defendant's assertion that plausible explanations for flight, other than guilt of the offense charged, can be advanced, particularly when flight is removed from the

crime by a considerable period of time. Remoteness, however, goes only to the weight of the evidence, not to its admissibility. Our Supreme Court held as follows in *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977):

> "[S]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." (Citation omitted.)

See also State v. Jones, 292 N.C. 513, 234 S.E. 2d 555 (1977); *State v. Self, supra.*

[2] Defendant next contends that the trial court erred in failing to give requested limiting instructions when evidence of his past criminal record was first introduced. The trial court did, however, instruct as follows in its charge to the jury:

> "Members of the Jury, the defendant has testified that at an earlier time he was convicted of breaking and entering and larceny on two or three occasions. The Court charges you that you may consider this evidence for one purpose only. If, considering the nature of the crime, you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve his other testimony at this trial. It is not evidence of the defendant's guilt in this case, however. You may not convict him on the present charge because of something he may have done in the past."

Defendant does not except to the above portion of the charge and in his brief concedes that it was a proper instruction. He argues that it should have been given promptly as requested following the prosecution's question, "What have you been convicted of?" Defendant relies on *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967), and *State v. Austin*, 4 N.C. App. 481, 167 S.E. 2d 10 (1969), in support of this argument. In both cases, however, the trial court failed to give a limiting instruction at any time, even though indicating that it would do so. Here, although better practice may have been for the court to have given the requested in-

struction at the time the request was made and in conjunction with the admission of the evidence, we see no prejudicial error, since the trial court, in its charge, gave a correct limiting instuction. *See State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977); *State v. Dupree*, 30 N.C. App. 232, 226 S.E. 2d 670 (1976). We observe that when counsel objected and requested a limiting instruction, no answers as to past convictions had yet been given. The trial court responded, "All right, what do you contend *at this stage* I should instruct the jury on?" (Emphasis added.) Defendant did not renew his objection and request a limiting instruction after the answers had been given. At the time of objection and request, the trial court had no way of knowing to what purpose, if any, the evidence to be elicited should be limited. Indeed, at that point, defendant might have responded that he had been convicted of nothing. Thus, defendant may not have even been entitled to a limiting instruction. He received one in any event.

[3] Defendant's next contention pertains to a portion of the testimony of one of the State's witnesses, Chief Jailer Johnny Smith. While defendant was confined in the county jail, he requested to see the robbery victim, Mason. Defendant met with Mason in Smith's office. Defendant excepts to the following:

> "Q. Did the defendant . . . make any statement to Alvin Mason about returning Mr. Mason's money?
>
> A. Not to my knowledge. I was there for protection for Mr. Mason as a jailer.
>
> MR. DORSETT: I object to that and move to strike.
>
> COURT: Well, objection sustained, motion allowed."

Defendant contends that the trial court should have gone further, instructing the jury to disregard Smith's testimony. Again, we see no prejudicial error. Upon allowing a motion to strike an unresponsive answer, it is proper procedure for the court immediately to instruct the jury not to consider the answer. The court did, however, promptly allow the motion to strike, a ruling the jury could only interpret as meaning that Smith's answer was not to be regarded as evidence. *See State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966).

[4] Finally, defendant argues that the trial court abused its discretion in sentencing him to a term of not less than 30 nor more than 40 years and recommending that he "served this sentence at hard labor without the benefit of parole, commutation, work release or community leave." Where, as here, the sentence is within statutory limits, the punishment imposed is a matter of trial court discertion. *State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977); *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). We see no abuse of that discretion.

Based on the foregoing, in the trial below, we find

No error.

Judges CLARK and ARNOLD concur.

FELICIA JOHNSON, BY HER GUARDIAN AD LITEM, MARVIN JOHNSON, AND MARVIN JOHNSON, INDIVIDUALLY, AND LENORA T. JOHNSON, INDIVIDUALLY v. WILLIE LEE CLAY

No. 7710SC883

(Filed 7 November 1978)

1. Automobiles § 63.1— striking child running into road—directed verdict improper

In an action to recover damages for injuries sustained by the minor plaintiff when she was struck by an automobile driven by defendant, the trial court erred in granting a directed verdict for defendant where the evidence tended to show that the accident occurred adjacent to a school yard during the time the children were leaving for the day; defendant was employed by the school and was clearly aware of the situation; though defendant was not traveling at an excessive speed, he did fail to keep a proper lookout in that he turned around to speak to the minor plaintiff's mother who was seated in a vehicle beside the road and the accident occurred only seconds after defendant looked back over his left shoulder and waved at the mother; the minor plaintiff's father testified that defendant told him after the accident that the child was at his bumper when he turned back around; and the investigating officer testified that a motorist keeping a proper lookout in this situation would be able to see a child coming across the lawn and could take necessary precautions.

2. Negligence § 18— contributory negligence of minor—rebuttable presumption

A directed verdict on the basis that a child between seven and fourteen was contributorily negligent is not proper, since there is a rebuttable presump-

tion that a child between the ages of seven and fourteen is incapable of contributory negligence, and whether the presumption has been rebutted in a particular case is a question for the jury.

APPEAL by plaintiffs from *Hall, Judge.* Judgment entered 5 April 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 17 August 1978.

The minor plaintiff, Felicia Johnson, by her guardian *ad Litem* brought this action against defendant, Willie Lee Clay, seeking to recover damages for injuries sustained by the minor plaintiff when she was struck by an automobile operated by defendant. The individual plaintiffs joined in the action seeking to recover for medical expenses incurred as a result of the accident and lost wages. Defendant answered, denying the plaintiffs' allegations of negligence. Defendant also alleged that the minor plaintiff's failure to exercise proper care in attempting to cross the street constituted contributory negligence and should bar any recovery by the plaintiffs. Plaintiffs in response pled the doctrine of last clear chance, alleging that even if the minor plaintiff was negligent, defendant knew or should have known of the minor plaintiff's peril and could have avoided striking her had he been exercising ordinary care in the operation of his car. At the close of plaintiffs' evidence, defendant's motion for directed verdict, made on grounds that plaintiffs had failed to show any negligence by defendant, was granted by the court, and judgment for defendant was entered.

Amos E. Link, Jr., for plaintiffs.

Boyce, Mitchell, Burns & Smith, by Robert E. Smith for defendant.

BROCK, Chief Judge.

[1] The question raised on a motion for a directed verdict is whether there is sufficient evidence to go to the jury. The directed verdict motion replaced the former procedural device of a motion for involuntary nonsuit. The standard to be applied in determining whether a motion for directed verdict should be granted is essentially the same, however, as the standard formerly applied in ruling on a motion for nonsuit. *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972). "To determine the sufficiency of the evidence to go to the jury, all evidence sup-

porting 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." *Oliver v. Royall*, 36 N.C. App. 239, 240, 243 S.E. 2d 436, 438 (1978).

Plaintiffs' evidence at trial would permit the jury to find: The minor plaintiff's mother, Lenora T. Johnson, arrived at Lincoln Heights Elementary School in Fuquay-Varina at approximately 2:45 p.m. on 24 May 1974 to pick up her nine year old daughter, Felicia. Mrs. Johnson parked her car on the south side of Washington Street, which runs in front of the school. The street is approximately twelve feet wide and 150 feet long, running in an east-west direction. There were four cars parked opposite her car on the north shoulder of the street, all of which were headed west. The school yard is on the north side of the street and is slightly elevated above the level of the street. There was a small hedge where the school yard met the street.

Mrs. Johnson's daughter, Felicia, had already boarded a school bus for the trip home. A schoolmate informed Felicia that her mother was waiting for her, and she left the bus. Felicia alternately ran and walked across the school yard, through the hedge, and out into the street, which she had to cross to reach her mother's car. She looked both up and down the street to check for traffic on at least two occasions before attempting to cross.

While Mrs. Johnson was waiting for her daughter to reach the car, she saw defendant Clay enter his car, which was parked on the north side of the street headed west, several car lengths away from her. Mrs. Johnson knew defendant Clay, who was employed as a custodian by the school. She saw him pull into the street, and as his car passed hers, she waved to him. Defendant Clay turned and waved to her, looking back over his left shoulder to do so. Shortly thereafter, five or six seconds from the time she first observed defendant Clay looking back over his shoulder at her, Mrs. Johnson heard a bump or noise and looked around to see her daughter falling from the rear of defendant Clay's car. The minor plaintiff had run out into the street, but only after she had looked both ways.

Marvin Johnson, father of the minor plaintiff, testified to the following conversation he had with defendant Clay after the accident:

> "He said—well he said when he looked back that Felicia, that he saw her at the right front bumper of his car and he couldn't stop. I'm saying that Mr. Clay told me that he looked around to wave at my wife. And that when he looked back, it was too late for him to stop and Felicia was at his right bumper."

Officer Nathaniel Burt, who investigated the accident, testified with respect to other statements made by defendant Clay.

> ". . . Mr. Clay said that he turned to speak to Mrs. Johnson. She was sitting on the side of the road in her car. . . . At that time when he turned and spoke to Mrs. Johnson, and looked back around, Felicia was out in the road at that time and he couldn't stop the vehicle in time without hitting her."

Over objection by counsel for defendant, Officer Burt was allowed to testify that in his opinion a person traveling west on Washington Street keeping a proper lookout would have been able to see an object or child coming across the lawn and into the street.

There was no evidence indicating defendant was operating his car at an excessive rate of speed. Indeed the only evidence relative to speed showed that the posted speed limit in the area was 25 miles per hour and that defendant Clay was traveling at a rate of 20 miles per hour.

"The amount or degree of diligence and caution which is necessary to constitute due, reasonable, or ordinary care varies with changing conditions or with the facts and circumstances of each particular case, according to the exigencies which require vigilance and attention." 65 C.J.S., Negligence, § 11(3), p. 578. The law imposes a high standard of care when one either knows or should know that one's actions pose a grave risk to the safety of children. A motorist "must recognize that children have less discretion than adults and may run out into the street in front of his approaching automobile unmindful of the danger. Therefore,

proper care requires a motorist to maintain a vigilant lookout, to give a timely warning of his approach, and to drive at such speed and in such a manner that he can control his vehicle if a child, in obedience to a childish impulse, attempts to cross the street in front of his approaching automobile." *Wainwright v. Miller*, 259 N.C. 379, 381, 130 S.E. 2d 652, 654 (1963). We are also cognizant of the "sudden appearance doctrine," whereby a driver who exercises ordinary and reasonable caution is not liable for injuries caused when a child unexpectedly runs into the street. *See Dixon v. Lilly*, 257 N.C. 228, 125 S.E. 2d 426 (1962). But we do not think that doctrine is applicable to the facts of this case.

The evidence in this case must be evaluated in light of the fact that the accident occurred adjacent to a school yard during the time the children were leaving for the day. Defendant, who was employed by the school, clearly was aware of that situation and subject to the high standard of care discussed *supra*. With that fact in mind, we think the jury could have found from the plaintiffs' evidence that defendant, despite the lack of any evidence of excessive speed, was negligent in failing to keep a proper lookout and that his failure to do so was the proximate cause of the child's injuries. Mrs. Johnson's testimony establishes that the accident occurred only seconds after defendant turned to look back over his left shoulder and wave to her. The minor plaintiff's father testified defendant Clay told him after the accident that the child was at his bumper when he turned back around. The investigating officer testified that a motorist keeping a proper lookout in this situation would be able to see a child coming across the lawn and could take necessary precautions. Defendant urges that the officer's opinion testimony is incompetent; nevertheless, "[a]ll relevant evidence admitted at trial, whether competent or not, is to be given its full probative force in determining a motion for a directed verdict." Shuford, North Carolina Civil Practice and Procedure, § 50-5, p. 411.

[2] Plaintiffs' evidence does tend to show contributory negligence on the part of the minor plaintiff. There is, however, a rebuttable presumption that a child between the ages of seven and fourteen is incapable of contributory negligence. *Mitchell v. Guilford County Board of Education*, 1 N.C. App. 373, 161 S.E. 2d 645 (1968). Whether the presumption has been rebutted in a particular case is a question for the jury, and a directed verdict on

the basis that a child between seven and fourteen was contributorily negligent is not proper. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974).

Viewing all of plaintiffs' evidence in the light most favorable to them, we think it would not be an unreasonable inference to conclude that defendant's negligence caused the minor plaintiff's injuries. The court's entry of a directed verdict for the defendant was therefore improper.

New trial.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. BILLY RAY REID

No. 788SC286

(Filed 7 November 1978)

Criminal Law § 29— mental capacity to stand trial

Evidence that defendant was a patient in a mental hospital at the time of a robbery and that he suffers from a mental illness known as paranoid schizophrenia for which he has taken medication did not show as a matter of law that he was mentally incompetent to stand trial for the robbery. However, the trial court's determination that defendant was mentally competent to stand trial was not supported by the evidence where the State's expert in psychiatry testified that defendant was competent to stand trial on a date two to three months prior to the trial, that defendant's condition was subject to sporadic changes, and that he could render no opinion at the time of trial as to defendant's mental capacity to proceed with trial.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 17 November 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 August 1978.

Defendant was charged in a proper bill of indictment with common law robbery. Upon his plea of not guilty, the State offered evidence tending to show the following:

On 3 August 1977 at approximately 1 p.m., the defendant entered Wachovia Bank and Trust Company in Goldsboro, North Carolina, and approached Kay Gunnett who was working as a

teller. With his left hand on the counter and his right hand concealed, the defendant said, "This is a stick-up; give me all your money." Gunnett gave the defendant $997.00, and the defendant fled from the bank. Responding to pleas for help from a bank official, Officer Pearson of the Goldsboro Police Department apprehended the defendant two blocks from the bank. At the police station the defendant signed a waiver of his constitutional rights and divulged to Sergeant R. K. Whaley the details of the robbery.

The defendant offered evidence tending to show that at the time of the robbery he was a patient at Cherry Hospital suffering from a mental illness known as paranoid schizophrenia, and that when he committed the robbery he could not distinguish between right and wrong.

The jury found the defendant guilty of common law robbery. From a judgment imposing a prison sentence of five to seven years, the defendant appealed.

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

Hulse and Hulse, by H. Bruce Hulse, Jr., for the defendant appellant.

HEDRICK, Judge.

By his first assignment of error the defendant maintains that the trial court erred in its pre-trial finding that the defendant was mentally capable to proceed with trial.

It is mandated by statute that "[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." G.S. 15A-1001(a). The courts of this State have frequently cited the factors in the quoted statute as determinative of a defendant's mental capacity to proceed to trial. *See, e.g. State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968); *State v. Baldwin*, 26 N.C. App. 359, 216 S.E. 2d 466 (1975). The question of defendant's capacity is within the trial judge's

discretion and his determination thereof, if supported by the evidence, is conclusive on appeal. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Taylor, supra.*

Pursuant to the defendant's motion in the present case, the trial court conducted a *voir dire* hearing prior to trial to determine the defendant's capacity to proceed with trial. At the hearing the defendant presented exhibits tending to show that the defendant was involuntarily committed to Cherry Hospital on 29 June 1977; that he remained there until after the robbery; and that he suffers from a mental illness known as paranoid schizophrenia for which he has taken medication. We do not agree with the defendant that this evidence dictates a determination that he was mentally incapable of proceeding with trial as a matter of law.

On the other hand, the State relied totally on the testimony and psychiatric report of Dr. Bob Rollins, a psychiatrist at the Dorothea Dix Hospital in Raleigh. Rollins testified that he had examined the defendant on three occasions in August, 1977; that the defendant suffers from a chronic mental illness known as paranoid schizophrenia; and that due to medication the defendant was in a state of partial remission at the time of his examinations. Rollins further testified as follows: "Based on [the examination of the defendant] . . . I formed an opinion that Mr. Reid was capable of proceeding to trial. I formed that opinion on August 23rd, 1977 and I have had no contact with Mr. Reid since that date." On cross-examination Rollins added:

> As of August 23rd, I believe Mr. Reid understood his situation, and understood the legal issues involved and in my opinion was able to cooperate with counsel . . . That is, on the 23rd, I felt Mr. Reid could tell to his attorney what took place and felt that he was able to cooperate with his attorney in order to do this. Yet, as of now, I have no opinion as to whether he can do that.

In our opinion Dr. Rollins' testimony and evaluation is not sufficient to support the trial court's determination in light of his admission that he had no current opinion as to the defendant's capacity to proceed. Obviously, the most critical time with which we should be concerned in this determination is the time of trial. The fact that two to three months prior thereto the defendant

was determined to be mentally capable to proceed to trial cannot be determinative in itself when the examining psychiatrist casts doubt on his own testimony. In this connection we also find it significant that Dr. Rollins diagnosed the defendant's mental illness as chronic paranoid schizophrenia with which a patient typically experiences sporadic changes in condition; that at the time of his examination the defendant was in a state of partial remission which meant that some symptoms had diminished but could recur at any time; and that if he were not treated with medication on a regular basis "his condition might worsen." No evidence was presented as to whether the defendant continued to receive treatment in the interim between Dr. Rollins' examination and trial. Under these circumstances Dr. Rollins' admission comprehends more than a slight possibility that the defendant might have regressed in his disease, and neither we nor the trial court can assume the stability of his mental condition over a two to three month period. In short, when Dr. Rollins candidly stated that he could render no current opinion as to the defendant's mental capacity to proceed with trial, he nullified his earlier evaluation and left the State without any evidence to contest the defendant's motion. We hold that the trial court's determination that the defendant was mentally capable to proceed with trial is not supported by the evidence. Defendant's trial, therefore, was a nullity, and the verdict and judgment must be vacated, and the cause remanded to the Superior Court for further proceedings against the defendant if the district attorney shall elect to bring the defendant to trial on the charge set out in the bill of indictment.

The verdict and judgment is vacated and the cause remanded for a new hearing on the defendant's motion.

Vacated and remanded.

Judges MORRIS and WEBB concur.

DEXTER BYERLY v. BEULAH ANDERS BYERLY

No. 7822SC19

(Filed 7 November 1978)

1. **Rules of Civil Procedure § 50— failure to state grounds for directed verdict—objection waived**

Where plaintiff did not specifically object at trial to defendant's failure to state specific grounds for her motion for a directed verdict as required by G.S. 1A-1, Rule 50(a), plaintiff lost the right to complain on appeal of defendant's failure to state specific grounds in her motion.

2. **Trusts § 19— property in wife's name—no agreement to hold in trust**

In an action by plaintiff to have the court impress a trust for his benefit on certain real estate titled solely in the name of his wife, the defendant, the trial court properly granted defendant's motion for directed verdict where there was no evidence that defendant expressly agreed to hold the property in question, or any part thereof or any interest therein, in trust for the plaintiff.

3. **Trusts § 19— consideration furnished by husband not used for purchase—no resulting trust**

In an action by plaintiff to have the court impress a trust for his benefit on certain real estate titled solely in the name of his wife, the defendant, plaintiff's evidence clearly showed that the consideration furnished by him was used to pay off a mortgage on property which had been previously titled solely in the defendant's name, and, as such, the consideration was not paid toward the purchase price and could not support a resulting trust in plaintiff's favor.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 12 September 1977 in Superior Court, DAVIE County. Heard in the Court of Appeals on 29 September 1978.

This is a civil action wherein plaintiff seeks to have the court impress a trust for his benefit on certain real estate titled solely in the name of his wife, the defendant. At trial, plaintiff introduced evidence tending to show the following:

In September 1969, plaintiff and defendant purchased a house located on Wellingford Drive in High Point and took title to the property as tenants by the entirety. The defendant made the down payment of $12,360.34 and thereafter plaintiff made monthly mortgage payments totalling $9,861.80. On 1 July 1974, plaintiff and defendant decided to buy a lot in Davie County. For reasons concerning plaintiff's employment, the parties decided to have the property titled in the defendant's name only, and the real estate

broker was instructed accordingly. The defendant paid the entire $3,466.66 purchase price of the lot. On 8 October 1974 plaintiff and defendant executed a deed of trust covering the Davie County property as security for a construction loan. On 2 April 1975 the parties, in order to obtain more favorable interest rates, executed another deed of trust covering the Davie County property and used the proceeds to pay off the earlier deed of trust. On 28 April 1976, the High Point property, on which plaintiff had paid $9,861.80, was sold for approximately $45,650.00. The sale proceeds were used to pay off the deed of trust on the Davie County property which was titled solely in the defendant's name. Subsequently, the plaintiff demanded that defendant convey an interest in the Davie County property to him. The defendant, however, refused to do so, telling plaintiff that she was going to see an attorney. Plaintiff testified that she later told him, "I have come to the decision that I am not going to put it [the property] in both names. I want to keep it in my own. If you are good to me, I'll will it to you; and if you are not, I'll give it to a perfect stranger."

At the close of plaintiff's evidence, defendant moved for a directed verdict pursuant to G.S. § 1A-1, Rule 50(a). The trial judge granted defendant's motion. From a judgment dismissing plaintiff's action, plaintiff appealed.

Morgan, Post, Herring & Morgan, by James F. Morgan and L. Samuel Dockery III, for the plaintiff appellant.

Randolph and Randolph, by Clyde C. Randolph, Jr., for the defendant appellee.

HEDRICK, Judge.

Plaintiff assigns as error the trial court's "granting of the defendant's motion for a directed verdict at the conclusion of the plaintiff's evidence on the grounds that the defendant failed to specify the specific grounds for the motion and on the grounds that there were questions of fact which were to be determined by the jury."

[1] G.S. § 1A-1, Rule 50(a) provides: "A motion for a directed verdict shall state the specific grounds therefor." Our appellate courts have held this direction to be mandatory, *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Wheeler v. Denton*, 9

N.C. App. 167, 175 S.E. 2d 769 (1970), and the failure to do so to be sufficient grounds standing alone for the trial court to overrule the motion. *Dixon v. Shelton*, 9 N.C. App. 392, 176 S.E. 2d 390 (1970). However, when a motion for a directed verdict is granted, the adverse party who did not make a specific objection at trial to the movant's failure to state specific grounds therefor is precluded from raising the objection on appeal. *Builders Supplies Co. v. Gainey*, 10 N.C. App. 364, 178 S.E. 2d 794, *cert. denied*, 278 N.C. 300, 180 S.E. 2d 178 (1971). The purpose of the "specific grounds" requirement of Rule 50(a) is to allow the adverse party to meet any defects with further proof and avoid the entry of a judgment notwithstanding the verdict at the close of the trial, on a ground that could have been met with proof had it been suggested earlier. *Anderson v. Butler, supra*; 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2533, at 579 (1971).

The record discloses that the plaintiff nowhere specifically objected to defendant's failure to state specific grounds as required by Rule 50(a). Since the plaintiff failed to bring the deficiency in defendant's motion to the attention of the Court, thereby affording defendant the opportunity to correct the defect, he has lost his right to complain on appeal of defendant's failure to state specific grounds in his motion.

A motion for a directed verdict under Rule 50(a) tests the sufficiency of the plaintiff's evidence to require submission of plaintiff's claim to the jury. Numerous decisions have established the rule that all the evidence supporting plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff giving him the benefit of every reasonable inference that may legitimately be drawn therefrom, and with all contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *E.g. Kinston Building Supply Co., Inc., v. Murphy*, 13 N.C. App. 351, 185 S.E. 2d 440 (1971). A directed verdict for defendant cannot be granted unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff under any view of the facts that the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

[2] Plaintiff first appears to argue in his brief that when the evidence is so considered, it is sufficient to raise an inference that he and the defendant entered into an oral agreement that she

would hold the property in question in trust for both of them. In order to engraft an express trust on property described in a deed that is absolute on its face, it must be shown that the grantee in the deed promised at or before acquiring legal title to hold the property conveyed for the benefit of a third person. *Wells v. Dickens*, 274 N.C. 203, 162 S.E. 2d 552 (1968). A married woman is under no legal handicap that would prevent her from entering into such an oral agreement to hold real estate in trust for the benefit of her husband. *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E. 2d 418 (1945). There is no evidence in this record that the defendant expressly agreed to hold the property in question, or any part thereof or any interest therein, in trust for the plaintiff. The evidence shows, at most, only that plaintiff and defendant entered into an agreement apportioning household expenditures between them. As such, the evidence falls far short of showing that defendant expressly agreed to hold property in trust for the plaintiff.

[3] Plaintiff next appears to argue in his brief that when a "husband and wife orally agree to purchase real estate, the actual ownership of which is to be a one-half interest by each in same, and purchase said real estate in the name of wife alone with funds part of which are supplied by husband . . . a resulting trust [arises] for the benefit of husband."

A purchase money resulting trust arises by operation of law when one party furnishes the consideration and title is taken in the name of a third party under circumstances that raise the inference that the party furnishing the consideration did not intend for the taker to have both legal and equitable ownership, but only to hold the property in trust for the purchaser's benefit. *Strange v. Sink*, 27 N.C. App. 113, 218 S.E. 2d 196, *cert. denied*, 288 N.C. 733, 220 S.E. 2d 353 (1975).

In order for a resulting trust to be impressed on property, it must be shown that the furnishing of consideration occurred prior to or contemporaneously with the vesting of legal title in the grantee and not from consideration thereafter paid. *Rhodes v. Raxter*, 242 N.C. 206, 87 S.E. 2d 265 (1955); *Cline v. Cline*, 34 N.C. App. 495, 238 S.E. 2d 673 (1977). Where one pays off a mortgage on land already owned by another he has not paid consideration

towards the purchase price as is required to raise a resulting trust. G. Bogert, *The Law of Trusts and Trustees* § 455, at 660-63 (rev. 2d ed. 1977).

Plaintiff's evidence clearly shows that the consideration furnished by him was used to pay off a mortgage on property which had been previously titled solely in the defendant's name. As such, the consideration was not paid towards the purchase price and cannot support a resulting trust in his favor.

The trial judge correctly granted defendant's motion for a directed verdict at the close of plaintiff's evidence.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

JERRY L. BLAKE v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 7810SC123

(Filed 7 November 1978)

Insurance § 149— liability insurance—attorney fees in attempt to retain job

A liability policy which required the insurer to pay any claims made against the insured school superintendent for amounts he is legally obligated to pay (including attorney fees necessary for defense of such claims) as the result of his negligence or breach of duty did not provide coverage for attorney fees incurred by the insured in attempting to retain his position as superintendent after the school board had rescinded a prior decision to reemploy plaintiff and in defending a counterclaim by the school board to recover amounts paid by the board pursuant to a stay order pending final outcome of the litigation.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 30 November 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 26 October 1978.

Plaintiff was Superintendent of the Currituck County Schools. He was an insured under a Board of Education Liability Insurance policy issued by the defendant. On 5 May 1975, the Currituck County Board of Education (hereinafter "Board") reelected

plaintiff as Superintendent for another two-year term. He took the oath of office on 1 July 1975. On 16 July 1975, the Board rescinded its action of 5 May 1975 and refused to enter into an employment contract with plaintiff. On 17 July 1975, plaintiff retained counsel and filed a petition for review of the Board's action pursuant to G.S. 143-306. The Board answered and counterclaimed. This litigation was settled by consent 25 February 1976. It was stipulated that during the course of this litigation plaintiff incurred attorney fees in the amount of $7,156.99. Plaintiff seeks to recover these attorney fees under the policy in question. By consent, this case was tried without a jury. The trial judge found facts, conclusions of law, and entered judgment for the defendant. Plaintiff appealed.

Sanford, Cannon, Adams & McCullough, by Robert W. Spearman and Charles C. Meeker, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Henry A. Mitchell, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff only excepts to the conclusion of law by the trial judge that plaintiff's alleged damages are not covered by the insurance policy and to the court's judgment for the defendant.

This appeal raises for consideration the following provisions of the policy:

I. COVERAGE

This Policy shall, subject to its terms, conditions and limitations, pay on behalf of:

. . . .

B. INSUREDS' LIABILITY—The Insureds as defined in Insuring Agreement IIB because of any claim(s) made against

them, jointly or severally, for "Loss" as defined in Condition I and caused by any negligent act, any error, any omission or any breach of duty while acting in their capacity as such or any matter claimed against them solely by reason of their being Insureds.

. . . .

1. LOSS

The term "Loss" shall mean:

. . . .

B. Under Insuring Agreement IB, any amount the Insured is obligated to pay as respects his legal liability, whether actual or asserted, for any negligent act, any error, any omission or any breach of duty, and, subject to the applicable limits and terms of this Policy, shall include damages, judgments, settlements, cost of investigation (excluding salaries of officers or employees of the School District or any other governmental body or income of School Board members) and costs, charges and expenses incurred in the defense of actions, suits or proceedings and appeals therefrom.

Any uncertainty or ambiguity in the meaning of the words used in the policy must be resolved in favor of the insured and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). The policy must not be construed piecemeal as the purpose is to determine the intent of the parties. The contract must be examined as a whole. The construction of the policy must not be strained, arbitrary, unnatural, or forced, but rather it should be reasonable, logical, and practical, having reference to the risks and purposes of the entire contract. 1 Couch on Insurance, 2d Edition, §§ 15.10-.17 (1959); *Lineberry v. Trust Co.*, 238 N.C. 264, 77 S.E. 2d 652 (1953).

With these rules of construction of insurance policies in mind, we hold plaintiff's alleged attorney fees are not covered by the insurance policy in question. It is not necessary for us to rewrite or

restate the policy to arrive at this decision. The parties intended, with respect to the above provisions of the policy, that the company pay any claims made against Blake for amounts he is legally obligated to pay (including attorney fees necessary for defense of such claims) as the result of his negligence or breach of duty.

The Board's action of 16 July 1975 rescinding its decision to employ plaintiff was not a "claim against plaintiff" within the meaning of the policy. Plaintiff's attorney fees were not incurred defending a claim against plaintiff. Plaintiff states in his brief that he retained counsel after the 16 July 1975 meeting of the Board and that he did so to obtain judicial review of this action. His attorney fees were incurred in an attempt to retain his position as superintendent and to pursue a civil rights action under 42 U.S.C. § 1983 against the Board.

The counterclaim filed by the Board merely sought to recover those amounts paid by the Board pursuant to the stay order of the trial court pending the final outcome of the litigation. It was not based upon any actions of the plaintiff and only directed to plaintiff because he received the payments ordered by the court. Therefore, any attorney fees plaintiff incurred with respect to this action by the Board fall without the terms of the policy.

Plaintiff's assignments of error are overruled.

Affirmed.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER E. HARDIN AND FRANKIE P. HARDIN

No. 7818SC524

(Filed 7 November 1978)

Criminal Law §§ 76.1, 114— confession—finding of voluntariness in jury's presence—expression of opinion

The trial court's finding in the presence of the jury that a confession was made "freely and voluntarily" constituted an expression of opinion in violation of G.S. 1-180 which entitles defendants to a new trial.

State v. Hardin

APPEAL by defendants from *Crissman, Judge*. Judgment entered 12 November 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 September 1978.

Defendant, Frankie P. Hardin, was charged in an indictment alleging that she falsified and manipulated books and records of Foley's, Inc. resulting in the misapplication of approximately $240,000 over a four-year period. Defendant, Christopher E. Hardin, was indicted for aiding and abetting his wife Frankie P. Hardin. Both were charged with violations of G.S. 14-254, Malfeasance of Corporate Officers or Agents.

Defendants' cases were consolidated for trial. The State's evidence tended to show that Frankie P. Hardin was the bookkeeping clerk of Foley's, Inc. and thus had access to books and records of the corporation. Evidence indicated that she had drawn checks to the order of herself and C. E. Hardin in amounts up to $22,000 per check.

The State also offered into evidence a confession of defendant, Frankie P. Hardin. After voir dire, the trial court found the confession to have been made voluntarily and admitted it into evidence.

The defendants were found guilty as charged and each was sentenced for a term of not less than 5 years nor more than 7 years. From entry of judgments on the verdicts, each defendant appeals.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Assistant Public Defender Thomas F. Kastner for the defendant appellants.

MORRIS, Judge.

Defendants assign as prejudicial error the trial court's finding, in the presence of the jury, that a confession was made "freely and voluntarily". They assert that such a finding in the jury's presence amounted to an expression of opinion on the evidence in violation of G.S. 1-180. The State concedes there was a technical violation of the statute, but argues that, considering the entire record, the error was not prejudicial. The State correctly points

out that all expressions of opinion do not warrant a new trial. *See State v. Teasley*, 31 N.C. App. 729, 230 S.E. 2d 692 (1976). However, we agree with defendants and hold that they are entitled to a new trial.

The ruling of the trial court followed a voir dire examination of Tony Hill, an attorney who was acting as guardian ad litem of the Hardin children in connection with a civil matter arising as a result of the indictment of the defendants. Mr. Hill had obtained an affidavit from Frankie P. Hardin that confessed misappropriation of the money from Foley's, Inc. With the jury present, the following ruling was made at the conclusion of testimony on voir dire:

> "THE COURT: Let the record show that the Court finds as a fact that State's Exhibit No. 237 should be allowed into evidence: the Court finding as a fact that this statement was given with full understanding and was given without any coercion, given freely and voluntarily and therefore would be admissible."

It is well established that the proper procedure is for the court to make its findings of voluntariness in the absence of the jury. *State v. Carter* and *State v. Toyer*, 268 N.C. 648, 151 S.E. 2d 602 (1966). The question of the credibility of evidence is for the jury. Similarly, it is for the jury to determine the weight, if any, to be given to a confession. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). In a case presenting precisely the same question as the present one, our Supreme Court held: "The finding by the court, in the presence of the jury, that a statement, said to have been made by the defendant, was made voluntarily is the expression of an opinion by the court that the statement was made." *State v. Carter* and *State v. Toyer*, 268 N.C. at 652, 151 S.E. 2d at 605; *see also State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966) (overruling *State v. Davis*, 63 N.C. 578 (1869) and *State v. Fain*, 216 N.C. 157, 4 S.E. 2d 319 (1939)).

Furthermore, this Court has stated that "[o]nce the trial judge expresses an opinion as to the facts before the jury, the resulting prejudice to the defendant is virtually impossible to cure." *State v. Teasley*, 31 N.C. App. at 732, 230 S.E. 2d at 694. The trial court's summarization of the defendant's contentions and its instructions on reasonable doubt are insufficient to cure the error.

Because of the trial court's inadvertent expression of opinion on the evidence, we must award each of the defendants a new trial.

New trial for defendant Christopher E. Hardin.

New trial for defendant Frankie P. Hardin.

Judges MITCHELL and ERWIN concur.

STATE OF NORTH CAROLINA v. GARY WATTS

No. 7826SC585

(Filed 7 November 1978)

Landlord and Tenant § 18— notice to tenant to vacate premises—no simulation of court process

A "Notice to Vacate" for nonpayment of rent sent by a realtor to a tenant did not simulate a court process in violation of G.S. 14-118.1 because it contained the words "State of North Carolina" and "County of Mecklenburg" preceding the words "Notice to Vacate" or because the signature of the person who issued the notice was notarized, especially since the notice was issued in the name of a realty company as agent for the owner and not in the name of any person purportedly having authority to issue a court process, and since any inference that the notice was intended to simulate a court process was negated by a statement in the body of the notice that action would be taken in the District Court of Mecklenburg County to remove the tenant from the premises if he failed to vacate as notified.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 22 March 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1978.

Defendant, president of a realty agency, was convicted of intimidating a tenant by issuance of a "Notice To Vacate" which simulated a court process in violation of G.S. 14-118.1, and he appeals from the judgment imposing a jail sentence suspended upon condition that he pay a fine of $200.00 and court costs and he not use a document similar to the "Notice to Vacate".

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Lindsey, Schrimsher, Erwin, Bernhardt and Hewitt by Lawrence W. Hewitt for defendant appellant.

CLARK, Judge.

The sole question presented on appeal is whether the trial court erred in failing to grant defendant's motions for nonsuit.

G.S. 14-118.1 provides:

> "*Simulation of court process in connection with collection of claim, demand or account.*—It shall be unlawful for any person, firm, corporation, association, agent or employee to in any manner coerce, intimidate or attempt to coerce or intimidate any person by the issuance, utterance or delivery of any matter, printed, typed or written, which simulates or is intended to simulate a summons, warrant, writ or other court process in connection with any claim, demand or account or any forms of demand or notice or other document drawn to resemble court process, writs, summonses, warrants or pleadings or any simulation of seals or words using the name of the State or county or any likeness thereof, or the words 'State of North Carolina' or any of the several counties of the State as a part of such simulation. Any violation of the provisions of this section shall be a misdemeanor and shall be punishable by a fine of not more than two hundred dollars ($200.00) or by imprisonment of not more than six months, or both such fine and imprisonment, in the discretion of the court."

The printed "Notice to Vacate", referred to in the magistrate's summons, and introduced in evidence as State's Exhibit #1, which was issued by defendant to his tenant, Fred Moore, was as follows:

"STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Notice To Vacate

TO: Mr. Fred Boyd-Moore
1025 Trembeth Avenue
Charlotte, NC 28205

YOU ARE HEREBY NOTIFIED THAT YOU ARE REQUIRED TO VACATE THE PREMISES NOW OCCUPIED BY YOU, LOCATED AT:

1025 Trembeth Avenue IN THE CITY OF Charlotte, Mecklenburg County, STATE OF NORTH CAROLINA, ON OR BEFORE Monday, August 16, 1976.

YOU WILL FURTHER TAKE NOTICE THAT IF YOU FAIL TO VACATE THE SAID PREMISES AS REQUIRED IN THIS NOTICE, ACTION WILL BE TAKEN TO REMOVE YOU THERE FROM THROUGH THE DISTRICT COURT OF MECKLENBURG COUNTY, IN THE MANNER PROVIDED BY LAW.

THE CAUSE OF THIS NOTICE IS Non-payment of rent in the amount of $100.00, plus late charges in the amount of $16.00, and Vacate Notice fee of $10.00. The total being $126.00.

THIS 11th DAY OF August, 1976.

Watts Realty Company
AGENT FOR OWNER

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

I, Roberta S. Plummer, a Notary Public for said County and State aforesaid do hereby certify that Watts Realty Company by Deborah Parham, Agent for Owner, personally appeared before me this day and acknowledged the due execution of the foregoing Notice to Vacate.

WITNESS my hand and notarial Seal, this 11th day of August, 1976.

s/ Roberta S. Plummer
Notary Public
My Commission Expires: July 15, 1981

(Affix Seal)"

The use of the words "STATE OF NORTH CAROLINA" and "COUNTY OF MECKLENBURG" preceding the words "Notice To Vacate" were not sufficient to constitute a simulated court process in violation of G.S. 14-118.1. They are often used in deeds, leases, contracts and other paper writings which are not and do

not purport to be court processes. The fact that the signature of Deborah Parham was notarized is not sufficient to constitute a simulation of a court process since signatures are frequently notarized on legal documents other than court processes.

Nor do the words "Notice To Vacate" simulate a court process because the notice was issued in the name of "Watts Realty Company, Agent for Owner" and not the name of any court or any person purportedly having authority to issue a court process.

In the body of the Notice, addressed to the tenant, the tenant is advised that if he fails to vacate the house as notified "ACTION WILL BE TAKEN TO REMOVE YOU THERE FROM THROUGH THE DISTRICT COURT OF MECKLENBURG COUNTY . . . ." This language is sufficient to negate any inference that the notice was intended to simulate a court process. The tenant is simply informed that the realty agency intends to take court action to evict him from the premises if he does not vacate as notified.

In interpreting G.S. 14-118.1 and in determining whether the "Notice To Vacate" constitutes a violation of the statute we do not assume that the tenant to whom the Notice is directed is illiterate or so lacking in intelligence that he cannot understand the clear import of the language in the notice. Even if it be conceded that the Notice is coercive or intimidating, there is no violation of the statute because there is nothing to support the element of the statutory crime that the Notice "simulates or is intended to simulate" a court process.

The judgment is vacated and the charge is dismissed.

Judges ARNOLD and ERWIN concur.

IN THE MATTER OF THE WILL OF HERBERT M. WESTON, DECEASED

No. 775SC902

(Filed 7 November 1978)

1. Wills § 19— caveat proceeding—will probated in common form—admission of evidence not reversible error

Testimony by propounder's witness in a caveat proceeding about the probate of deceased's will in common form prior to commencement of the caveat

proceeding did not constitute reversible error, since the clerk's order of probate was not introduced; the fact that the document had been probated in common form came out in the course of the witness's testimony with respect to when he first saw the will after deceased's death and what he did with it; and that testimony was offered to prove the witness's competency, although he was sightless at the time of the caveat proceeding, to testify with respect to execution of the will.

2. **Wills § 19— caveat proceeding—attesting witness blinded after will executed—witness not unavailable**

An attesting witness to the will in question was not unavailable within the meaning of G.S. 31-18.1(c) to testify at a caveat proceeding, though the witness was blind at the time of the proceeding, since the witness had full use of his sight at the time the testator executed the document and at the time it was probated in common form; the witness gave detailed testimony about the preparation and execution of the will; he testified that he saw the same will again shortly after the testator's death; and when the document was read to him, he stated unequivocally that the document was the same one which he had earlier witnessed.

3. **Wills § 23— caveat proceeding—preemptive jury instruction proper**

The trial court in a caveat proceeding did not err in instructing the jury that they should find that the document offered by propounder was deceased's last will and testament if they first found that the deceased executed the document being propounded in accordance with the formalities required by law, and that at the time he did so he had sufficient mental capacity to make a will.

APPEAL by caveator from *Smith (Donald), Judge.* Judgment entered 1 July 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 21 August 1978.

This is a caveat proceeding involving the will of Herbert M. Weston, who died in New Hanover County on 19 October 1974. Propounder's evidence showed that the deceased went to the office of Attorney Elbert A. Brown on 29 October 1973 accompanied by his niece, Mrs. Annie Hendrix (the propounder) and asked that a will be prepared for him. The will was drawn, and Weston returned the next day to execute the document. Attorney Brown explained it to him and called in two other persons who, in addition to himself, witnessed Weston's execution of the document.

The caveat proceeding, alleging insufficient mental capacity, was brought by the deceased's son, a beneficiary of the challenged will, on 4 February 1975. At the time of the trial of the matter, one of the subscribing witnesses had died, and another, Attorney Elbert Brown, had lost the power of sight. Only one subscribing

witness was able to see the will at the time of the caveat proceeding and identify the signatures on it.

There was conflicting testimony with respect to the deceased's mental capacity at the time he executed the document. The case was submitted to the jury on the issue of *devisavit vel non.* The jury returned a verdict in favor of the propounder. Caveator appealed.

Burney, Burney, Barefoot, and Bain, by John J. Burney, Jr., for the propounder.

Otto K. Pridgen and Franklin L. Block, for the caveator.

BROCK, Chief Judge.

[1] On direct examination, propounder's witness, Elbert Brown, testified about the probate of the deceased's will in common form, which action he supervised shortly after Weston's death and at a time before Elbert Brown lost his sight. Caveator contends that any mention of the fact that the will was probated in common form prior to the commencement of the caveat proceeding constitutes reversible error. In support of this contention, he relies primarily on *In re Will of Etheridge,* 231 N.C. 502, 57 S.E. 2d 768 (1950). The Court's holding in that case, however, was that it is reversible error when the actual order of probate is introduced at the caveat proceeding for the purpose of proving the validity of the will. In this instance, the clerk's order of probate was not introduced; the fact that the document had been probated in common form came out in the course of Brown's testimony with respect to when he first saw the will after Weston's death and what he did with it. That testimony was offered to prove Brown's competency, although he was sightless at the time of the caveat proceeding, to testify with respect to its execution.

[2] In his second assignment of error, the caveator assigns error to the admission into evidence of a writing purporting to be the last will and testament of Herbert Weston. Caveator contends that the propounder failed to satisfy the requirements as set forth in G.S. 31-18.1 for probate of an attested will. That statute sets forth the requirements for probate of an attested will in three alternative situations: (1) when two or more of the attesting witnesses are available; (2) when only one attesting witness is

available; and (3) when none of the attesting witnesses are available. Caveator contends that only one attesting witness was available in this proceeding, and that the propounder failed to satisfy one of the requirements applicable to that situation, *i.e.*, showing proof of the handwriting of the testator.

We disagree with caveator's interpretation of the term "unavailable." G.S. 31-18.1(c) specifies when an attesting witness is "unavailable." The witness is unavailable when he is, "dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify." The propounder produced two attesting witnesses at this caveat proceeding. One of these witnesses, Elbert Brown, was blind; he had, however, had full use of his ocular capacity at the time the testator executed the document and at the time it was probated in common form. We do not think this witness comes within any of the definitions of "unavailable" set forth in G.S. 31-18.1(c). The witness gave detailed testimony about the preparation and execution of the will; he testified that he saw the same will again shortly after the testator's death; and when the document was read to him, he stated unequivocably that the document was the same one which he had earlier witnessed. Several other witnesses, familiar with the handwriting of Elbert Brown, testified that his signature appeared on the document as an attesting witness. G.S. 31-18.1(a)(1) requires only that an attested will be probated "upon *the testimony* of at least two of the attesting witnesses; or . . . ." (Emphasis added.) We do not think the statute requires that the witness be able to see the will and the signatures on it at the time of the caveat proceeding in order that he may give testimony to prove it. This assignment of error is overruled.

[3] In his assignments of error numbers 5 and 6, the caveator challenges the court's instructions to the jury. The court submitted three issues to the jury:

> "1. Was the paper writing dated October 30, 1973, marked Propounders' Exhibit 2 and now offered for probate executed by Herbert M. Weston with the formalities required by law for a valid Will and Testament?
>
> 2. At the time of the signing and executing of the paper writing, did Herbert M. Weston have sufficient mental

capacity to make and execute a valid Last Will and Testament?

3. Is the paper writing dated October 30, 1973, and marked Propounders' Exhibit 2 and each and every part thereof the Last Will and Testament of Herbert M. Weston?"

The court further instructed the jury that if they should answer Yes to issues number (1) and (2), they should then answer the third issue Yes as well. The caveator assigns error to that portion of the charge asserting that G.S. 31-18.1 requires that even if the jury answers Yes to issues (1) and (2), they must still be allowed to determine whether the will has been "proven." We do not find anything in the statute which supports this contention. *In re Will of Sessoms*, 254 N.C. 369, 119 S.E. 2d 193 (1961), involved a similar challenge to a preemptive instruction. In that caveat proceeding, the court instructed the jury, "Now Gentlemen, if you answer the first issue Yes, that is, if you find from the evidence in this case . . . that the paper writing propounded . . . was executed . . . according to the formalities of law required to make a last will and testament, . . . you will then answer the second issue Yes." *Id.* at 377, 119 S.E. 2d at 198. The second issue submitted to the jury was whether the document being propounded was the last will and testament of the deceased. Overruling the caveator's assignment of error to this preemptive charge the Court stated, "Judge Paul's charge on the second issue is correct, for the reason that it necessarily follows that the second issue should be answered Yes by the jury if they answered the first issue Yes . . . ." *Id.* at 379, 119 S.E. 2d at 200. *See also In re Will of Simmons*, 268 N.C. 278, 150 S.E. 2d 439 (1966). The challenged instructions given in this case were clearly not erroneous. The jury was instructed they should answer the third issue Yes only if they first found that the deceased executed the document being propounded in accordance with the formalities required by law, and that at the time he did so he had sufficient mental capacity to make a will.

The caveator further contends that the court erred by failing to instruct the jury on the terms of G.S. 31-18.1. The caveator asserts that the jury should have been so instructed so that they could determine whether the testimony of witness Elbert Brown constituted sufficient proof of the will. Whether or not the

witness by virtue of his blindness at the time of the caveat proceeding was "unavailable", however, was a question of law to be decided by the judge. The court's instructions clearly apprised the jury of their function, which was to determine whether the testimony of the witnesses for the propounders had sufficiently proven the execution of the will in conformance with the requirements of G.S. 31-3.3. This assignment of error is without merit.

No error.

Judges HEDRICK and ARNOLD concur.

TURNER HALSEY COMPANY, INC., A CORPORATION v. LAWRENCE KNITTING MILLS, INC., A CORPORATION AND LAWRENCE LEVY AND MRS. LAWRENCE LEVY

No. 7726DC1042

(Filed 7 November 1978)

1. **Damages § 9— minimizing damages—jury question raised—summary judgment improper**

In an action to recover the alleged balance due for goods sold by plaintiff's assignor to defendant, the trial court erred in allowing plaintiff's motion to amend the complaint and motion for summary judgment where defendant alleged that plaintiff failed to take action to sell the undelivered goods to someone else and thereby minimize damages; plaintiff's amendment was a reduction in the amount of the prayer for relief on the ground that plaintiff, after considerable effort, was able to sell the goods for a reduced amount; the amendment raised the same question of minimizing damages which defendant had earlier raised; and whether plaintiff exercised reasonable diligence to minimize its loss was a question for the jury to determine in its consideration of the issue of damages.

2. **Rules of Civil Procedure § 15— motion to amend allowed—immediate summary judgment improper**

The trial court erred in allowing plaintiff's motion for summary judgment on the same day that he allowed plaintiff's motion to amend its complaint, since G.S. 1A-1, Rule 15(a) gives a party 30 days to respond to an amended pleading.

APPEAL by defendants from *Johnson, Judge.* Judgment entered 27 July 1977, District Court, MECKLENBURG County. Heard in the Court of Appeals 22 September 1978.

In this action plaintiff seeks to recover the alleged balance due for goods sold to Lawrence Knitting Mills, Inc., by Marion Manufacturing Company. The complaint filed 21 July 1976, alleges that Marion Manufacturing Company sold and Lawrence Knitting Mills, Inc., purchased goods for which a balance of $3591.50 remains unpaid. Marion Manufacturing Company assigned the account to plaintiff and defendants Levy executed and delivered to plaintiff a personal guaranty for all liabilities of Lawrence Knitting Mills, Inc. to plaintiff. By answer, defendants denied all the material allegations of the complaint with the exception that they admitted the personal guaranty.

Plaintiff moved for summary judgment and filed affidavit of the Assistant Treasurer of plaintiff verifying the amount due. In opposition to the motion, defendants filed affidavit of Lawrence Levy, individually and as President of Lawrence Knitting Mills wherein he averred that he was a guarantor for Lawrence Knitting Mills which had a contract with Marion Yarns, assignor of plaintiff, for yarn to be used in knitting piece goods for a contract which Lawrence Knitting Mills had with a customer; that Lawrence Knitting Mills accepted some of the yarn but that before the contract with its customer was completed, its customer cancelled the contract; that Lawrence Knitting Mills notified Marion of this situation and that it could not use the yarn; that if it had been spun to sell it to someone else; that no more yarn was shipped to Lawrence Knitting Mills; that had Marion sold the yarn to someone else it would not have suffered any loss but would probably have made a profit greater than that it would have made under its contract with Lawrence Knitting Mills; that although Lawrence had many times requested of Marion that it sell the yarn to minimize damages, it has failed to do so.

The court granted the motion for summary judgment on the issue of liability as to all three defendants but denied it "as to the issue of damages or mitigation thereof."

On 9 June 1977, plaintiff filed a motion for leave to amend its complaint to reduce the amount demanded to $1893.70 because, after considerable effort, it had been able to sell for $1697.80 the goods which defendants refused to accept. At the same time, it moved for summary judgment on the issue of damages. In support of its motion for summary judgment it filed affidavits of employees of both Marion Manufacturing Company and plaintiff.

The contents of the affidavits, summarized, are: On or about 21 October 1974, Lawrence Knitting Mills placed an order with Marion Yarn for 10,000 pounds of a 50% polyester, 50% rayon knitting twist yarn at a per pound price of $1.10, the yarn to be available at the times specified but held for shipping instructions. During 1975, on several occasions, Lawrence Levy orally requested that Marion attempt to sell the yarn elsewhere because he could not afford to pay for immediate delivery. On or about 14 September 1975, Marion sold its accounts receivable against Lawrence Knitting Mills to its factor, the plaintiff herein. On 7 October 1975, Lawrence Levy wrote Marion refusing to accept shipment of the remaining yarns or to pay the invoices. Under the contract, mailing of an invoice prior to receiving written notice of cancellation from the buyer constitutes an effective tender of delivery. On 4 September 1975, an invoice for the remaining 3265 pounds of yarn was mailed to Lawrence Knitting Mills demanding payment in ten days. Since 1 November 1975, salesmen of Marion have tried to sell the yarn but have been unable to obtain any offers except what "would be considered odd lot or close out sales of $.30 per pound". "The highest amount that could be received for the yarn was 25 cents per pound, received on or about January 1, 1975."

On 27 July 1977, the court entered an order reciting that plaintiff's motion to amend the complaint and for summary judgment had been heard on 21 June 1977. The court allowed both motions and defendants appealed.

Casey and Daly, by Durant W. Escott, for plaintiff appellee.

Francis O. Clarkson, Jr., and William B. Webb, Jr., for defendant appellants.

MORRIS, Judge.

[1] Defendants assign as error the court's granting the plaintiff's motion to amend the complaint and motion for summary judgment. We think the assignment is well taken. The amendment was a reduction of the amount of the prayer for relief. The grounds for the motion were that the contract price was $3591.50 but plaintiff, after considerable effort, was able to sell the goods for $1697.80, thereby leaving a balance of $1893.70. The amendment raises the question of minimizing the damages, a question

previously raised by the affidavit of defendant Lawrence Levy which was filed 22 March 1977. The affidavits filed by plaintiff were all sworn to prior to that date. The affidavit of the salesmen simply aver that they had attempted to sell the yarn; two since November 1975 and one, since August 1976. The affidavits were given by employees of plaintiff and an officer of Marion Yarns, plaintiff's assignor.

The general rule is that where there has been a breach of contract, the injured party must do "what fair and reasonable prudence requires to save himself and reduce the damage; or the damage which arises from his own neglect will be considered too remote for recovery." *Little v. Rose*, 285 N.C. 724, 728, 208 S.E. 2d 666, 669 (1974), quoting from *Tillinghast v. Cotton Mills*, 143 N.C. 268, 55 S.E. 621 (1906). The injured party is required to exercise *reasonable* diligence to minimize the loss. *Chesson v. Container Co.*, 215 N.C. 112, 1 S.E. 2d 357 (1939). Whether the injured party did exercise reasonable diligence to minimize his loss is a question for the jury to determine in its consideration of the issue of damages. *Timber Management Co. v. Bell*, 21 N.C. App. 143, 203 S.E. 2d 339 (1974), *cert. denied*, 285 N.C. 376, 205 S.E. 2d 97 (1974); *Tillis v. Cotton Mills* and *Cotton Mills v. Tillis*, 251 N.C. 359, 111 S.E. 2d 606 (1959).

> "As a rule, it is for the jury to determine whether the plaintiff could have lessened the injury by the exercise of ordinary care and at a reasonable expense. Thus, it is for the jury to decide whether reasonable efforts to avoid damages have been made, and to decide what constitutes ordinary and reasonable care and means to lessen the consequences of an injury." 22 Am. Jur. 2d, Damages § 339, p. 441.

The court was in error in granting plaintiff's motion for summary judgment.

[2] We also note that the court allowed the motion for summary judgment on the same day that he allowed plaintiff's motion to amend its complaint. G.S. 1A-1, Rule 15(a), provides that "[a] party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders." Defendants do not argue that the court erred in granting the plaintiff's motion to be allowed to amend, but they do take the position that they should have been given time within which

to answer before the hearing on the motion for summary judgment. We are inclined to agree. ". . . [W]hen the complaint is amended defendant should be entitled to amend his answer to meet the contents of the new complaint . . ." 6 Wright & Miller, Federal Practice and Procedure § 1476, p. 391; *see also* 3 Moore's Federal Practice 2d § 15.12 p. 15-154. We assume that defendants have, by now, answered, and, with the disposition of the matter here made, the questions raised is of no further importance in this action.

Reversed.

Judges MITCHELL and ERWIN concur.

IN THE MATTER OF: LARRY JAMES JACOBS, RESPONDENT

No. 779DC1061

(Filed 7 November 1978)

1. **Insane Persons § 1.2— involuntary commitment order—failure to record supporting facts**

Order committing respondent to a mental health care facility must be reversed where the court failed to record sufficient facts to support its findings that respondent was mentally ill and imminently dangerous to himself or others as required by G.S. 122-58.7(i).

2. **Insane Persons § 1— involuntary commitment—right to hearing within ten days after confinement**

The respondent in an involuntary commitment proceeding was denied his right to a hearing before the district court within ten days of confinement as provided by G.S. 122-58.7(a) where the State failed at the original hearing held six days after confinement to offer any evidence or to come forward with even a copy of the magistrate's order of commitment or the petition for involuntary commitment, and the trial court continued the hearing, over respondent's objection, for seven days.

APPEAL by respondent from *Wilkinson, Judge*. Judgment entered 22 September 1977 in the District Court, GRANVILLE County. Heard in the Court of Appeals 26 September 1978.

This case arose as an involuntary commitment proceeding pursuant to G.S. Chapter 122, Article 5A. Franklin County Sheriff

William T. Dement filed a petition to initiate proceedings on 9 September 1977. A magistrate issued a custody order upon the petition. Thereafter respondent Jacobs was taken into custody and committed to John Umstead Hospital pending a hearing in the district court.

The sheriff's petition alleged that "respondent is a mentally ill or inebriate person who is imminently dangerous to himself or others". The petition alleged the following facts as basis for commitment:

> "Went to the Clerk of Court's Office Fixed (sic) his will and told the girls in the office that he was going to commit suicide. Tried to commit suicide in the Franklin County Jail by trying to hang himself. Tried to burn himself by wrapping toilet tissue around his body and setting himself on fire, by lighting same."

The hearing was calendared for 15 September 1977 at Umstead Hospital in Butner, Granville County, pursuant to G.S. 122-58.7. Respondent represented by special counsel appeared. The files containing the custody order and the petition had not been transferred, at the time the first hearing was scheduled, to the Clerk of Superior Court in Granville County where the hearing was to be held. Neither the order nor petition was available to the trial court or respondent's counsel. The respondent waived service of notice of the hearing.

Respondent moved to dismiss the proceedings. The motion was denied. However, neither party presented evidence. On the court's own motion, and over respondent's objection, the proceeding was rescheduled and heard on 22 September 1977. Respondent's motion to dismiss at the second hearing was denied. Both the State and respondent presented evidence. After the evidence was heard, the court found the patient to be mentally ill or inebriate and imminently dangerous to himself or others. Respondent was ordered committed to John Umstead Hospital for a period of 90 days.

From the order of commitment respondent appeals.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

Special Counsel Susan Freya Olive for respondent appellant.

MORRIS, Judge.

[1] Respondent does not challenge the sufficiency of evidence. Nevertheless, he assigns as error the district court's failure to make findings of fact to support its commitment order. G.S. 122-58.7(i) provides in unambiguous terms: "The court shall record the facts which support its findings." This Court has held on numerous occasions that the district court must record the facts necessary to support its findings. *See e.g., In Re Koyi*, 34 N.C. App. 320, 238 S.E. 2d 153 (1977); *In the Matter of Crouch*, 28 N.C. App. 354, 221 S.E. 2d 74 (1976); *In Re Neatherly*, 28 N.C. App. 659, 222 S.E. 2d 486 (1976). We note that the commitment order in the case *sub judice* is essentially identical to that order found to be insufficient in *In Re Koyi, supra.* Merely placing an "X" in the boxes on the commitment order form does not comply with the statute.

[2] Although the district court's failure to make findings of fact is sufficient error to require reversal, we note additionally that the trial court continued the respondent's hearing, over objection, for seven days. The State failed at the originally scheduled hearing to offer any evidence or to come forward with even a copy of the magistrate's order of commitment or the petition for involuntary commitment. The result was that respondent was denied his right to a hearing before the district court within ten days of confinement. G.S. 122-58.7(a) (1977 Cum. Supp.) mandates the following procedure for the district court hearing:

> "A hearing *shall* be held in district court within 10 days of the day the respondent is taken into custody. Upon motion of the *respondent's* counsel, sufficiently in advance to avoid movement of the respondent, continuance of not more than five days each may be granted." (Emphasis added.)

The language of the statute is again plain and unambiguous. The granting of a continuance for five days is within the discretion of the trial judge only on the motion of respondent. If the legislature had intended to allow the trial court to exercise its traditional discretion in granting continuances, the second sentence in the quotation from the statute, supra, would not have been necessary. The statute indicates a conscious legislative decision to place the burden on the State to come forward with evidence to justify the commitment within 10 days. Such a duty

should not prove burdensome since within 24 hours a qualified physician at an appropriate mental health facility must have examined the respondent and concluded respondent was mentally ill or inebriate and imminently dangerous to himself or others. *See* G.S. 122-58.6.

This Court noted in a case applying the forerunner of G.S. Chapter 122, Article 5A (held unconstitutional since that decision) that taking a person without the intervention of any court proceeding is a drastic procedure. *Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E. 2d 209 (1970), *cert. den.*, 277 N.C. 458, 178 S.E. 2d 225 (1971) (allowing commitment merely upon acknowledged statement of physician). The Court, speaking through Campbell, Judge, indicated its commitment to applying the statute strictly: "There being a statute which provides for a drastic remedy, it is encumbent upon all that use it to do so with care and exactness, even though the user may think it 'impractical'." 9 N.C. App. at 497, 177 S.E. 2d at 213. "When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by . . . a court under the guise of construction." *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E. 2d 184, 192 (1977). Although the lack of flexibility provided in the statute may impose hardship on the State, the plain language of the statute, until amended, must control.

We note that this is not a situation wherein the application of G.S. 1A-1, Rule 6(a) would extend the ten-day period. *See e.g., In the Matter of Eugene Underwood*, 38 N.C. App. 344, 247 S.E. 2d 778 (1978) (where tenth day fell on a weekend).

This situation should also be distinguished from the rehearing proceedings under G.S. 122-58.11. *See In the Matter of Jackie Boyles*, 38 N.C. App. 389, 247 S.E. 2d 785 (1978). In that situation the respondent had already been committed pursuant to a district court proceeding and had undergone extended treatment. The time period in such cases, though important, is less critical than a hearing on initial commitment.

For failure to make findings to support its order for commitment, the district court must be

Reversed.

Judges MITCHELL and ERWIN concur.

ANN S. CAVENDISH v. RICHARD C. CAVENDISH

No. 7726DC1034

(Filed 7 November 1978)

1. **Divorce and Alimony § 17.3— permanent alimony—reduction for acts of dependent spouse**

Pursuant to G.S. 50-16.5(b), the trial court has the discretion to award some permanent alimony to a dependent spouse even when the jury finds that the dependent spouse has committed acts which would support the granting of a divorce from bed and board in favor of the supporting spouse.

2. **Divorce and Alimony § 17.3— reduction of alimony for indignities of dependent spouse—specific indignities—amount of reduction—findings not required**

Where the trial court found that the husband and wife had both rendered indignities to each other and reduced the amount of alimony awarded to the wife by 30% because of the indignities on her part, it was not necessary for the court to make findings of fact as to what specific indignities had been rendered by each of the parties or to show how it arrived at the 30% figure.

3. **Divorce and Alimony § 18— divorce from bed and board—jury verdict—alimony pendente lite—continuance pending hearing on permanent alimony**

Where the jury in an action for divorce from bed and board found that both spouses had rendered indignities to the other, the trial court did not err in permitting an alimony *pendente lite* order to remain in effect pending a hearing on the issue of whether an award of permanent alimony to the dependent spouse should have been disallowed or reduced pursuant to G.S. 50-16.5(b).

APPEAL by defendant from *Johnson, Judge*. Judgment entered 20 July 1977 in the District Court of MECKLENBURG County. Heard in the Court of Appeals 21 September 1978.

Plaintiff-wife sued the defendant-husband for divorce from bed and board, alimony *pendente lite*, counsel fees and permanent alimony on the grounds of abandonment and indignities. Defendant denied plaintiff's allegations and counterclaimed for divorce from bed and board on the grounds of abandonment and indignities.

Plaintiff's evidence tended to show that defendant had an uncontrollable temper, had threatened and abused her and drank to excess. The defendant had asked her to live in Tryon so he could live alone in Charlotte and failed to visit her in Tryon on many occasions. He also had failed to accompany her to social events.

Defendant's testimony tended to show that the plaintiff drank to excess and had created a rift between him and his children. The plaintiff had joined a wealthy social group and the defendant was unable to meet her financial demands.

The jury found that neither spouse had abandoned the other, but found that each had rendered indignities to the other. The court ordered the alimony *pendente lite* order to remain in effect pending hearing on the issue of whether permanent alimony should be disallowed or reduced pursuant to G.S. 50-16.5(b). The hearing was held three months later. At hearing, plaintiff's affidavits and testimony tended to show that her monthly expenses were about $1,500 and that she has no other source of income. Defendant's affidavits and testimony show that he has an income of about $2,300 a month and expenses of $2,057. The court found that the defendant earned $40,000 a year, and had monthly expenses of $1,300, and that the plaintiff was a dependent spouse with monthly expenses of $1,200. The court found that the husband had committed acts which were grounds for awarding permanent alimony, and that the plaintiff had committed acts which would entitle the defendant to permanent alimony if she were the supporting spouse. The court found that plaintiff's acts constituted fault on her part in the amount of 30%. The court then reduced the amount of $1,200 per month which she would have been entitled to receive as permanent alimony had she not been at fault, to $840 per month pursuant to G.S. 50-16.5(b). The court then granted the plaintiff a divorce from bed and board and counsel fees of $2,000.

Harkey, Faggart, Coira & Fletcher by Charles F. Coira, Jr. for plaintiff appellee.

Thomas R. Cannon for defendant appellant.

CLARK, Judge.

[1] Defendant first contends that the trial court erred in failing to grant him a divorce from bed and board from the plaintiff since the jury had found that both plaintiff and defendant had rendered indignities to the other. Defendant contends that if divorce from bed and board were entered in favor of both parties then the defendant would have no obligation to pay alimony to the plaintiff.

G.S. 50-16.5(b) provides:

> "Except as provided in G.S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse."

This statutory language makes it clear that the trial court may, in its discretion, award some permanent alimony to a dependent spouse even when the jury finds that the dependent spouse has committed acts which would support the granting of a divorce from bed and board in favor of the supporting spouse. *See Self v. Self*, 37 N.C. App. 199, 245 S.E. 2d 541 (1978). The statute provides that the only case in which the trial court is precluded from awarding any alimony to the dependent spouse is when the dependent spouse has committed adultery. That is not the case here, and therefore, even if the court had granted the divorce from bed and board in favor of the defendant, it would not affect the award of alimony. *See, Self v. Self, supra.* Therefore, defendant's first contention is without merit.

[2] Defendant next contends that the judgment was not supported by adequate evidence and findings of fact. Specifically, the court did not make findings of fact as to what indignities had been rendered by each of the parties nor did the court give any indication of how it arrived at the 30% figure. The amount of alimony to be awarded lies in the sound discretion of the trial judge. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). G.S. 50-16.5(b) does not require the court to make findings of fact in support of its reduction of alimony. In *Self, supra*, this court held that the trial judge need not set out the amount of the reduction of the alimony award in the judgment. In the case *sub judice*, the trial court went further than required by including the precise percentage of reduction in the judgment. The alimony awarded was substantially less than plaintiff's living expenses and there is no evidence that the court abused its discretion in reducing the alimony in the amount of 30%. Defendant's contention is without merit.

Defendant's third contention is that there was insufficient evidence and findings of fact to support the court's order which

discounted approximately $700 from defendant's monthly financial needs. We find no merit in defendant's contention. The trial court based its findings of fact upon the Affidavits of Financial Standing submitted by the parties and upon the testimony of the parties. There was ample evidence presented to support the finding of fact. The judgment included a finding of fact that the defendant earned a salary of $40,000 per year and his expenses were approximately $1,300 per month.

[3] The defendant's final argument is that the court erred in permitting the order, which provided for alimony *pendente lite*, to remain in effect until the hearing on permanent alimony. Although the verdict entered in April 1977 resolved certain issues, a final judgment could not be entered without additional evidence on the issue of permanent alimony. The trial court is empowered to order the previous *pendente lite* order to remain in effect until it was superseded by a final judgment. G.S. 50-16.1; see, Lee, N.C. Family Law, § 135 (3d ed. 1963).

The contentions of defendant are without merit and therefore the judgment is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN (Harry C.) concur.

WILLIE L. VINCENT v. ARTHUR H. VINCENT

No. 7828DC9

(Filed 7 November 1978)

Constitutional Law § 26.6; Divorce and Alimony § 19.1— alimony awarded in N. C. —award terminated in Alabama—validity of Alabama decree

An Alabama court which had *in personam* jurisdiction over plaintiff by virtue of her general appearance in a divorce proceeding instituted by defendant could terminate alimony payments awarded under an N. C. decree; the alimony payments could not be modified retroactively since Alabama could modify the decree only to the extent N. C. could, and N. C. could not modify the decree retroactively, absent a showing of sudden emergency; and the Alabama decree terminating alimony payments took effect immediately in that state and therefore took effect immediately in N. C., since the N. C. courts must give the Alabama decree the same effect which it had in Alabama.

Vincent v. Vincent

APPEAL by defendant from *Allen (C. Walter), Judge*. Judgment entered 16 September 1977 in the District Court, BUNCOMBE County. Heard in the Court of Appeals 28 September 1978.

On 15 December 1972, plaintiff was awarded alimony without divorce in the amount of $800 per month in the Buncombe County District Court. From 1972 until 1975, plaintiff filed several motions in the cause seeking to enforce the alimony judgment and to hold the defendant in contempt for failure to comply with the 1972 judgment. In March 1977, plaintiff filed a motion in the cause seeking to collect $26,230.41 in arrearages due under the 1972 judgment. Defendant's reply alleged that the parties were divorced by the Circuit Court of Jefferson County, Alabama on 9 February 1976. The record shows that the plaintiff made a general appearance in that case. The plaintiff answered the complaint and requested a divorce, division of the property and alimony. The Alabama court granted the defendant-husband an absolute divorce and declined to award plaintiff-wife any alimony due to defendant's reduced income and ill-health. The plaintiff did not appeal from the Alabama judgment.

On 16 September 1977, a judgment was entered in the District Court of Buncombe County, which held that the Alabama decree cut off plaintiff's right to alimony as of 9 February 1976, and that the plaintiff was entitled to $16,030.41 in arrearages which had accrued as of 9 February 1976. From this judgment plaintiff appeals.

Morris, Golding, Blue & Phillips by James Golding for plaintiff appellant.

Elmore & Elmore by Bruce A. Elmore, Jr. for defendant appellee.

CLARK, Judge.

Plaintiff first contends that the Alabama court was not entitled to modify the prior North Carolina alimony decree. G.S. 50-11(d) provides that a sister state cannot terminate alimony payments awarded under a North Carolina decree when the supporting spouse obtains an *ex parte* divorce in that state. *See, e.g., Fleek v. Fleek*, 270 N.C. 736, 155 S.E. 2d 290 (1967).

In the case *sub judice*, however, the Alabama courts had *in personam* jurisdiction over the plaintiff-wife since she answered the complaint, counterclaimed and entered a general appearance in the Alabama proceeding. There are no North Carolina cases which consider this issue, and therefore this is a case of first impression.

It is generally accepted that where a "court has personal jurisdiction over both parties it is probably the wisest course for a state to require their property and alimony problems to be resolved by the court which divorces them. The interests of both parties are protected if they are afforded their 'day in court'—a full opportunity to urge their respective positions." Paulsen, Support Rights and an Out-of-State Divorce, 38 Minn. L. Rev. 709, 722 (1954); Lee, N.C. Family Law § 100 at 398 (3d ed. 1963). See, *Isserman v. Isserman*, 11 N.J. 106, 93 A. 2d 571 (1952).

In *Thomas v. Thomas*, 248 N.C. 269, 103 S.E. 2d 371 (1958), the North Carolina Supreme Court considered whether or not the North Carolina courts had the power to modify a custody and child support decree rendered by a Nevada court. The court noted that " '[a] court . . . has the power to modify a foreign decree indirectly by ordering the husband to pay more or less than was required by the foreign decree, where both states have the power to modify decrees . . . . The foreign decree has no constitutional claim to a greater effect outside the State than it has within the State.' " 248 N.C. at 272, 103 S.E. 2d at 373; 24 Am. Jur. 2d, Divorce and Separation § 987 at 1125; *Lopez v. Avery*, 66 So. 2d 689 (Fla. 1953); *Goodman v. Goodman*, 15 N.J. Misc. 716, 194 A. 866 (1937). The court held that the North Carolina courts were bound by the Nevada decree unless the plaintiff shows such changed conditions and circumstances to justify an increase in the allowance made by the Nevada court.

Both North Carolina and Alabama have statutory authority for the modification of decrees for alimony. G.S. 50-16.9; ALA. CODE tit. 30 § 2-51. Therefore, under the principles outlined in *Thomas*, the Alabama courts can modify a North Carolina alimony decree to the same extent that the North Carolina courts may do so. The Alabama decree concluded that the plaintiff-husband was "in bad health and that his income and earnings are substantially less than that of the Defendant." The Alabama court in effect

found that circumstances had changed since the entry of the North Carolina decree; since under North Carolina law, an alimony decree can be modified upon a showing of changed circumstances, the Alabama court was entitled to modify the decree.

The plaintiff contends that, assuming that the Alabama court could modify the North Carolina decree, it could only do so prospectively because the North Carolina decree was final as to arrearages. There are no North Carolina cases which directly hold that an alimony decree can be retroactively modified, although in *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), the court indicated that a retroactive increase in child support might be permitted in a sudden emergency. In the case *sub judice*, there was no showing of any sudden emergency requiring a retroactive reduction in alimony. Therefore the 1972 judgment could not be modified retroactively in North Carolina and the Alabama courts are similarly precluded. *See, Thomas, supra.* The plaintiff is therefore entitled to recover the arrearages which had accrued as of 9 February 1976.

The plaintiff also contends that defendant's obligation to make alimony payments should continue until the Alabama divorce decree is brought to the attention of the North Carolina courts. There is a split of authority as to whether the defendant's obligation is extinguished at the entry of the foreign decree or continues until the defendant obtains a judgment in the home state which gives full faith and credit to the foreign decree. Annot., 49 A.L.R. 3d 1266, §§ 13, 14 (1973). The full faith and credit clause, U.S. Const., Art. IV, § 1, provides that the North Carolina courts must give full faith and credit to a decree rendered by a sister state, and must give it the same effect as it would have in that state. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966). The Alabama decree, under Alabama law, took effect immediately and the North Carolina courts must give it the same effect. The plaintiff's right to alimony was terminated as of the entry of the Alabama decree. In addition, the plaintiff in the case *sub judice* was present during the proceedings in Alabama and was fully aware of the provisions of the Alabama decree. There is no need to prolong the litigation by requiring the defendant to commence a third proceeding in this State to set aside the prior North Carolina judgment. Should the plaintiff attempt to en-

force the superseded decree, then the defendant may bring the Alabama decree to the attention of the North Carolina courts.

The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. HERBERT HUFFMAN

No. 7813SC597

(Filed 7 November 1978)

1. **Criminal Law § 15.1— motion for change of venue—pretrial publicity—no prejudice from denial**

Defendant failed to show an abuse of the trial court's discretion in denying his motion for change of venue where defendant showed only that the case received extensive local news coverage and certain newspaper photographs were used at trial, but the record did not show defendant's examination of prospective jurors nor did it show that defendant exhausted his peremptory challenges.

2. **Criminal Law § 91.1— continuance denied—no prejudice shown**

Defendant failed to show that the trial court abused its discretion in denying his motion for a continuance where defendant did not show how his case would have been better prepared had the continuance been granted, nor did he show that he was prejudiced by the motion's denial.

3. **Criminal Law § 92.4— two charges against one defendant—consolidation proper**

The trial court did not err in consolidating for trial charges of second degree rape and assault with a deadly weapon with intent to kill, since the two charges arose from a continuous series of acts by defendant; there was no lesser included offense involved; and the State's proof of assault with a deadly weapon with intent to kill was not an indispensable element in the State's proof of second degree rape. Moreover, if it was error for the trial court to fail to put the State to an election, such error was cured by the court's arrest of judgment on the assault with a deadly weapon inflicting serious injury conviction.

4. **Rape § 5— victim's consent—offense committed by violence—sufficiency of evidence of rape**

Defendant's contention that he was entitled to judgment of nonsuit because the rape victim at no point testified that the sexual acts were without

her consent is without merit since the victim's testimony clearly showed that defendant committed the offense through violence and the inducement of fear, and "consent" induced by violence or the threat thereof is not a defense to the charge of rape.

APPEAL by defendant from *Herring, Judge*. Judgment entered 23 February 1978 in Superior Court, BLADEN County. Heard in the Court of Appeals 23 October 1978.

Defendant was indicted for first degree rape and assault with a deadly weapon with intent to kill, tried for second degree rape and assault with a deadly weapon with intent to kill, convicted by a jury of assault with intent to commit rape and assault with a deadly weapon inflicting serious injury, and sentenced to 15 years for the assault with intent to commit rape. The trial court granted defendant's motion for arrest of judgment as to assault with a deadly weapon inflicting serious injury.

Prior to trial, defendant moved for change of venue or a special venire. After a voir dire, the trial court denied the motions, finding that there was not such prejudice existing in Bladen County as to prevent defendant from receiving a fair trial in Bladen County.

At trial, the testimony of Mrs. Thelma Dockery tended to show that: on 22 October 1977 at approximately 10:30 p.m., defendant, whom she had known all her life, knocked on her door; she let him in, and he began slapping her, pulling out a pistol and hitting her with it; defendant pulled off her pajamas and had intercourse with her; he then made her go into the bedroom and had oral sex and intercourse with her; and defendant then slapped her again and fired his pistol, the bullet striking the kitchen floor. The State presented several photographs, showing cuts and abrasions on Mrs. Dockery's body. Daniel Dockery testified that he saw his mother on 23 October 1977 and that she was in a bruised and bloodied condition.

Defendant testified that he had been having sexual relations with Mrs. Dockery for some time and that on the night in question, he did strike her. He stated, however, that she told him that "she felt it was her duty to satisfy him sexually," and that they then attempted intercourse. Defendant denied firing a pistol.

Defendant appeals.

Attorney General Edmisten, by Associate Attorney Thomas F. Moffitt, for the State.

H. Goldston Womble, Jr., for defendant appellant.

ERWIN, Judge.

Having carefully considered defendant's arguments on this appeal, we conclude that he received a fair trial, free of prejudicial error.

[1] Defendant presents seven arguments on appeal. He first contends that the trial court abused its discretion in denying his motion for a change of venue or in the alternative for a special venire. Defendant points out that the case received extensive local news coverage, and apparently certain newspaper photographs were used at the trial. Such motions are addressed to the trial judge's sound discretion, and an abuse thereof must be shown for there to be error in their denial. *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978); *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). We see no abuse of that discretion on the record before us. The record does not show defendant's examination of prospective jurors nor does it reflect that he exhausted his peremptory challenges. *See State v. Dollar, supra.*

[2] Defendant next contends that the trial court abused its discretion in denying his motion for a continuance. Again, a motion for a continuance is normally a matter of trial court discretion. Defendant appears to argue that denial of the motion prejudiced him by giving counsel insufficient time to prepare for trial:

> "Defendant contends that the securing of the indictments and arraignment one week prior to trial, together with the fact that retained counsel had not long been associated on the case, worked to his prejudice in the research and preparation of his case."

If the motion is based upon a constitutional right, the question is one of law, and the decision of the trial court is reviewable. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977); *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E. 2d 398 (1978). Where such

constitutional issues are raised by the motion's denial, whether defendant's rights have been denied is to be determined based on the circumstances of each case. *State v. McFadden, supra*; *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

Here, defendant does not show how his case would have been better prepared had the continuance been granted, nor does he show that he was prejudiced by the motion's denial. The record shows that the case was well tried, cross examination was vigorous, and counsel presented and argued various motions on defendant's behalf throughout the trial. We find no merit in this contention of defendant.

[3] Four of defendant's further arguments pertain to the trial court's consolidation of the charges of second degree rape and assault with a deadly weapon with intent to kill and to its denial of various motions of defendant to require the State to elect between the two charges. We see no prejudicial error.

A continuous series of acts by a defendant, occurring at the same time and as parts of one entire plan of action, may constitute separate criminal offenses. *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967); *State v. Vawter*, 33 N.C. App. 131, 234 S.E. 2d 438 (1977), *cert. denied*, 293 N.C. 257 (1977). Clearly, we are not here confronted with a lesser included offense, nor was the State's proof of assault with a deadly weapon with intent to kill an indispensable element in the State's proof of second degree rape. *Cf. State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Even assuming error by the trial court in failing to put the State to an election, it was effectively cured by its arrest of judgment on the assault with a deadly weapon inflicting serious injury conviction.

[4] Finally, defendant urges that the trial court erred in denying his motion for judgment as of nonsuit at the close of all the evidence. He maintains in support of this contention that at no point did Mrs. Dockery testify that the sexual acts were without her consent. Her testimony, however, clearly tends to show that defendant committed the offense through violence and the inducement of fear. "Consent" induced by violence or the threat thereof is not a defense to the charge of rape. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified on other grounds*, 428 U.S. 902 (1976).

In the trial below, we find

No error.

Judges MORRIS and ARNOLD concur.

LUCY BURRUS MAURICE AND HUSBAND, SAMUEL S. MAURICE, ALONZO BURRUS, JR. AND WIFE, CORA G. BURRUS, ADOLPHUS BURRUS, JR. AND WIFE, GOLDIE S. BURRUS, GRACE BURRUS BLAND AND HUSBAND, HENRY F. BLAND, WILLIAM Z. BURRUS AND WIFE, MINNIE A. BURRUS, MARION BURRUS AUSTIN AND HUSBAND, BRUCE AUSTIN v. HATTERASMAN MOTEL CORPORATION

No. 781SC88

(Filed 7 November 1978)

1. **Boundaries § 10.2— description of land conveyed—admissibility of parol evidence**

In an action to quiet title to land, the trial court erred in granting summary judgment for defendant where the description of the land in question referred to the property as "Fulchers' homestead" in Hatteras Township, Dare County, on the Sound at Cape Hatteras and referred to such extrinsic guides as "D. W. Fulcher's North corner line," "W. J. Williams' heirs' line," "A. C. Guidly's heirs' line," and "deed from George L. Fulcher to Shipp 25th February 1886," since such ambiguities as were contained in the description were latent, and parol evidence could be received to fit the description to the location of the land.

2. **Rules of Civil Procedure § 41.1— voluntary dismissal—time for taking—improper procedure when affirmative relief sought**

Plaintiffs could not defeat defendant's motion for summary judgment by taking a voluntary dismissal after a hearing on the summary judgment motion where plaintiffs introduced evidence and after the court had signed the summary judgment but before it was filed with the clerk; moreover, plaintiffs could not take a voluntary dismissal because defendant had filed a counterclaim seeking affirmative relief against plaintiffs arising out of the same transactions alleged in plaintiffs' complaint.

APPEAL by plaintiffs from *Cowper, Judge*. Judgment entered 10 November 1977 in Superior Court, DARE County. Heard in the Court of Appeals 24 October 1978.

Plaintiffs instituted this action to quiet title to a tract of land lying in Hatteras Township, Dare County, on the Pamlico Sound. Defendant answered, denying plaintiffs' title and alleging sole ownership. Following discovery, defendant moved for summary judgment. This motion was allowed 9 November 1977, and the judgment was filed 10 November 1977. On 9 November 1977, after the judgment had been signed but before it had been filed, plaintiffs filed a notice of voluntary dismissal with the Clerk of Dare County. Plaintiffs appealed from the granting of summary judgment.

Twiford, Trimpi & Thompson, by Russell E. Twiford and John G. Trimpi, and Herbert L. Thomas for plaintiff appellants.

Kellogg, White and Reeves, by Thomas L. White, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiffs urge two assignments of error.

[1] First. Plaintiffs contend the trial court erred in granting summary judgment. In the summary judgment, the court found:

> [I]t appearing to the Court that the descriptions of the property claimed by the Plaintiffs as set out in the complaint and as contained in the Plaintiffs' deeds is such that the descriptions leave the identity of the land absolutely uncertain and refer to nothing extrinsic by which the same may be identified with certainty and are therefore patently ambiguous, and therefore the motion should be allowed.

The summary judgment was based solely upon this finding of the court.

Plaintiffs rely upon this description:

> [I]n Hatteras Township, Dare County, North Carolina, and more particularly described as follows:
>
> All that certain parcel of land at Cape Hatteras, known as Fulchers' homestead and described as follows:
>
> Beginning at D. W. Fulcher's North corner line, and running from thence along W. J. Williams' heirs' line North-

westerly to the Sound; from thence with the Sound Southwesterly, to A. C. Guidly's heirs' line Southeasterly to the place of beginning. Containing twenty-five acres more or less, and also another tract said to contain five acres on such interest in said tract as formerly belonged to George L. Fulcher and which was conveyed by said Fulcher to said Shipp the 25th day of February, 1886, and described as follows:

Beginning at D. T. Fulcher's north corner and running Northeastwardly to William Salter's Heirs' line; from thence Northwesterly to the Sound and with the Sound Northwesterly to George L. Fulcher's line; and with said Fulcher's line to the beginning.

A description of land is void unless it is sufficient to identify the land or refers to something extrinsic by which the land may be identified with certainty. When the description itself, including the references to extrinsic things, describes with certainty the property, parol evidence is admissible to fit the description to the land. *Overton v. Boyce*, 289 N.C. 291, 221 S.E. 2d 347 (1976); *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593 (1946); N.C. Gen. Stat. 8-39. Parol evidence is not admissible to enlarge the scope of the description. *Overton v. Boyce, supra.* If an ambiguity in the description be latent and not patent, it will not be held void for uncertainty but parol evidence will be admitted to fit the description to the thing intended. There must be language in the description sufficient to serve as a guide to the ascertainment of the location of the land. If the ambiguity in the description is patent, the instrument is void for uncertainty. A patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to the land involved.

A description of lands by name, where lands have a known name, is sufficient to allow parol evidence. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E. 2d 589 (1977); *Moore v. Fowle*, 139 N.C. 51, 51 S.E. 796 (1905); *Scull v. Pruden*, 92 N.C. 168 (1885). In *Smith v. Low*, 24 N.C. 457 (1842), the property involved was described as the "Julius Coley home place," the "Leonard Greeson place, containing 400 acres, more or less," and the "Lynn Place." The Court

held parol evidence was admissible. The great Chief Justice Ruffin said:

> The name of a place, like that of a man, may and does serve to identify it to the apprehension of more persons than a description by coterminous lands and water-courses, and with equal certainty. For example, "mount Vernon, the late residence of General Washington," is better known by that name than by a description of it, as situate on the Potomac River, and adjoining the lands of A, B, and C. . . . [T]his question of identity is one for the jury. If the description in the levy or deed be not so indefinite that by the help of no evidence can it be told to what subject it applies, the identity of that subject is not for the court, but for the jury to determine on the evidence; . . ..

Id. at 461.

We hold the description of the land in plaintiffs' complaint is not void as a matter of law. The description refers to the property as "Fulchers' homestead" in Hatteras Township, Dare County, on the Sound at Cape Hatteras. The witness Burrus called it "the old home of George Leftus Fulcher" and that "the Fulcher homestead can be located on the ground by the oak trees and the trees that surround it." Plaintiffs' description refers to such extrinsic guides as "D. W. Fulcher's North corner line," "W. J. Williams' heirs' line," "A. C. Guidly's heirs' line," "deed from George L. Fulcher to Shipp 25th February 1886." Such ambiguities as are contained in the description are latent and parol evidence may be received to fit the description to the location of the land. This assignment of error is sustained.

[2] Second. Can a plaintiff defeat a motion for summary judgment by taking a voluntary dismissal after a hearing on the summary judgment motion where plaintiff introduces evidence and after the court signs the summary judgment but before it is filed with the clerk? The answer is "no." The decision of the court resulting from a motion for summary judgment is one on the merits of the case. All parties have an opportunity to present evidence on the question before the court. Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of Rule 41(a)(1)(i) of the North

Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i). To rule otherwise would make a mockery of summary judgment proceedings.

Plaintiffs' effort to take a voluntary dismissal also fails for the reason that defendant had filed a counterclaim seeking affirmative relief against plaintiffs arising out of the same transactions alleged in plaintiffs' complaint. Where defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under Rule 41 without the consent of defendant. *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976). The purported voluntary dismissal by plaintiffs is void and is hereby vacated.

This assignment of error is overruled.

Reversed and remanded.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. JERRY DEAN FEWELL

No. 7826SC539

(Filed 7 November 1978)

1. **Criminal Law § 73.3— deceased's intention to do particular act—exception to hearsay rule**

In a homicide prosecution, a witness's testimony that deceased let the witness out at a bridge and stated that he was going to pick up the defendant was admissible as an exception to the hearsay rule.

2. **Criminal Law § 48— implied admission by silence**

In a homicide prosecution, statements made to a witness by defendant's brother in the presence and hearing of defendant to the effect that defendant had just shot and killed "a punk" because "he had beaten him out of some money" was admissible as an implied admission by defendant since the statements were of such a nature and made under such circumstances that a denial would have been naturally expected or forthcoming had the statements been untrue.

State v. Fewell

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 13 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 September 1978.

Defendant was charged in a proper bill of indictment with the murder of Nathaniel Talbert, Jr. Upon his plea of not guilty, the State presented evidence tending to show the following:

On 17 December 1974, Nathaniel Talbert, Jr., the deceased, and his roommate, Rudolph Thompson, were riding in an automobile in the early afternoon when they saw defendant standing on a street corner. While their automobile was stopped at the intersection, defendant told Talbert that he had some cocaine and to pick him up at 7:00 p.m. and they would go to his house and get "high". At trial, Thompson testified over objection that around 6:45 p.m., "Talbert let me out at the bridge and Talbert stated he was going to pick up Jerry Fewell." Thompson also testified that defendant had on an earlier date shown him a small silver pistol which he believed to be a .22 caliber handgun. Around 9:30 or 10:00 p.m. on that same night, Talbert was seen driving an automobile in which the defendant was riding. About ten minutes later, Talbert was found slumped over the steering wheel, having been shot to death in the automobile. A pathologist testified that the deceased had been shot six times, apparently with a .22 caliber weapon.

Sometime after midnight, the defendant and his brother, Henry Fewell, went to the apartment of Doretta Fewell. At trial, Doretta Fewell testified that while she, the defendant, and the defendant's brother were present in her apartment, Henry Fewell told her "that his brother [the defendant] had just killed a punk" because "he had beaten him out of some money." He also told her that "the punk" his brother had killed was Nathaniel Talbert. She further testified that the defendant "still had the pistol in his hand. He would just take it out of his pocket and put it back in, like he was going crazy or something, in some kind of a daze."

The defendant presented evidence tending to show the following: Defendant testified that he had never known or had any association with the deceased, Nathaniel Talbert, and that he had never owned a gun or firearm in his life.

Defendant was convicted by a jury of voluntary manslaughter. From a judgment entered on the verdict imposing a sentence of sixteen years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

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

HEDRICK, Judge.

[1] Defendant first contends that the court erred in denying his motion to strike the testimony of Rudolph Thompson, that "Talbert let me out at the bridge and Talbert stated he was going to pick up Jerry Fewell." Defendant argues that the statement should have been excluded as hearsay and that its admission was prejudicial.

The issue presented by this assignment of error, whether the declarations of a person indicating an intention to do a particular act in the immediate future should be admissible as evidence that the act was in fact performed, has concerned the courts and commentators for many years. *See, e.g., Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); *Hunter v. State*, 40 N.J. Law 495 (1878); Wigmore on Evidence § 1725 (Chadbourn rev. 1976); McCormick on Evidence § 295 (2d ed. 1972); 1 Stansbury's N.C. Evidence § 162 (Brandis rev. 1973).

Our Supreme Court in *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), dealt with this issue at length. In *Vestal*, a murder victim's wife was allowed to testify over defendant's objection that her husband had told her that he was leaving their home on a Sunday evening to take a business trip with the defendant. Justice Lake, writing for the majority, held the testimony admissible as an exception to the hearsay rule, stating:

> The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness. As Professor Morgan has said in 31 Yale Law Journal 229, 231, "If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and the cross-examination."

Id. at 582, 180 S.E. 2d at 769.

In the present case, the subsequent death of Talbert establishes the first basis of an exception to the hearsay rule—his unavailability to testify. The circumstances under which Talbert made the statements supply the second basis for a hearsay exception—the reasonable probability of truthfulness. We hold the challenged testimony falls within the exception to the hearsay rule described in *State v. Vestal, supra.* However, see Chief Justice Bobbitt's concurring opinion in *State v. Vestal, supra,* at page 779, and the cases cited therein. Even if the statement were erroneously admitted no prejudice was done to the defendant since there was other evidence placing the defendant and Talbert together in the automobile just ten minutes before the shooting.

[2] Next defendant argues the trial judge erred in allowing Doretta Fewell to testify as to statements made to her by her husband, Henry Fewell (the defendant's brother). Doretta Fewell tetified:

> Henry told me that his brother just killed a punk and told me to be quiet. I asked him, "for what", and he said "for what—he beat him out of some money" and he said he wouldn't have killed him—
>
> . . .
>
> Go ahead.
>
> He said he wouldn't have killed him if he hadn't told him to and I asked him what happened and he told me that he had beaten him out of some money and he came in the house and asked me what should he do about it—that was Henry Jerry was talking to—and Henry said that he told Jerry that he would kill the son of a bitch, so Jerry went outside and started shooting him and the car was still running.

The record discloses that all of the statements challenged by this exception were made by the defendant's brother in the presence and hearing of the defendant. The general rule concerning implied admissions is as follows:

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by

> a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he [the defendant] was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. (Citations omitted.)

State v. Hardy, 293 N.C. 105, 118-19, 235 S.E. 2d 828, 836 (1977).

Clearly, the statements objected to were of such a nature, and were made under such circumstances that a denial would have been naturally expected or forthcoming from the defendant had the statements been untrue. The trial judge properly admitted the testimony as an implied admission of the defendant.

All of the remaining assignments of error brought forward and argued in defendant's brief are without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN (Robert M.) concur.

KENNETH R. BUCHANAN, EMPLOYEE; PLAINTIFF v. MITCHELL COUNTY OF NORTH CAROLINA, EMPLOYER; HARTFORD ACCIDENT & INDEMNITY, CARRIER; DEFENDANTS

No. 7710IC1002

(Filed 7 November 1978)

1. **Master and Servant § 94.2— workmen's compensation—agreement for compensation approved by Industrial Commission—binding effect**

   An agreement between the employer and workmen's compensation carrier and the employee for the payment of compensation benefits, when approved by the Industrial Commission, is binding on the parties thereto, but such agreement may be set aside when there has been error due to fraud, misrepresentation, undue influence or mutual mistake.

2. **Master and Servant § 94— workmen's compensation—findings of fact by Industrial Commission unnecessary**

   In a hearing upon defendants' request to be allowed to discontinue compensation payments to plaintiff, the Industrial Commission was not required to

make any findings of fact with respect to the employee's intoxication at the time of the accident or to draw any conclusions based on such findings, since the issue before the Commission was whether the agreement to pay compensation was entered into as a result of mutual mistake and was not whether the employee was intoxicated at the time of his injury.

3. Master and Servant § 94— workmen's compensation—agreement for compensation—no mutual mistake—findings of fact unnecessary

Defendants' contention that the Industrial Commission erred by failing to find and conclude that the agreement to pay compensation to plaintiff was entered into through mutual mistake is wholly without merit, since there was no evidence in the record whatsoever that the agreement was entered into through a mutual mistake, and defendants showed only that they signed the agreement believing the claimant's injuries to be compensable.

APPEAL by defendants from order of the North Carolina Industrial Commission entered 13 September 1977. Heard in the Court of Appeals 18 September 1978.

On 5 January 1976, plaintiff Kenneth R. Buchanan, employee, entered into an agreement on I. C. Form 21 with defendants Mitchell County, employer, and Hartford Accident and Indemnity Company, the workman's compensation carrier, wherein the defendants agreed to make disability compensation payments to the plaintiff for an injury "arising out of and in the course of said employment." This agreement was approved by the North Carolina Industrial Commission on 16 January 1976.

Defendants thereafter made compensation payments to plaintiff totalling $2,169.29 as of 6 April 1976, when defendants applied to the North Carolina Industrial Commission for authorization "to stop payment of compensation to Kenneth Roy Buchanan on the grounds that at time of accident claimant was intoxicated and charged by investigating officer with DUI and discharge summary indicated acute alcoholic intoxication." Subsequently, a hearing was held and Chief Deputy Commissioner Forrest H. Shuford, II, by order filed 5 April 1977, concluded that "[t]he agreement for compensation under which certain benefits have been paid to and on behalf of plaintiff was entered into through mutual mistake and should be set aside."

On appeal the North Carolina Industrial Commission set aside the order of Chief Deputy Commissioner Shuford and ordered defendants to make payments in compliance with the terms of the original agreement.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague and George W. Dennis III, for defendant appellants.

Pritchard, Hise & Peterson, by Lloyd Hise, Jr., for plaintiff appellee.

HEDRICK, Judge.

[1] An agreement between the employer and workmen's compensation carrier and the employee for the payment of compensation benefits, when approved by the Industrial Commission, is binding on the parties thereto. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E. 2d 355 (1976); *Neal v. Clary*, 259 N.C. 163, 130 S.E. 2d 39 (1963). Such an agreement, however, may be set aside when "there has been error due to fraud, misrepresentation, undue influence or mutual mistake." G.S. § 97-17.

The Commission correctly treated defendants' request to be allowed to discontinue compensation payments to plaintiff as a motion to set aside the agreement on I. C. Form 21 dated 5 January 1976 for the payment of compensation benefits. There is no allegation that the agreement to pay compensation was entered into through "fraud, misrepresentation, [or] undue influence." Consequently, the sole issue before the Commission was whether the agreement to pay compensation was entered into as a result of "mutual mistake."

[2] By their first assignment of error, based on exceptions 4, 6, 7, 8, 9, 10, 11, 12 and 14, defendants contend that the Commission erred "in failing to find as a fact and conclude as a matter of law that the plaintiff-appellee was intoxicated at the time of his injury by accident, that the intoxicants consumed by the plaintiff-appellee were not supplied by his employer, that said intoxication was the proximate cause of his injury, and that plaintiff-appellee's claim for workmen's compensation benefits should be denied."

We note at the outset that the exceptions upon which this assignment of error is based relate primarily to the conclusions of law and the award and bear little or no relation to the Industrial Commission's failure to find facts. The issue before the Commission was whether the agreement to pay compensation was entered into as a result of "mutual mistake;" it was not whether the employee was intoxicated at the time of his injury. Thus,

there was no necessity for the commission to make any findings of fact with respect to the employee's intoxication at the time of the accident or for the Commission to draw any conclusions based on such findings. This assignment of error has no merit.

By their second assignment of error, based on exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 and 14, defendants contend the Industrial Commission erred "in awarding workmen's compensation benefits to the plaintiff-appellee and in ordering the defendant-appellants to pay the same, and erred in failing to find as a fact and conclude as a matter of law that the agreement for compensation of January 5, 1976 was entered into through mutual mistake and should be set aside." Exceptions 1, 2, and 3 challenge certain gratuitous legal opinions of the Commission and do not support the assignment of error. We therefore refrain from entering into an esoteric discussion of these exceptions.

The remaining exceptions upon which this assignment of error is based challenge the conclusions of law drawn by the Commission from the facts found and challenge the order requiring defendants to pay compensation to the plaintiff. In essence, defendants' second assignment of error raises the single question whether the facts found support the order entered.

The Commission has the duty to make specific findings of fact necessary to determine all questions relevant to the issues raised in a proceeding before it. G.S. § 97-91; *Spivey v. Oakley's General Contractors*, 32 N.C. App. 488, 232 S.E. 2d 454 (1977). On appeal, the Commission's findings of fact are conclusive and the role of the reviewing court is limited to ascertaining whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision. *Inscoe v. DeRose Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977).

[3] Defendants have not challenged any of the facts found by the Commission. We hold that the findings of fact made by the Commission support its award. Defendants' contention that the Commission erred by failing to find and conclude that the agreement to pay compensation was entered into through mutual mistake is wholly without merit. There is no evidence in the record whatsoever that the agreement was entered into through a mutual

mistake. Thus, the Commission had no duty to make any findings or conclusions relative thereto.

Defendants have shown only that they signed the agreement believing the claimant's injuries to be compensable. To permit an employer and carrier to enter into an agreement with an employee and then later contest the agreement solely on the ground that the parties mistakenly believed the injuries to be compensable would seriously undermine the efficacy of the statutory provisions authorizing voluntary settlements by the parties.

We hold that the defendant carrier is bound by the Commission approved written agreement dated 5 January 1976 in which defendants agreed to pay and plaintiff agreed to accept monthly compensation payments.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. DELMAS PEARSALL

No. 784SC415

(Filed 7 November 1978)

Constitutional Law § 74— witness's pleading of Fifth Amendment—no compulsion to testify for defendant

The trial court properly concluded that a person charged with the same crime for which defendant was on trial and claiming the Fifth Amendment privilege against self-incrimination could not be compelled to testify for defendant, since that person's appeal from her conviction of armed robbery was pending; however, a transcript of that person's testimony at defendant's first trial was admissible in defendant's second trial, since there was no claim of privilege as to the transcript and thus no question as to the effectiveness of her waiver of the privilege in the first trial of defendant.

APPEAL by defendant from *James, Judge*. Judgment entered 18 January 1978, in Superior Court, DUPLIN County. Heard in the Court of Appeals 31 August 1978.

State v. Pearsall

Defendant was convicted of armed robbery of Cynthia Boykin, clerk in a convenience store at Warsaw on 29 August 1977. He appeals from judgment imposing imprisonment.

It appears from the State's evidence that on the night of 29 August 1977, Ms. Boykin was robbed of about $433 by a black female, (thereafter identified as Linda Sutton Williams) carrying a shotgun.

Shortly before the robbery, Police Chief R. P. Wood observed a 1968 gold-colored Plymouth parked at a warehouse next to the convenience store. About the time of the robbery two police officers on patrol observed the Plymouth drive away from the warehouse and stopped the vehicle. Defendant was the operator. After getting permission from defendant to search the vehicle, the officers received a radio call directing them to investigate a robbery at the convenience store. About an hour later the two officers observed the same Plymouth about two blocks from the same store. The operator and sole occupant was Linda Sutton Williams. They saw a shotgun on the floor of the vehicle. Ms. Williams was arrested.

Defendant voluntarily came to the police station about an hour after Ms. Williams' arrest. Defendant made a statement in substance that he and Ms. Williams on the night in question drank some beer and smoked marijuana. She had a shotgun. They talked about robbing the convenience store. She asked the defendant about going in with her, but he refused because the clerk knew him. Defendant loaded the shotgun and showed her how to cock it. When the police car came by the warehouse, he drove off and the officers stopped him. Defendant also stated he knew where part of the stolen money was hidden, but they would have to find it.

Defendant testified that he had no knowledge that Ms. Williams intended to rob the convenience store until just before she left the car with the gun; that he told her that he would have nothing to do with it. He left the car and caught a ride back to town. When he heard the police were looking for him, he went to the police station.

Attorney General Edmisten by Associate Attorney Lucien Capone III for the State.

Bruce H. Robinson, Jr. for the defendant appellant.

CLARK, Judge.

The sole issue raised by this appeal is whether the trial court erred in ruling that Linda Sutton Williams, having claimed the Fifth Amendment privilege against self-incrimination, was not required to testify as a witness for the defendant.

Before taking the stand to testify in his own behalf, defendant called Linda Sutton Williams as his witness. She informed the court that she would not testify. Her lawyer was not present. She had been convicted of armed robbery of the clerk in the convenience store (as defendant was charged in the case before us) but her appeal was pending at the time of this trial. The trial court ruled that she would not be required to testify.

It appears from the record on appeal that counsel then stipulated that "the following is the testimony of Linda Sutton Williams at a trial conducted on October 12 and October 13, 1977."

"Q. Do you know Delmas Pearsall?

A. No, I put a gun to his head in the store.

Q. Weren't you with Delmas Pearsall on this night?

A. No, sir, I wasn't.

Q. He never had occasion to drive your car on this night?

A. I can't tell you if he had or not. Yes, I can, because the police officer said that he stopped him in the car.

Q. You never gave him permission to use your car?

A. No, sir, I didn't, and I would like to break his face for breaking up my car. What is all them scratches doing on my car?"

The transcript of the testimony was read to the jury by defense counsel.

Did Linda Sutton Williams by testifying for the defendant in his trial of October, 1977, waive her constitutional right against self-incrimination?

It is the majority view that a witness who testifies to incriminating matters in one proceeding does not thereby waive the right to refuse to answer as to such matters on subsequent, separate, or independent trial or hearing. *Commonwealth v. Fisher*, 189 Pa. Super. Ct. 13, 149 A. 2d 666 (1959), *rev'd on other grounds*, 398 Pa. 237, 157 A. 2d 207 (1960); C. McCormick, Evidence, § 132 at 281 (2d ed. 1972); 8 Wigmore on Evidence, § 2276 at 470 (McNaughten rev. 1961). However, the privilege against self-incrimination is waived as to the testimony given in the first proceeding, provided that the privilege was effectively waived. Annot., 5 A.L.R. 2d 1404 (1949).

There was no claim of privilege as to the transcript of the testimony of Linda Sutton Williams and thus no question as to the effectiveness of her waiver of the privilege in the first trial of the defendant. Since the appeal from her conviction and judgment was pending at the time she was called as a witness in the case before us, there had been no final disposition of the armed robbery charge against her, and she was protected by her privilege from being compelled to testify in this case. The trial court did not err in its ruling that Linda Sutton Williams would not be required to testify.

No error.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. LORENZA WHITTED

No. 7814SC488

(Filed 7 November 1978)

Criminal Law § 114— summary of defendant's evidence improper—victim falling *into lawn mower*—*prejudicial expression of opinion*

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries where defendant testified that he did not have a knife,

did not cut the complaining witness and did not see him cut, defendant is entitled to a new trial where the trial judge expressed an opinion on the evidence and held defendant up to ridicule and attacked his credibility by summarizing defendant's testimony as evidence tending to show that the prosecuting witness was not cut and must have fallen into a lawn mower, and the judge compounded the error by his later instruction cautioning the jury against going to the alleged scene and the danger of falling into the lawn mower.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 23 November 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 September 1978.

The defendant was indicted for the felony of assault with a deadly weapon with intent to kill inflicting serious injuries in violation of G.S. 14-32 and entered a plea of not guilty. By its verdict, the jury found the defendant guilty of the misdemeanor of assault inflicting serious injury in violation of G.S. 14-33(b)(1). From judgment sentencing him to imprisonment for a term of eighteen months, the defendant appealed.

The State offered evidence tending to show that the defendant and others attacked one Duane Smith with knives on the evening of 7 April 1977 in the parking lot at Forest Hills Shopping Center in Durham County. As a result of the attack by the defendant and others, Smith received cuts to his head, face, neck, chest, and arms. Approximately two hundred stitches were required to close the wounds Smith received as a result of the attack.

The defendant offered evidence tending to show that he and the others were attacked by Smith who pointed a gun at them. The defendant indicated that he at no time attacked Smith with a knife or saw anyone go near Smith with a knife.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Malone, Johnson, DeJarmon & Spaulding, by George W. Brown, for defendant appellant.

MITCHELL, Judge.

By his single assignment of error, the defendant contends that the trial judge committed prejudicial and reversible error in

his instructions to the jury by stating the defendant's contentions upon assumed facts not in evidence and, thereby, expressed an opinion in violation of G.S. 1-180. This assignment of error is meritorious.

At the outset we note that G.S. 1-180 was repealed effective 1 July 1978. The enactment of G.S. 15A-1232, effective concurrently with the repeal of G.S. 1-180, restated and brought forward the substance of the former statute. *See also* G.S. 15A-1222. By Section 39 of Chapter 711 of the Session Laws of 1977, the General Assembly provided that G.S. 15A-1232 "shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him." Therefore, G.S. 15A-1232 controls in the present case, even though the trial here occurred prior to its effective date of 1 July 1978, and continues to provide the defendant the identical rights previously provided him by G.S. 1-180. Although the cases referred to herein were decided under former G.S. 1-180, we find them equally applicable and binding in interpreting G.S. 15A-1232.

During his final instructions to the jury, the trial judge reviewed the evidence relating to the wounds of the prosecuting witness and stated: "There is evidence tending to show that he wasn't cut at all and that nobody saw him cut, that he must have fallen into a lawn mower." After completing the final instructions to the jury, the trial judge cautioned the jury against discussing the case and stated: "Don't run out to the Forest Hills parking center and view the scene. No telling what might happen—might fall in the lawn mower." Having made this statement, the trial judge took a recess until the following morning.

G.S. 15A-1232 imposes upon the trial judge the duty of absolute impartiality and forbids any intimation of the judge's opinion in any form whatever. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to the trial of his case before a neutral judge and an un-

biased jury. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Hewitt*, 19 N.C. App. 666, 199 S.E. 2d 695 (1973).

Not every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial. *State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Blue*, 17 N.C. App. 526, 195 S.E. 2d 104 (1973). Here, however, the statement of the trial judge went to the heart of the very issue for which the defendant was on trial, that is, whether he was possessed of a deadly weapon with which he cut the complaining witness. The defendant took the stand and testified that he did not have a knife, did not cut the complaining witness and did not see him cut. The trial judge summarized the testimony of the witness as evidence tending to show that the prosecuting witness was not cut and must have fallen into a lawn mower. There was, of course, no evidence whatsoever of any lawn mower in the vicinity of the scene of the alleged crime. This erroneous summarization of the defendant's evidence by the trial judge was compounded by his later instruction cautioning the jury against going to the alleged scene and the danger of falling into the lawn mower.

It is possible that the quoted remarks by the trial judge were intended as humorous. Whatever the intent, we find the remarks by the judge, considered in the light of all the facts and attendant circumstances, to have had the result of holding the defendant and his testimony up to ridicule and attacking his credibility. As such, they were of such prejudicial nature as to reasonably be anticipated to have had an appreciable effect on the result of the trial. *State v. Teasley*, 31 N.C. App. 729, 230 S.E. 2d 692 (1976).

Accordingly, the defendant is entitled to, and we hold there must be a

New trial.

Judges MORRIS and ERWIN concur.

JARVIS B. BROWN v. GENNIE BRYANT BROWN AND NORVA O. WADDELL

No. 7813SC28

(Filed 7 November 1978)

Automobiles § 58.2— collision with overtaking vehicle—failure to give turn signal

Plaintiff's evidence was sufficient for the jury in an action to recover for injuries suffered by plaintiff when the car in which he was a passenger struck defendant's car in its left side while defendant was executing a left turn where it tended to show that defendant did not give a turn signal and turned directly into the path of an overtaking vehicle which was in the left or passing lane. G.S. 20-154(a).

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 4 November 1977. Heard in the Court of Appeals 16 October 1978.

This is an appeal by the plaintiff from the entry of a directed verdict in favor of the defendant in the plaintiff's action for injuries alleged to have been sustained as a result of the defendant's negligent operation of an automobile. The plaintiff initially brought this action against two defendants. Prior to trial, a voluntary dismissal was taken as to the defendant, Norva O. Waddell, leaving only the action against the defendant, Gennie Bryant Brown, pending.

At trial the plaintiff offered evidence tending to show that he was a passenger in an automobile driven by Norva Waddell on the evening of 24 June 1976. The automobile was proceeding in a westerly direction on Rural Paved Road 1740 with Waddell driving and the plaintiff asleep on the front seat beside him. Waddell's brother was driving another car preceding them on the same road. As the two cars approached a point at which Rural Paved Road 1740 is intersected to the left by Rural Paved Road 1846, Waddell's brother saw, between fifty and one hundred yards ahead of him, the taillights of a third car driven by the defendant. The car driven by Waddell and containing the plaintiff was, at that time, still directly behind the car driven by Waddell's brother. The defendant's turn signal still was not flashing and was never activated. Seeing the defendant's car, Waddell's brother began to slow the car he was driving. The car driven by Norva Waddell, in which the plaintiff was a passenger, pulled into

the left lane and passed his brother's car traveling at a speed of fifty-five to sixty miles per hour.

As the car driven by Norva Waddell approached or reached the intersection, the defendant's automobile began to turn left into the intersecting road. As the defendant's car executed the left turn, it was struck on the left rear side by the car driven by Waddell and bearing the plaintiff. The right front passenger portion of Waddell's car was extensively damaged causing significant personal injuries to the plaintiff who was still asleep.

At the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). The trial court granted the defendant's motion. The plaintiff appealed from the trial court's judgment granting the defendant's motion and dismissing with prejudice the plaintiff's action against the defendant.

Ray H. Walton for plaintiff appellant.

D. Jack Hooks and Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee.

MITCHELL, Judge.

By his single assignment of error, the plaintiff contends that he presented evidence that the defendant was negligent in turning in front of another car without giving a turn signal. The plaintiff contends this evidence required the trial court to submit the case to the jury, and that the trial court erred in granting the defendant's motion for directed verdict and entering judgment thereon. The plaintiff's assignment and contentions are meritorious.

All of the evidence before the trial court tended to indicate that the defendant did not give a turn signal and turned directly into the path of an overtaking vehicle which was in the left or passing lane. G.S. 20-154(a) does not require that a motorist give a signal before turning unless the surrounding circumstances afford reasonable grounds for apprehending that the turn may affect the operation of another vehicle. *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115 (1950). The plaintiff's evidence tended to show that the circumstances surrounding the collision in this case afforded the defendant reasonable grounds for apprehending that her turn

might affect the operation of another vehicle and that, therefore, a signal was required.

Under circumstances making G.S. 20-154(a) applicable, the statute imposes *both* the duty of giving the required turn signal *and* the duty to see prior to turning that such movement can be made in safety. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966); *McNamara v. Outlaw*, 262 N.C. 612, 138 S.E. 2d 287 (1964). Additionally, without regard to whether the turning driver gives the appropriate signal, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. *Eason v. Grimsley*, 255 N.C. 494, 121 S.E. 2d 885 (1961).

Upon the defendant's motion for directed verdict, the plaintiff's evidence must be taken as true and considered in the light most favorable to him. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977); *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). When viewed in such light, the plaintiff's evidence was sufficient to withstand the defendant's motion for a directed verdict. The Supreme Court of North Carolina, in cases involving defendants turning left into the path of overtaking vehicles and similar on their facts to the present case, has held that the issues of negligence arising from such evidence should be submitted to the jury for determination. *Farmers Oil Co. v. Miller*, 264 N.C. 101, 141 S.E. 2d 41 (1965); *Eason v. Grimsley*, 255 N.C. 494, 121 S.E. 2d 885 (1961). We do not find convincing the defendant's assertion that these cases should be held distinguishable as the overtaking vehicle in each case sounded a warning horn. Instead, we find them controlling authority which required the plaintiff's evidence be submitted to the jury on the issue of the defendant's negligence.

The defendant has cited us to numerous cases involving rear-end collisions as authority for the proposition that the evidence here did not present an issue of negligence on her part. As the car in which the plaintiff was a passenger struck the defendant's car in its left side while the defendant was executing a left turn, we find these cases easily distinguishable and believe the previously referred to cases are controlling.

The defendant has also contended that the evidence clearly reflects that any negligence on her part was not the proximate

cause of the plaintiff's injuries. In support of this contention, the defendant argues that the evidence clearly reveals that the plaintiff could not have seen her turn signal even if it had been activated. The law, however, holds every driver to the duty of seeing that which ought to have been seen. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783 (1968). We cannot say that based upon the plaintiff's evidence taken in the light most favorable to him, it is so clear that he could not have seen a turn signal if given by the defendant at the appropriate time as to require the trial court to allow the defendant's motion for a directed verdict. *See Eason v. Grimsley*, 255 N.C. 494, 121 S.E. 2d 885 (1961).

The plaintiff's evidence was sufficient to withstand the defendant's motion for a directed verdict. We must, therefore, reverse the judgment of the trial court and remand this case for trial.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

KYLE KELLY HARRINGTON AND KYLE HARRINGTON, TRUSTEES v. ALEX S. AND JOYCE S. HARRINGTON

No. 7811SC47

(Filed 7 November 1978)

1. **Rules of Civil Procedure § 60.2— defendants' failure to appear for trial—no excusable neglect**

Defendants' contention that their failure to appear at the August session of court when their case was calendared was excusable neglect is without merit, since defendants were told in June by the trial judge himself that the case would be tried in August; defendants received a copy of the August calendar which listed their case; and any confusion brought about by the receipt of an August and a September calendar, each showing defendants' case calendared for that month, could have been cleared up by a phone call to the clerk of court.

2. **Appeal and Error § 14; Rules of Civil Procedure § 58— notice of appeal not timely—appeal dismissed—requirements for entry of judgment**

The trial court properly dismissed defendants' appeal where more than ten days elapsed between the entry of judgment and the notice of appeal, and

defendants' contention that "entry of judgment" should require that every judgment be set forth on a separate document, as required by federal rules, is without merit, G.S. 1A-1, Rule 58 requiring only that the clerk make a notation in his minutes, such notation to constitute the entry of judgment.

APPEAL by defendants from *Braswell, J.* Orders entered 25 October 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 18 October 1978.

Plaintiffs petitioned for the adjudication of the true boundary line between their property and defendants' property. Defendants filed answer and claimed part of plaintiffs' land by adverse possession. The case was calendared for trial in February, March and June of 1977 and continued each time at defendants' request. According to plaintiffs' uncontradicted testimony, as well as that of the Clerk of Superior Court for Harnett County, when the case was called in June defendant Alex Harrington was told by the court that the case would be tried at the August term.

The case was calendared for the 29 August session, and defendants received a copy of the trial calendar. On 27 August, defendants received another trial calendar indicating that the action was tentatively calendared for trial during the week of 26 September. It apparently is the practice in Harnett County, and common knowledge among the attorneys there, to calendar a case tentatively for a second session in case it is not reached at the first calendared session.

The matter was heard in the 29 August session, but defendants did not appear. Judgment for plaintiffs was entered in open court on 1 September, signed on 9 September, and filed on 12 September. On 21 September, defendants gave notice of appeal. Plaintiffs moved to dismiss the appeal as not timely entered, and defendants moved to set aside the judgment and for a new trial. After a hearing on both parties' motions, the trial court granted plaintiffs' motion to dismiss the appeal; defendants' motions were denied. From these orders defendants appeal.

Morgan, Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan, for plaintiff appellees.

Mast, Tew, Nall & Moore, P.A., by Joseph T. Nall, for defendant appellants.

ARNOLD, Judge.

[1] Defendants first contend that their failure to appear in court on 29 August was excusable neglect, induced by the confusion of receiving two trial calendars with their case calendared for two different months. They argue that it was reasonable for them to assume that the September calendar "extinguished" the August one, and they seek relief under G.S. 1A-1, Rule 60(b)(1) from the judgment entered against them.

We find that defendants' failure to appear at the August session was not excusable neglect. We note initially that relief under Rule 60(b) is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion. *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976). It is clear that the trial court's decision here comports with numerous North Carolina cases on the same topic. *See, e.g., Baer v. McCall*, 212 N.C. 389, 193 S.E. 406 (1937); *Mason v. Mason*, 22 N.C. App. 494, 206 S.E. 2d 764 (1974); *Engines & Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972); *Holcombe v. Bowman*, 8 N.C. App. 673, 175 S.E. 2d 362 (1970). "A lawsuit is a serious matter. He who is a party to a case in court 'must give it that attention which a prudent man gives to his important business.' " *Pepper v. Clegg*, 132 N.C. 312, 315, 43 S.E. 906, 907 (1903). The record indicates that defendants were told in June by the trial court itself that the case would be tried in August. Moreover, any confusion brought about by the receipt of the two trial calendars could have been cleared up by a simple phone call to the clerk of court. It is apparent that defendants did not deal with this case as one would an important business matter.

[2] We also reject defendants' contention that their appeal of the original judgment was improperly dismissed. In the order dismissing the appeal, the trial court found as fact that judgment was rendered and entered in the court minutes on 1 September 1977, signed by the judge on 9 September, and filed on 12 September. Defendants filed appeal entries on 21 September. Under Rule 3(c) of the Rules of Appellate Procedure, "appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry." The trial court found that more than 10 days had elapsed between the entry of judgment and the notice of appeal, and dismissed the appeal.

Defendants argue that this Court should consult the Federal Rules of Civil Procedure for assistance in defining "entry of judgment." They insist that the federal requirement that "every judgment shall be set forth on a separate document," FRCP Rule 58, should be read into our Rule 58. However, G.S. 1A-1, Rule 58 clearly defines an entry of judgment: "where judgment is rendered in open court, the clerk shall make a notation in his minutes . . . and such notation shall constitute the entry of judgment for the purposes of these rules." We need not look outside our rules to expand the definition. Here, judgment was entered on 1 September and notice of appeal was given on 21 September. As the 10-day period was exceeded, the appeal was properly dismissed.

The orders of the trial court are

Affirmed.

Judges CLARK and ERWIN concur.

CAROLYN H. CAISON v. LARRY BRYANT CLIFF AND DELMAS EDWARD BABSON

No. 785SC94

(Filed 7 November 1978)

Damages § 16.1 — automobile accident — subsequent phlebitis — insufficient evidence of permanent injury

Even if testimony by plaintiff's expert medical witnesses was sufficient to permit the jury to find a causal connection between the automobile accident in question and plaintiff's subsequent phlebitis, there was no evidence which would support a finding with reasonable certainty that the phlebitis itself would be permanent so as to require the court to instruct the jury as to permanent injury and future pain and suffering where the only evidence in regard thereto was a doctor's testimony that plaintiff's phlebitis "very well could be of a permanent nature — intermittently improving and may be coming back every so often. It is very difficult to know exactly what is going to happen to this leg."

APPEAL by plaintiff from *Rouse, Judge*. Judgment entered 11 August 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 25 October 1978.

This is a civil action to recover damages for personal injuries sustained by plaintiff on 5 April 1974 when a truck driven by defendant Cliff struck the automobile in which plaintiff was riding. In a pretrial order the parties stipulated that the negligence of Cliff was the proximate cause of plaintiff's injuries and that the only issue to be submitted to the jury was as to damages. The jury awarded plaintiff $3,250.00. From judgment on the verdict, plaintiff appealed.

Addison Hewlett, Jr., for plaintiff appellant.

Smith & Kendrick by Vaiden P. Kendrick for defendant appellee.

PARKER, Judge.

The sole question presented is whether the trial judge erred in instructing the jury that there was not sufficient evidence to justify an award of damages for future pain and suffering and for failing to charge the jury as to permanent injury. We find no error.

> To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural.

Short v. Chapman, 261 N.C. 674, 682, 136 S.E. 2d 40, 46-47 (1964).

In the present case plaintiff presented the testimony of her family physician, Dr. Armistead, who testified that plaintiff had phlebitis of the right leg, that he first diagnosed this in September, 1976, almost two and a half years after the accident, and that in his opinion the injuries plaintiff received in the 5 April 1974 accident "could have been a cause of her phlebitis." Dr. Armistead expressed this opinion in response to a hypothetical question which called for his opinion "based upon a reasonable

medical probability as to whether or not the accident—collision and injury received by Carolyn Caison on April 5, 1974, could have been a competent producing cause of the condition in regard to her leg which was diagnosed as phlebitis." On cross-examination, however, Dr. Armistead testified:

> I have indicated this is a possible cause. I think that is as far as I can honestly go, and this is the extent of my opinion.

Plaintiff also presented the testimony of Dr. Dorman, an orthopedic surgeon, who had treated plaintiff during the period from June to October 1974 for the injuries she received in the 5 April 1974 accident. Dr. Dorman testified that he had discharged plaintiff on 7 October 1974, that he again saw her on 14 May 1975 at which time she still complained of bruising over the right leg but he "could not find anything objective on her" and again tried to reassure her, and that he finally saw her again on 8 August 1977, which was Monday on the week of the trial, at which time she told him she was being treated by Dr. Armistead for phlebitis of the right leg. In response to a hypothetical question, Dr. Dorman stated that in his opinion plaintiff's condition "could or might have been the result of the automobile accident." Although the hypothetical question called for Dr. Dorman's opinion based upon a reasonable medical probability, on cross-examination Dr. Dorman testified:

> I don't recall answering the question a few minutes ago that a reasonable medical probability—that this was—I do not recall that no. A reasonable medical probability to me would mean whatever you were talking about you are reasonably sure in your mind that this is what caused it. It is my opinion that the automobile accident of 1974 is only a possible cause of Mrs. Caison's thrombophlebitis. I would not say medically certainty at all. I would say that it is a possibility.
>
> If I answered it to a reasonable medical probability, I was in error. It could, or might be the cause or a contributing cause to the thrombophlebitis. Any of the factors that we have discussed could or might have also been a contributing factor. It is difficult to determine based on my examination and what I know about this which of these factors it could have been.

> And it would be very difficult based on my examination and what I know about this to determine which of these factors it could have been. My opinion that it is connected with the injury is conjecture on my part.

On redirect examination, plaintiff's counsel asked Dr. Dorman for his opinion "as to the permanent damage" to plaintiff's leg, to which Dr. Dorman replied:

> I feel that this woman has thrombophlebitis of this extremity and this very well could be of permanent nature—intermittently improving and may be coming back every so often. It is very difficult to know exactly what is going to happen with this leg.

"There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty." *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E. 2d 753, 760 (1965). We find no such evidence in this case, and accordingly no instruction permitting the jury to make an award for permanent injuries was warranted. *Short v. Chapman, supra*; see Annot., 18 A.L.R. 3rd 170 (1968). Plaintiff does not contend there was any evidence of a permanent injury other than the evidence relating to her phelebitis. If it be assumed that the testimony given by her doctors on direct examination was sufficient to permit the jury to find a causal connection between the 1974 accident and plaintiff's subsequent phlebitis, an assumption which is highly questionable in view of the explanations made on cross-examination, yet there was no evidence which would support a finding with reasonable certainty that the phlebitis itself will be permanent. The only evidence to which plaintiff's counsel directs attention in this regard is the testimony above quoted of Dr. Dorman that plaintiff's thrombophlebitis "very well could be of a permanent nature—intermittently improving and may be coming back every so often. It is very difficult to know exactly what is going to happen with this leg." If the medical expert can do no more than conjecture, the jury should not be permitted to speculate. At least this is true in absence of any other evidence, and there is none in this record, which would permit the jury to forecast the future with greater certainty.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. CARTER FAGG COLLINS

No. 782SC365

(Filed 7 November 1978)

Searches and Seizures § 9— passenger in vehicle driven by drunk driver—warrantless search for weapon—marijuana discovered—suppression improper

The trial court erred in suppressing evidence seized from defendant's person on the grounds that it was obtained by means of an illegal search and seizure where the evidence tended to show that defendant was a passenger in a car being operated by a drunken driver; defendant also appeared to be intoxicated and had fortified wine and vodka in bottles between his feet; officers were justified in asking defendant to step out of the vehicle to complete their investigation; an officer then saw what appeared to be a knife bulging from defendant's pocket; and when the officer attempted to remove what he thought was a weapon, marijuana fell out of defendant's pocket.

APPEAL by the State from *Cowper, Judge*. Order entered 22 March 1978 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 25 August 1978.

Defendant was arrested on 20 August 1977 in Washington, N.C., and charged with the possession of less than one ounce of marijuana. Before the time for his trial, defendant moved to suppress the evidence on the grounds that it was obtained by means of an illegal search and seizure.

When the motion came on for hearing, defendant agreed that the assistant district attorney could state the facts to the court. The facts thus stated are as follows:

> "On August 20, 1977, at approximately 3:45 a.m., Mr. Billy Nichols of the State ABC Board, Alcohol Law Enforcement Division, and Mr. Rick Batts, Juvenile Officer employed by the Beaufort County Sheriff Department, observed that the automobile in front of them was being operated on a public street in a weaving motion. Officer Nichols turned on his blue light and stopped this automobile. The driver of the

vehicle was approached, arrested, and subsequently convicted of Driving Under the Influence of Intoxicants in the Beaufort County District Court. Officer Nichols approached the passenger side of the vehicle and, upon looking through the window, observed that the defendant Carter Fagg Collins was seated next to the door in the passenger area and between his feet in the floor of the vehicle was a one-half-gallon jug of fortified wine and a pint bottle of vodka. Although the defendant had the odor of an intoxicant on his breath and appeared to be in an intoxicated state, Officer Nichols was unable to form an opinion as to whether its cause was liquor or some other substance.

Officer Nichols requested that the defendant step out of the car, the purpose being to investigate the presence of the half-gallon of wine and pint of liquor. Defendant alighted, whereupon Officer Nichols observed a bulge in the defendant's pants pocket, which at the time appeared to be a knife. Fearing that the bulge might be a weapon, the officer told the defendant to place his hands on the top of the car and that [sic] time commenced to frisk the defendant. Officer Nichols reached into the defendant's pocket and began to remove what he thought to be a knife; however, intertwined in that object and simultaneously removed with it was a plastic bag which contained a substance later determined to be marijuana. The defendant was then arrested for Possession of Marijuana. The object Mr. Nichols first believed to be a knife was upon removal found to be a key chain."

After hearing this statement, the court concluded that the search was not permissive or incident to a legal arrest. He ruled that the evidence was illegally obtained and should be suppressed. The State, under the authority of G.S. 15A-1445, appealed.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Wilkinson & Vosburgh, by James R. Vosburgh, for defendant appellee.

VAUGHN, Judge.

The statement of facts by the assistant district attorney must be treated as a stipulation of facts. There is no evidence to weigh or credibility to consider. The only question before us, therefore, is the admissibility of the evidence on that statement of facts, even though all of those facts are not set out in the judge's order.

Evidence must be suppressed if its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina.

When all of the stipulated facts are considered and, as they must be, taken as true, nothing appears that requires suppression of the evidence in this case. There was clearly no impropriety in stopping the subject vehicle which was being operated by a drunken driver. Defendant, a passenger in the front seat of the vehicle, also appeared to be intoxicated and had, between his feet, a one-half gallon jug of fortified wine and a pint bottle of vodka. The officers were justified in asking defendant to step out of the vehicle to complete their investigation. The officer then saw what appeared to be a knife bulging from defendant's pocket. When he attempted to remove what he thought was a weapon, the marijuana was discovered. None of defendant's constitutional rights were thereby transgressed.

In *Pennsylvania v. Mimms*, 434 U.S. 106, 54 L.Ed. 2d 331, 98 S.Ct. 330 (1977), Mimms was stopped for a routine traffic violation. The officer asked him to step out of the car and produce his registration card and driver's license. When he did so, the officer observed a bulge under his sport jacket. Fearing the bulge might be a weapon, the officer frisked Mimms and discovered a loaded revolver. He arrested him for carrying a concealed weapon. Another revolver was found on the person of the other occupant of the car. The Supreme Court held that where there is no question about the propriety of the initial restrictions upon the person's movement, the additional intrusion resulting from asking the occupants of a car to step out are well justified as a precautionary measure for the protection of the officer. When there are reasonable grounds to order an occupant out of the car, then he may be subjected to a limited search for weapons when the facts available to the officer justify the belief that such an action is ap-

propriate. *See also Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Bridges*, 35 N.C. App. 81, 239 S.E. 2d 856 (1978).

We hold that the court erred in ordering the suppression of the State's evidence in this case. The order is, therefore, reversed.

Reversed.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. JOSEPH LINWOOD BLACKMON

No. 7818SC469

(Filed 7 November 1978)

1. **Assault and Battery § 14.4— felonious assault—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for felonious assault where it tended to show that the victim took a pistol away from defendant's companion during an altercation near a bar and fired several shots with the pistol, and that defendant came out of the bar and shot the victim, inflicting serious injuries.

2. **Assault and Battery § 15.5— self-defense—failure to instruct**

The trial court in a felonious assault case erred in failing to instruct the jury on self-defense where defendant testified that the victim took a pistol away from defendant's companion and fired the pistol at defendant before defendant shot him.

APPEAL by defendant from *Lupton, Judge*. Judgment entered 28 July 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 September 1978.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon with intent to kill, inflicting serious injury. After trial, defendant was found guilty by a jury of assault with a deadly weapon, inflicting serious injury.

From a judgment entered on the verdict imposing a prison sentence of eight years, defendant appealed.

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

Assistant Public Defender Frederick G. Lind for the defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. The State offered evidence tending to show the following:

Defendant and Melvin Jones went to the Village Inn, a bar in High Point, on 28 January 1978. Jones was carrying a pistol in his belt. Once inside, Jones got into an argument with Ben Bethea. Preston McDuffie, a cousin of Bethea's, attempted to break up the argument. McDuffie and Bethea left the Village Inn. In a parking lot across the street, Jones and McDuffie got into a struggle over the pistol. McDuffie took the gun away from Jones and fired several shots. Defendant came out of the bar and shot McDuffie, inflicting serious injuries. Defendant presented evidence tending to show the following: Defendant testified that after McDuffie had wrested the pistol from Jones, McDuffie fired the pistol at him and Jones, and it was then that he shot McDuffie.

Upon motion for judgment of nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State, disregarding all discrepancies and contradictions therein and giving the State the benefit of every inference of fact that may reasonably be deduced therefrom. *E.g., State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The evidence introduced by the State, so considered, is ample to require submission of the case to the jury. Defendant's motion for judgment as of nonsuit was properly denied.

[2] By assignment of error number four, defendant contends the trial court erred in not instructing the jury on self-defense. Under G.S. § 1-180 (now G.S. § 15A-1222, 1232, effective 1 July 1978) it is the duty of the trial court to declare and explain the law arising on the evidence even without a special request for instructions. When the defendant's evidence, even though contradicted by the State, raises an issue of self-defense, the failure of the trial court to charge on self-defense is error. *State v. Hickman*, 21 N.C. App.

421, 204 S.E. 2d 718 (1974). In resolving whether an instruction should be given, the facts are to be interpreted in the light most favorable to the defendant. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973). Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge. *State v. Hickman, supra.*

We think the evidence in this case is sufficient to raise the issue whether the defendant shot McDuffie in self-defense. Although witnesses for the State testified that McDuffie fired the pistol "in the air," defendant testified several times that McDuffie had pointed the pistol at him and fired at him before he shot McDuffie. At one point, the defendant testified as follows:

> I think I heard four shots fired all together before I shot. Those four shots sounded like a 22. As I was looking at it, it was fired from the pistol McDuffie was holding from behind the car. The first shot I didn't see. The second time I heard it it was coming towards me, and the third one went towards the back of Melvin's head. And the third one was at me and him. That is when I fired. It was just seconds after the last pistol shot was fired that I fired at McDuffie. He was still holding the gun up at me.
>
> . . .
>
> I fired right at him. I intended to hit him. I did not intend to kill him. I wanted to stop him. He was shooting at me. I just wanted to stop him.

From the evidence introduced by the defendant it would be permissible for the jury to find that the defendant shot McDuffie in self-defense.

We hold the court erred in not instructing the jury on self-defense.

We do not discuss the defendant's remaining assignments of error since they are unlikely to recur at a new trial.

New trial.

Judges PARKER and MARTIN (Robert M.) concur.

TOWN OF HILLSBOROUGH, A MUNICIPAL CORPORATION, PETITIONER v. PEGGY BARTOW, ALSO KNOWN AS VIRGINIA C. BARTOW, AND HUSBAND, WILLIAM BARTOW, RESPONDENTS

No. 7715SC1024

(Filed 7 November 1978)

1. **Appeal and Error § 30.3— evidence admitted without objection—subsequent motion to strike**

Where testimony is first admitted without objection, a subsequent motion to strike the testimony is addressed to the sound discretion of the court, and petitioner in this eminent domain proceeding failed to show any abuse of discretion by the trial judge in refusing to strike expert testimony of a licensed real estate broker with respect to value of the subject property.

2. **Eminent Domain § 5.3— municipality's condemnation for sewer system—only special benefits to land considered**

The trial judge in an eminent domain proceeding instituted by a municipality did not err in failing to instruct that any damages to which the respondents were entitled must be offset by any general benefits accruing to the respondents as a result of the condemnation of their land, since in condemnation proceedings pursuant to G.S. Chapter 40 the benefits that can be offset are limited to the special benefits to the condemnee's land.

APPEAL by petitioner from *Snepp, Judge*. Judgment entered 21 September 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 20 September 1978.

This is an eminent domain proceeding in which petitioner condemned land belonging to respondents for sewer line construction. On 27 August 1976, three duly appointed commissioners found respondents entitled to $600 damages as a result of the condemnation. To that finding, respondents took exception and appealed.

A trial was held in the superior court on the sole issue of what damages, if any, respondents had suffered as a result of the condemnation of the right of way across their land. The jury returned a verdict of $4,500 damages for the respondents. From a judgment entered on the verdict, petitioner appealed.

Graham & Cheshire, by Lucius M. Cheshire, for the petitioner appellant.

Powe, Porter, Alphin & Whichard, by N. A. Ciompi, for the respondent appellees.

HEDRICK, Judge.

[1] At trial, Mrs. Elizabeth Staton, a licensed real estate broker, was allowed to give testimony as an expert stating her opinion as to the value of the subject property immediately before and immediately after the condemnation. On cross-examination it was elicited from the witness that she had considered the highest and best use of the property to be residential and that she had not considered whether the property was suitable for commercial or industrial use. Petitioner moved to strike the entire testimony of the witness. An exception to the denial of this motion is the basis of petitioner's first assignment of error.

"Where, as here, testimony is first admitted without objection, a subsequent motion to strike the testimony is addressed to the sound discretion of the court and its ruling will not be disturbed unless an abuse of discretion has been shown." *Invesco Financial Services, Inc. v. Elks*, 29 N.C. App. 512, 513, 224 S.E. 2d 660, 661 (1976). *See also* 1 Stansbury's N.C. Evidence § 27 (Brandis rev. 1973). Petitioner has failed to demonstrate any abuse of discretion by the trial judge in denying the petitioner's motion to strike. This assignment of error has no merit.

[2] By its second assignment of error petitioner contends that the trial judge incorrectly charged the jury by failing to instruct that any damages to which the respondents were entitled must be offset by any general benefits accruing to the respondents as a result of the condemnation of their land. The trial judge instructed the jury that any damages to the respondents must be set off only by any special benefits accruing to the landowners as a result of the condemnation.

It is true that the Legislature has specifically provided by statute that when the power of eminent domain is exercised by the Board of Transportation pursuant to G.S. Chapter 136 the measure of damages for taking a portion of a tract of land is "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." G.S. § 136-112(1). *See also North Carolina State Highway Commission v. Gasperson*, 268 N.C. 453, 150 S.E. 2d 860 (1966).

A different measure of damages applies, however, when the condemning authority is a municipal corporation. G.S. § 40-2(2) confers the power of eminent domain upon municipalities operating water systems and sewer systems. In condemnation proceedings they are required to follow the procedure set out in G.S. § 40-11, to -29. When condemnation is pursuant to G.S. Chapter 40 the benefits that can be offset are limited to the special benefits to the condemnee's land. *Goode v. Asheville*, 193 N.C. 134, 136 S.E. 340 (1927); *Stamey v. Burnsville*, 189 N.C. 39, 126 S.E. 103 (1925). The instructions given by the trial judge were fully in accord with the law. This assignment of error has no merit.

No error.

Judges PARKER and MARTIN (Robert M.) concur.

HERBERT McKINLEY HILL AND WIFE, EDNA BYRD HILL, PLAINTIFFS AND THIRD-PARTY PLAINTIFFS v. ESTHER SMITH, DEFENDANT v. WILLIAM H. ANDERSON AND WIFE, MARGARITA H. ANDERSON, THIRD-PARTY DEFENDANTS

No. 7718DC1026

(Filed 7 November 1978)

Appeal and Error § 6.8 — summary judgment denied — appeal fragmentary

Defendant's appeal from an order denying her motion for summary judgment is fragmentary and is dismissed.

APPEAL by defendant from *Pfaff, Judge*. Order entered 29 September 1977 in District Court, GUILFORD County. Heard in the Court of Appeals 21 September 1978.

Plaintiffs instituted an action for summary ejectment claiming that defendant was in unlawful possession of their real property. Defendant answered, contending that she was the owner. The third-party defendants are the predecessors in title to the plaintiffs. Both plaintiffs and defendant moved for summary judgment, and a hearing was held on 26 September 1977. The trial judge concluded that genuine issues of material fact existed and

denied both motions. Defendant appealed from the denial of her motion for summary judgment.

Badgett, Calaway, Phillips, Davis & Montaquila, by Chester C. Davis, for plaintiff appellees.

O'Connor & Speckhard, by Donald K. Speckhard, for defendant appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Luke Wright, for third-party defendants.

VAUGHN, Judge.

The right to appeal from a decision of a superior court judge is governed by G.S. 1-277 which, in pertinent part, provides:

> "An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, 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."

Defendant claims that the facts in this case were undisputed and that the refusal of the trial court to determine the questions of law by the denial of summary judgment in effect denied her a substantial right. Plaintiffs, on the other hand, contend that there are genuine issues of material fact.

Generally, orders denying motions for summary judgment are not appealable. In *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970), this Court stated that the denial of a motion for summary judgment did not affect a substantial right. In *Stonestreet v. Compton Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973), this Court refused to review a denial of defendant's motion for summary judgment stating that the ends of justice would be met by a full trial. *See also Parker Oil Co., Inc. v. Smith*, 34 N.C. App. 324, 237 S.E. 2d 882 (1977). The federal courts have also refused to review a denial of summary judgment. *Valdosta Livestock Co. v. Williams*, 316 F. 2d 188 (4th Cir. 1963). The purported appeal is fragmentary and will be dismissed.

Dismissed.

Judges ARNOLD and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 NOVEMBER 1978

HILGART v. VOLKSWAGEN No. 784SC49	Onslow (76CVS346)	Affirmed
HYMAN v. HYMAN No. 7810DC130	Wake (76CVD3482)	Affirmed
IN RE DAVIS No. 779DC1063	Alamance & Granville (77SP253)	Reversed
IN RE POLLOCK No. 7814DC504	Durham & Granville (77SP860)	Reversed
IN RE PURVIS No. 7718DC989	Guilford (77SP1087)	Affirmed
IN RE RICHARDSON No. 7822DC489	Davidson & Wake (78SP86)	Affirmed
IN RE SCARLETT No. 789DC559	Durham & Granville (76SP400)	Affirmed
STATE v. BENNETT No. 7820SC515	Richmond (78CRS1266)	No Error
STATE v. BURKE No. 7812SC662	Cumberland (74CRS14097)	New Trial
STATE v. CASH No. 7827SC620	Cleveland (75CRS11420)	No Error
STATE v. CLARK No. 7826SC602	Mecklenburg (77CRS60358)	No Error
STATE V. ELLIOTT No. 7812SC573	Cumberland (77CRS40500) (77CRS40503)	No Error
STATE v. FOWLER No. 7829SC502	Rutherford (76CR4243)	No Error
STATE v. GREEN No. 7830SC557	Haywood (76CR4469)	No Error
STATE v. HARRIS No. 7816SC658	Robeson (77CR17036)	No Error
STATE v. HENDERSON No. 7819SC579	Randolph (77CRS11454)	No Error

STATE v. JACKSON No. 7826SC606	Mecklenburg (77CR41333)	No Error
STATE v. JONES No. 7810SC646	Wake (77CR61824)	No Error
STATE v. LATIMER No. 7826SC660	Mecklenburg (77CRS52102)	No Error
STATE v. LEAZER No. 7819SC481	Rowan (77CRS9474)	Affirmed
STATE v. MACKEY No. 7829SC508	Henderson (77CR5620)	No Error
STATE v. NICHOLS No. 7810SC578	Wake (77CRS54858) (77CRS54859)	Judgment Arrested No Error
STATE v. PORTER No. 7826SC426	Mecklenburg (77CRS42260)	New Trial
STATE v. ROBERTSON No. 7819SC645	Randolph (77CRS12060)	No Error
STATE v. ROBINETTE No. 7829SC568	McDowell (75CR4856) (75CR4857)	No Error
STATE v. SHEHAN No. 7829SC540	McDowell (77CRS1163)	No Error
STATE v. SIMPSON No. 782SC533	Washington (77CRS1317)	No Error
STATE v. STANCILL No. 783SC604	Pitt (77CRS17661)	No Error
STATE v. TRIPP No. 783SC553	Pitt (77CRS14440)	No Error
STATE v. WAY No. 7826SC477	Mecklenburg (77CRS30482)	No Error
STATE v. WEBB No. 7817SC436	Rockingham (77CR421) (77CR422)	No Error
STATE v. WILLIAMS No. 7811SC571	Harnett (77CRS9226)	New Trial
STATE v. WILSON No. 7827SC561	Cleveland (77CRS11650)	No Error
TYSON v. TYSON No. 7820DC61	Anson (77CVD100)	Error and Remanded

UTILITIES COMM. v. EDMISTEN No. 7710UC48	Utilities Comm. (G-5, Sub. 121)	Affirmed
UTILITIES COMM. v. EDMISTEN No. 7710UC49	Utilities Comm. (G-21, Sub. 153)	Affirmed
UTILITIES COMM. v. EDMISTEN No. 7710UC112	Utilities Comm. (G-1, Sub. 59)	Affirmed
UTILITIES COMM. v. EDMISTEN No. 7710UC113	Utilities Comm. (G-3, Sub. 70)	Affirmed
UTILITIES COMM. v. EDMISTEN No. 7710UC114	Utilities Comm. (G-9, Sub. 157)	Affirmed
VICK v. VICK No. 787SC34	Edgecombe (77CVS200)	Reversed and Remanded
WOODELL v. PETERS No. 7719SC981	Randolph (77CVS375)	Affirmed

EDLETRAUD RUTHERFORD, ADMINISTRATRIX OF THE ESTATE OF GLENN F. RUTHERFORD v. BASS AIR CONDITIONING CO., INC., AND EARL S. SHELTON

No. 7812SC12

(Filed 21 November 1978)

1. Rules of Civil Procedure § 36— request for admission of facts—timeliness—method for objecting—failure to respond

The trial court properly ordered that plaintiff's request for admissions be deemed admitted because of defendants' failure to respond within the 20-day period allowed under then existing G.S. 1A-1, Rule 36, and defendants' contention that the request for admissions was a nullity because it was filed more than 120 days beyond the last required pleading of defendants is not determinative of the issue, since G.S. 1A-1, Rule 36, as it existed at the time of plaintiff's request, provided that, to avoid having requests deemed admitted, a party must respond within the period of the rule if there was any objection whatsoever to the request, and defendants therefore should have asserted the nullity of the request within the 20-day period.

2. Negligence § 27— failure to warn of dangerous condition—evidence of prior contract admissible

In a wrongful death action where plaintiff alleged negligent installation of a home air conditioning unit and negligent failure of defendant's employee to warn plaintiff's intestate of the dangerous condition alleged to exist in the air conditioning system when he serviced it one week prior to intestate's death, the trial court did not err in allowing testimony concerning the original installation contract or in instructing relative to the original installation and contract, though the court had previously granted defendants' motion for pretrial summary judgment in regard to plaintiff's allegations concerning negligent installation, since such evidence was probative of the fact that defendants were continually aware of the characteristics of the system and knew or should have known the dangerous condition of the unit when the employee made his service call; if defendants were concerned that the evidence might be understood by the jury to relate to a matter not in issue, defendants could have requested a limiting instruction; and the court properly instructed the jury, as requested by defendants, that the plaintiff's only cause of action arose from the alleged negligent conduct of defendant's employee who made the service call.

3. Death § 7.4— wrongful death—deceased's earning capacity—expert testimony—statistical computation not given

The trial court in a wrongful death action did not err in permitting testimony of an expert economist concerning the expected income of intestate, since, other than the statistical basis for the expert's calculations, the facts relating to the deceased's earning capacity which could be found by the jury were properly included in the hypothetical question put to the expert, and the failure to elaborate the expert's computations step by step went to the weight to be given his testimony, not to its admissibility.

4. Appeal and Error § 30.3— unresponsive answer—motion to strike required—exception to denial required on appeal

Where there is a voluntary statement by a witness not called for in the question, the only way to take advantage of the error is to move to strike the testimony and to except to the denial of that motion on appeal.

5. Evidence § 55— expert in electrical engineering—personal observation—opinion admissible

In a wrongful death action where the evidence tended to show that deceased was electrocuted when he came into contact with uninsulated wires while changing the air filter in his air conditioning unit, the trial court did not err in allowing a professor of electrical engineering from N. C. State University to testify, over objection, that it would not be necessary, for safety reasons, to cut off the power to the unit if the capacitor had been shielded properly or placed in a more remote location, since the witness had personally inspected the air conditioning unit in question and was qualified by opportunity, training and experience to give such an opinion.

6. Death § 3.6; Negligence § 13.1— wrongful death action—electrocution—no contributory negligence as matter of law

In a wrongful death action where the evidence tended to show that deceased was electrocuted when he came into contact with uninsulated wires while changing the air filter in his air conditioning unit, evidence was insufficient to show that decedent was contributorily negligent as a matter of law where the evidence did not show that deceased knew or in the exercise of reasonable care should have known of the dangerous condition of the capacitor, nor did it show that he failed to exercise due care to avoid contact with the starter coil when he attempted to change filters.

7. Limitation of Actions §§ 3.1, 4.3— installation of air conditioning unit—wrongful death action seven years later barred—no revival

Trial court properly granted summary judgment for defendants on plaintiff's claim for wrongful death based on negligent installation of an air conditioning unit and breach of warranty arising upon that installation, since plaintiff's action, instituted on 15 August 1972 and based on the installation which occurred on 20 July 1965, was barred by the three year statute of limitations of G.S. 1-52 and could not be revived by G.S. 1-15(b), which became effective three years after plaintiff's action was already barred.

APPEAL by defendants from *Herring, Judge*. Judgment entered 11 June 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 September 1978.

Plaintiff, the duly qualified administratrix of the estate of Glenn F. Rutherford, instituted this action 15 August 1972 for the recovery of damages resulting from the wrongful death of Glenn F. Rutherford. The plaintiff alleged: (1) negligent installation of a home air conditioning unit in July of 1965, and (2) negligent

failure of Earl S. Shelton, employee of Bass Air Conditioning, to warn plaintiff's intestate of the dangerous condition alleged to exist in the air conditioning system when he serviced the system 24 August 1970, one week prior to decedent's death.

Defendants, Bass Air Conditioning Company, Inc. and Earl S. Shelton, answered the complaint 13 November 1972 denying the material allegations while averring contributory negligence and pleading the statute of limitations in bar of the action.

Plaintiff filed a request for admissions pursuant to G.S. 1A-1, Rule 36 on 3 August 1973. No answer or objection to the requests was filed when, on 2 May 1977, plaintiff filed a motion requesting the trial court to rule in its pretrial order that the requested admissions be deemed admitted. Defendants responded to plaintiff's motion on 9 May 1977 by requesting the trial court to deny the motion or in the alternative, in its discretion to accept the answers tendered with the response.

Plaintiff filed a motion for summary judgment 20 May 1977 seeking a ruling that, as a matter of law, defendants were negligent in installing the unit and in failing to warn of its dangerous condition. Defendants filed a cross-motion for summary judgment 23 May 1977 seeking to dismiss the action as barred by the statute of limitations. The trial court heard all three of the foregoing motions 1 June 1977. The court ordered that the plaintiff's requests for admissions be deemed admitted. He also ordered dismissal of plaintiff's cause of action insofar as it related to negligent installation.

The case was tried before a jury on the issue of defendants' negligent failure to warn the deceased of the dangerous condition of the air conditioning unit. At the trial, Mrs. Rutherford testified that her husband died as the result of an electrical shock received 31 August 1970, when he attempted to change the air filters of the central air conditioning unit in his home. She testified that shortly after moving into their home at 5461 Granger Place in Fayetteville in July of 1965, she and the decedent arranged with Bass Air Conditioning Company, Inc. to have a Carrier Weathermaking system attached to the existing gas furnace in their home and that three days after initial installation the system had to be modified to provide sufficient cooling.

Plaintiff's evidence further tended to show that from the time of installation until August of 1970, the system was serviced exclusively by Bass except when either deceased or the plaintiff periodically replaced the air filters accessible through that portion of the furnace located in the hall closet. The Rutherfords returned from a trip in August of 1970, and found their air conditioning unit malfunctioning. The deceased called Bass Air Conditioning Company, Inc. to service the system. Defendant, Earl S. Shelton, an employee of defendant Bass, responded to the service call. While working in the hall closet portion of the unit, Shelton noticed that the air filters were dirty and needed to be replaced. He told the plaintiff that he did not at that time have the correct size filters to replace those in the unit. Mrs. Rutherford testified that Shelton told her and her husband nothing about cutting the power off before changing the filters or about the danger posed by exposed wires on a starter coil which was added to the unit after its original installation. Testimony was presented indicating that Bass employees had installed the external capacitor, which was located in close proximity to the filters, to boost the power of the fan motor located in the furnace.

The director of the Cumberland County Electrical Inspection Department testified on behalf of the plaintiff that wires leading into the starter coil, which was added to boost the cooling system, were not insulated and that the electrical connectors were exposed and unshielded. He concluded that, in his opinion, the condition of the starter coil in close proximity to the air filters was unsafe and that the coil would have been safe as installed if properly shielded. Other experts testified that the unit was unsafe since anyone who changed filters would be exposed to unshielded electrical wiring.

The plaintiff introduced evidence concerning the decedent's life expectancy prior to his death, the decedent's family life, and his plans for the future. She presented an economist to testify to the present monetary value of lost services to the deceased's survivors. Certain admissions were then introduced over defendant's objection.

Defendants' motion for directed verdict on the grounds that plaintiff had failed to establish negligence and that plaintiff was contributorily negligent as a matter of law was denied.

The defendants produced evidence that tended to show that the unit installed by Bass did not contain a high voltage starter coil located within the furnace assembly unit and that the motor located within the unit which was boosted by the capacitor was a rebuilt model not normally installed by the defendant Bass.

Defendant Shelton testified that when he made the service call the unit contained no external starter coil. He further testified that he advised the Rutherfords to turn off the power to the unit when changing the filters so to avoid possible injury from the blower fan. Other testimony was presented from experts indicating that if the power had been turned off decedent would not have been harmed by contact with the coil. The former service manager of Bass presented testimony that tended to show that Bass had no reason to, and did not, install the unshielded coil which caused decedent's death.

Defendants' renewed motion for a directed verdict was denied at the conclusion of their evidence. The jury returned a verdict awarding plaintiff $190,350. The defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a motion for a new trial were denied. From entry of judgment on the verdict defendant appeals.

Plaintiff cross-appeals asserting error in the trial court's granting of partial summary judgment ordering dismissal of plaintiff's allegations concerning negligent installation of the air conditioning unit.

Barrington, Jones, Witcover & Carter, by Carl A. Barrington, Jr., Henry W. Witcover, and C. Bruce Armstrong, for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay, by C. Woodrow Teague and Robert W. Kaylor, for defendant appellants.

MORRIS, Judge.

Defendants have brought forward numerous assignments of error based on orders and rulings of the trial court. We will address each of their eleven supporting arguments in the order they appear in defendants' brief. Additionally, plaintiff assigns as error on cross-appeal the trial court's granting of summary judgment relating to the allegations of negligent installation of the air conditioning unit.

Defendants' Appeal

[1] The first question presented is whether the trial court properly ordered that plaintiff's request for admissions be deemed admitted because of defendants' failure to respond within the 20-day period allowed under then existing G.S. 1A-1, Rule 36. Counsel for plaintiff stated at oral argument that admission No. 15 was a crucial element of his proof on the source of the shock causing decedent's death. He also conceded that without admission No. 15, his other evidence at trial may have been insufficient to withstand a motion for directed verdict on the issue of proximate cause. Furthermore, the jury indicated the importance it placed on the admission when it returned to the courtroom during deliberations and requested that admission No. 15 be read again. The following statement was ordered to be deemed admitted:

> "15. That plaintiff's decedent died as the result of contacting an unshielded high voltage starter coil which was part of the air-conditioning system upon which work was performed as recited in Exhibit B."

Defendants argue that they were justified on two grounds in not responding to the request for admissions. First, defendants assert that the request for admissions was a nullity because it was filed more than 120 days beyond the last required pleading of defendants. Defendants' answer was filed 13 November 1972 and the request for admissions was filed 3 August 1973. The General Rules of Practice, Rule 8 provides:

> "All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery."

Secondly, defendants argue that the request for admissions failed to comply with G.S. 1A-1, Rule 36 as it appeared at the time the request was served. At that time G.S. 1A-1, Rule 36(a) required that the party requesting admissions designate in the request a period of not less than 20 days after service in which the opposing party must answer. Because of an apparent typographical error, plaintiff's request was technically defective. The request was filed on 3 August 1973 and required defendants "on or before the *3rd* (sic) day of August 1973", to admit or deny

certain matters. Plaintiff would have strictly complied with the rule had he demanded response by the *23rd* of August.

We do not find it necessary to determine whether there was a waiver of the period for discovery as contended by plaintiff. We find that the plain words of G.S. 1A-1, Rule 36, as they appeared in August of 1973, sufficiently dispose of this issue. The statute provided in pertinent part as follows:

> ". . . Each of the matters of which an admission is requested *shall* be deemed admitted unless, within a period . . . not less than 20 days . . . , the party to whom the request is directed serves upon the party requesting the admission either
>
> (1) A sworn statement denying [matters] . . . or
>
> (2) Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or *that the request is otherwise improper in whole or in part.*" (Emphasis added.)

We understand G.S. 1A-1, Rule 36 to mean precisely what it says. A party, to avoid having the requests deemed admitted, must respond within the period of the rule if there is any objection whatsoever to the request. We find the following comment concerning the operation of the federal counterpart to N.C.R.C.P. 36 to be an accurate statement of the law as it should be in this State:

> "The rule is quite explicit that matters shall be deemed admitted unless, within the specified time limits, a sworn statement is filed or objections made.[1] It is needlessly wasteful of judicial effort to allow a party to obtain a reversal on appeal because of an objection he could have but failed to make when the request was served." 8 Wright and Miller, Federal Practice and Procedure: Civil § 2259 at 726. *Contra, Campbell v. Blue*, 80 So. 2d 316 (Fla. 1955).

We note that the trial court, within its discretion, may allow the filing of an untimely answer when it will aid in the presentation of the merits and will not prejudice the party who made the request. *See* 8 Wright and Miller, supra, § 2257. However, in this

1. Under the present G.S. 1A-1, Rule 36 (1977 Cum. Supp.) it is no longer necessary to make a sworn statement. The rule now only requires that the response be signed by the party or counsel. Shuford, N.C. Civil Practice and Procedure § 36-6 (1977 Supp.).

case, there is nothing in the record indicating excusable neglect on the part of defendants. Furthermore, allowing the tendered response only days before trial would have prejudiced plaintiff by requiring the preparation of further evidence on issues that were assumed to have been resolved. We cannot say the trial court abused its discretion in refusing to accept the tendered response. Similarly, the trial court was correct in ordering the requests deemed admitted.

[2] The defendants assert that the trial court committed prejudicial error when it allowed testimony concerning the original installation contract and when the court charged the jury relative to the original installation and the contract.[2] Defendants argue that the original contract and installation was irrelevant to the case before the jury since the court had previously granted defendants' motion for partial summary judgment in regard to those allegations concerning negligent installation. Plaintiff argues that such evidence was relevant to the issues of contributory negligence and defendants' knowledge of the condition of the air conditioning system. We agree with plaintiff.

The plaintiff's evidence concerning the contract for original installation by defendant Bass and the work they did on the unit to modify it, though incompetent on the issue of original negligent installation, is probative of the fact that defendants were continually aware of the characteristics of the system and knew or should have known the dangerous condition of the unit when defendant Shelton made his service call. It is clear that the evidence was relevant and a crucial element in establishing negligence. Counsel for defendants, if concerned that the evidence might be understood by the jury to relate to a matter not in issue, would have been entitled to a limiting instruction. *See generally* 1 Stansbury, N.C. Evidence § 79 (Brandis Rev. 1973). Furthermore, we do not find that the instructions of the court confused the issues and recapitulated irrelevant evidence. The trial court, after summarizing the evidence of the parties, instructed the jury, precisely as requested by the defendants, that the plaintiff's only cause of action arises from the alleged negligent conduct of defendant Shelton on 24 August 1970. This instruction was correct in law and sufficiently brought into focus

2. We note that the grounds for exception Nos. 5, 6, and 27 do not relate to assignment of error No. 3 and therefore will not be considered on appeal. Rule 10(c), North Carolina Rules of Appellate Procedure.

the issues of the case to avoid jury confusion. Defendant's second assignment of error is overruled.

[3] Defendants further assign as error the trial court's permitting, over the objection of defendants, testimony of an expert economist. Defendants contend that an expert witness may not testify to the present monetary value of the decedent to the persons entitled to receive damages under G.S. 28A-18-2(b) unless either (1) the expert bases his opinion on a complete set of facts, figures, statistics and charts as presented into evidence or (2) the opinion is based on a formula presented to the jury and demonstrated to them by the use of neutral figures. The defendants' objection to the hypothetical question, which asked the expert if he had an opinion satisfactory to himself "as to the present monetary value of reasonably expected net income for the *statistical group of persons to which this deceased person belonged*", placed into issue whether the expert could give his opinion without first having placed into evidence the statistics, formulae, calculations and economic assumptions used in arriving at his opinion. There is no question but that, other than the statistical basis for his calculations, the facts relating to the deceased's earning capacity which could be found by the jury were properly included in the hypothetical question.

The facts, figures, statistics, and charts relied upon by the witness, although not offered into evidence, are customarily relied upon by persons in the profession. *See generally* McCormick, Evidence §§ 14-16 (2d Ed.). Based upon the better reasoned cases, such information may be relied upon by the expert regardless of whether admissible into evidence. *See e.g., State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) (medical expert allowed to testify based on personal knowledge and information found in patient's records); *Pots v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968) (medical expert allowed to give opinion as to what was shown by a report and x-ray not introduced into evidence but used in reaching his diagnosis); *see also* McCormick, Evidence, supra.

Although the North Carolina decisions do not involve expert testimony concerning the measure of damages in a wrongful death action, the principles established in cases of medical expert testimony are equally applicable to the case *sub judice*. The

diagnosis of illness or the cause of injury is within the expertise of physicians and is based upon all reliable information which physicians consider when making such a diagnosis. Similarly, an expert in economics commonly relies upon statistics and data relating to all aspects of the work force and economy which affect the present value of the loss of future income earning capacity. We note that the basis of defendants' objection is not that the measure of damages recoverable, as testified to by plaintiff's expert economist, is improper under G.S. 28A-18-2. *Cf. Wetherbee v. Elgin, J. & E. R. Co.*, 191 F. 2d 302 (7th Cir. 1951); *Heppner v. Atchison T. & S.F.R. Co.*, 297 S.W. 2d 497 (Mo. 1956); *Wawryszyn v. Ill. Cent. R. Co.*, 10 Ill. App. 2d 394, 135 N.E. 2d 154 (1956); *see generally* Annotation, 79 A.L.R. 2d 259 (1961).

It has been accurately observed that the probative value of expert testimony is probably weakened by the failure, as in this case, to elaborate on the expert's computations step by step. *See Thomas v. Potomac Electric Power Co.*, 266 F. Supp. 687 (D.C. Dist. Col. 1967). However, that is not to say that such testimony is a prerequisite to admissibility of the opinion. There are no North Carolina cases that require expert testimony to assist the jury in assessing damages in a wrongful death action. *Contra, Haddigan v. Harkins*, 441 F. 2d 844 (3d Cir. 1970) (jury required more guidance in measuring damages [decision may be affected by Federal Rules of Evidence, Rule 703]). However, if an expert is utilized, the traditional rule of evidence for the introduction of writings would still apply to require that certain statistics, charts, and tables offered into evidence have a proper foundation for their admission. *Plant v. Simmons*, 321 F. Supp. 735 (D.C. Md. 1970); *Bennett v. Denver & Rio Grande W.R. Co.*, 117 Utah 57, 213 P. 2d 325 (1950); *Mitchell v. Arrowhead Freight Lines*, 117 Utah 224, 214 P. 2d 620 (1950). In this case, we hold that the expert economist's testimony was competent. It is the function of cross-examination to expose the weaknesses of that expert's opinion. The primary limitation on the experts' analysis is that the court will not permit expert testimony based upon obviously inadequate data. *Schafer v. R.R.*, 266 N.C. 285, 145 S.E. 2d 887 (1966); *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). We note, however, that whether certain data is a sufficient basis for an opinion will often be a matter within the witness' expertise. Although the lack of sufficient basis for testimony goes

primarily to the weight to be accorded such evidence, the courts have the inherent power to limit evidence when the chance of misleading the jury outweighs the probative value of the evidence. *See generally* 1 Stansbury, N.C. Evidence § 80 (Brandis Rev. 1973).

[4] Defendants complain that Mrs. Rutherford was allowed to testify in behalf of her dead husband and that such an assertion of what her deceased husband had not been told was inadmissible hearsay. The following appears in the record:

> "Q. . . . [W]hat, if anything, did any employee or agent or personnel from Bass ever tell you about turning the unit off when you changed the filters?
>
> A. We were never told anything . . .
>
> MR. NANCE: Objection.
>
> COURT: Overruled.
>
> MR. NANCE: Your Honor, my objection is to the statement 'we'. She can only answer for herself.
>
> COURT: Overruled."

The question calls for a non-objectionable, hearsay response from the witness to determine whether *she* had notice of the need to turn off the unit. The response sought is unobjectionable because it tends to establish the state of mind of the witness—whether she had knowledge of a warning. *See* Stansbury, N.C. Evidence § 141 (Brandis Rev. 1973). However, the response received contained an assertion that the decedent similarly had not been told to turn the unit off before changing filters. This fact was not, so far as can be ascertained from the record, within the witness' knowledge. This answer was not competent. Nevertheless, the proper procedure for defense counsel would have been to move to strike the incompetent and unresponsive portion of the answer. *See* Stansbury, supra, § 27. Where there is a voluntary statement by a witness not called for in the question, the only way to take advantage of the error is to move to strike the testimony and to except to the denial of that motion on appeal. *State v. Green*, 187 N.C. 466, 122 S.E. 178 (1924); *State v. McMullin*, 23 N.C. App. 90, 208 S.E. 2d 228 (1974); *State v. Wooten*, 20 N.C. App. 499, 201 S.E. 2d 696 (1974); *State v. Norman*, 19 N.C. App. 299, 198 S.E. 2d 480

(1973). When there is a proper procedure in the trial court for a party to negate the possible prejudice of unresponsive statements by a witness, he is admonished to do so at trial rather than wait to seek his relief in this Court. This assignment of error is overruled.

The defendants have objected to the form of questions asked of Mrs. Rutherford. It suffices to say that the defendants have failed to show that the trial court abused its discretion in allowing the questions, as propounded, to be answered. *See generally* Stansbury, *supra*, § 31. We also find that the questions as phrased by plaintiff's counsel did not make an assumption that the starter coil was a necessary part of the unit.

Defendants assign as error the court's allowing plaintiff's expert to answer, over objection, the question whether a homeowner could reasonably assume, when changing filters in that unit, he would not come into close proximity with unshielded electrical wiring. Although perhaps technically objectionable as phrased, read in context with other testimony by the expert which was not the subject of objection, we are convinced that the answer was not prejudicial to the defendants. The trial court refused to allow the witness to respond on cross-examination to defendants' question whether the appearance of the capacitor "would tell anybody that that was an open, uninsulated electrical terminal". Not only was the question as phrased not within the witness' sphere of expertise, the error was not properly preserved by offering the witness' answer for the record. *See generally* Stansbury, supra, § 26.

[5] A professor of electrical engineering from North Carolina State University was allowed to testify, over objection, that it would not be necessary, for safety reasons, to cut off the power to the unit if the capacitor had been shielded properly or placed in a more remote location. The witness had personally inspected the unit at the Rutherford home. A similar question was before the Court in *Hassel v. Daniels*, 180 N.C. 37, 103 S.E. 897 (1920). There an expert machinist was allowed to testify that the machine was safe if plaintiff had stood on the box provided by the employer to oil the machine. The Court observed:

> "While to some extent in the form of an opinion, this testimony is really the statement of a fact, but whether the

one or the other, the witness having personal observation of conditions, and being qualified by opportunity, training, and experience to give an opinion that would aid the jury to a correct conclusion on the subject, the testimony was in our opinion properly received. [Citations omitted.]" 180 N.C. at 39, 103 S.E. at 898.

We find, for the reasons stated in *Hassel*, that the trial court properly permitted the witness to answer the question.

The defendants' assignment of error relating to the admission of the 1968 National Electric Code on the grounds of relevance is not well taken. The electrical standards apply to negligence of defendants in failing to correct the improper installation or warn of danger regardless of whether the original installation violated the Code. Defendants' assignment of error asserting that Mr. Bass should have been allowed to answer the question whether Bass Air Conditioning installed the rebuilt motor similarly misses the point of the trial court's ruling. The evidence was properly excluded because it was not within the personal knowledge of the witness. He had already testified that his records did not indicate that his company had installed the motor and that his knowledge of what was done was based only on those records.

[6] Defendants contend that the decedent was guilty of contributory negligence as a matter of law and that it was error for the trial court to deny defendants' motion for a directed verdict at the end of the plaintiff's evidence and at the end of all the evidence. We reaffirm the specific application of the rule of ordinary care; *i.e.*, that a person, upon seeing an electrical wire known to be dangerous, has a duty to avoid contact with it. *See Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956); *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849 (1952). However, this Court, considering the inferences from the evidence at trial in the light most favorable to the plaintiff, cannot conclude as a matter of law that (1) deceased knew or in the exercise of reasonable care should have known of the dangerous condition of the capacitor and (2) he failed to exercise due care to avoid contact with the starter coil when he attempted to change filters in the unit on 31 August 1970.

We note that the trial court's instructions on the standard of care arising out of the contract for the servicing of plaintiff's air conditioning unit were entirely proper. The existence of that contract creates a duty on the part of the serviceman toward plaintiff's intestate. The standard of care remains that of the ordinary reasonably prudent man in an action in tort. *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978); *Peele v. Hartsell*, 258 N.C. 680, 129 S.E. 2d 97 (1963); *Pinnex v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893 (1955). The trial court explained to the jury that a contract arose between the parties when defendants accepted the service call. Furthermore, the instructions adequately distinguished the installation contract and the service contract. This assignment of error is overruled.

Defendants' assignment of error No. 20 is directed to another portion of the charge. It is without merit and, in our opinion, further discussion is not necessary.

Plaintiff's Cross-Appeal

[7] The trial court granted defendants' motion for partial summary judgment on those allegations by plaintiff relating to negligent installation of the air conditioning unit and breach of warranty arising upon that installation. The motion for summary judgment was based on defendants' assertion that G.S. 1-52 barred any claim relating to the installation which occurred 20 July 1965. Plaintiff's complaint was filed 15 August 1972.

G.S. 1-52(1) provides that an action "upon a contract, obligation or liability arising out of a contract, express or implied" must be brought within three years of the accrual of the cause of action. Similarly, G.S. 1-52(5) requires that an action for injury to the person be brought within three years. G.S. 1-15(b), effective 21 July 1971 and enacted to remedy the harsh results of prior law, is not applicable to this case.

> " '[I]t is well settled that the time within which an action may be brought may be enlarged as to pending causes *not barred*, and that such legislation [extending the time] is not deemed retroactive and does not impair vested rights' (Emphasis added)." *Ports Authority v. Roofing Co.*, 294 N.C. at 84, 240 S.E. 2d at 352 (1978) (quoting, *McCrater v. Engineering Corp.*, 248 N.C. 707, 710, 104 S.E. 2d 858, 861 (1958)); *see also Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933).

Cases prior to the enactment of the above statute consistently hold that "[t]he cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Wilson v. Development Co.*, 276 N.C. 198, 214, 171 S.E. 2d 873, 884 (1970); *see also Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965). Plaintiff's cause of action, therefore, was barred on 20 July 1968, and G.S. 1-15(b) may not revive that action. The trial court properly granted partial summary judgment dismissing those allegations relating to negligent installation.

Plaintiff's other assignments of error on cross-appeal have been abandoned. Rule 28, North Carolina Rules of Appellate Procedure.

Affirmed.

Judges MITCHELL and ERWIN concur.

WILLIAM E. MARSHALL, JR., PLAINTIFF v. MICHAEL J. KEAVENY AND WIFE, MARION T. KEAVENY, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. HANNON REAL ESTATE, INSURANCE AND DEVELOPMENT COMPANY, THIRD PARTY DEFENDANT.

No. 7810DC120

(Filed 21 November 1978)

1. **Evidence § 32.6; Fraud § 11— parol evidence rule—fraudulent misrepresentations**

A provision in a written contract for the sale of a house that no representations other than those expressed in the contract were a part of the agreement did not so closely relate to the precise subject matter of the seller's alleged misrepresentations of the heated square footage of the house as to preclude an action by the buyer based on those alleged misrepresentations, and parol evidence was, therefore, admissible to show that the written contract was procured by the alleged misrepresentations of the seller's agent as to the heated square footage of the house.

2. **Fraud § 5.1— representations as to square footage of house—no reasonable reliance by buyer**

The buyer of a house could not reasonably rely on representations of the seller or the seller's agent as to the heated square footage of the house where the buyer had full opportunity to inspect the house and could have determined the square footage therein for himself by simple measurements and mathematical computations.

3. Rules of Civil Procedure § 56.5— ruling on summary judgment motion—findings and conclusions not necessary

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.

APPEAL by plaintiff from *Parker, Judge.* Judgment entered 4 November 1977 in District Court, WAKE County. Heard in the Court of Appeals 26 October 1978.

The plaintiff, William E. Marshall, Jr., brought this action against the defendants, Michael J. Keaveny and wife, Marion T. Keaveny, alleging that they had misrepresented the number of heated square feet in their home, thereby fraudulently inducing the plaintiff into purchasing that home. The defendants answered denying the allegations of the complaint and moving that the action be dismissed. The defendants later moved for summary judgment in their favor pursuant to G.S. 1A-1, Rule 56 on the ground that no genuine issue as to any material fact was presented and that the defendants were entitled to judgment as a matter of law. Both parties filed affidavits. After a hearing, the trial court granted summary judgment for the defendants from which the plaintiff appealed.

The facts hereinafter set forth, as drawn from the pleadings and affidavits of the parties, are not in dispute. During the fall of 1971, the defendants listed their home at 915 Collins Drive in Raleigh with Hannon Real Estate, Insurance and Development Company [hereinafter "Company"], the third party defendant. In response to a newspaper advertisement, the plaintiff spoke by telephone to Patrick Hannon, Jr., an employee of the Company. During this conversation Hannon advised the plaintiff that the house contained 1,700 heated square feet. The advertisement which the plaintiff answered in calling the Company also referred to the house as having 1,700 heated square feet. At the bottom of the printed portion of that advertisement and immediately above a photograph of the house, however, the advertisement stated that, "The above information is believed to be accurate but is subject to verification by the buyer." On the same day he first spoke to Hannon by telephone, the plaintiff went to the house. While walking through the house, he was again told by Hannon that the house contained 1,700 heated square feet.

After viewing the house, the plaintiff made an offer to purchase it for $31,000 or $1,500 less than the listed price of $32,500. The defendants accepted his offer, and the parties entered into a written contract for the purchase of the house from the defendants by the plaintiff with the plaintiff making an earnest money deposit of $500. The contract made no reference to the number of square feet contained in the house and contained a clause stating that, "It is understood that no representations other than those expressed herein, either oral or written, are a part of this agreement."

After entering into the contract to purchase the house, the plaintiff discovered that it in fact contained only 1,410 heated square feet. The plaintiff notified Hannon of his discovery, and Hannon met the plaintiff at the house. They then measured the house and ascertained that it contained only 1,410 heated square feet. The plaintiff sought to have the defendants release him from the terms of the contract, but they refused to return his earnest money or otherwise agree. On 3 December 1971 the plaintiff purchased the house pursuant to the terms of the contract and, at the same time, served the defendants with a written reservation of any rights to recourse he might have as a result of misrepresentations by the defendants or their agents. The plaintiff initiated this action on 1 November 1974. The defendants filed their motion for summary judgment on 11 October 1977, which resulted in the summary judgment in their favor from which the plaintiff appealed. The trial court's order of summary judgment made no reference to the third party defendant, and it is not involved in this case on appeal.

Donald H. Solomon for plaintiff appellant.

Ragsdale, Liggett & Cheshire, by William J. Bruckel, Jr., and Michael A. Swann, for defendants-third party plaintiffs-appellees.

MITCHELL, Judge.

The plaintiff first assigns as error the action of the trial court in granting the defendants' motion for summary judgment. He contends in support of this assignment that his pleadings and the documents filed in support thereof were sufficient to support an action against the defendants for fraudulent misrepresentation of the heated square footage contained in the house which they sold to him. We do not agree.

Our courts have joined the preponderance of American jurisdictions in holding that, in proper cases, a seller's fraudulent misrepresentation concerning the acreage or quantity of real property which he sells to a buyer is actionable. *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953); *Shell v. Roseman*, 155 N.C. 90, 71 S.E. 86 (1911); *Hill v. Brower*, 76 N.C. 124 (1877); *Walsh v. Hall*, 66 N.C. 233 (1872) (disapproving prior cases *contra*); 37 Am. Jur. 2d Fraud and Deceit § 233, pp. 312-13; Annot., 54 A.L.R. 2d 660 (1957). In such cases the buyer has the right at his election to rescind or to keep the property and recover the difference between its actual value and its value as represented. *Horne v. Cloninger*, 256 N.C. 102, 104, 123 S.E. 2d 112, 113 (1961). There is also considerable authority for the proposition that a seller is responsible to third parties for the misrepresentations of his agent or real estate broker as to acreage. *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964); Annot., 58 A.L.R. 2d 10 (1958). Courts have not normally distinguished between fraud as to real or personal property in choosing such rules. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965); Annot., 13 A.L.R. 3d 875, 936 (1967).

[1] The defendants contend nonetheless that any misrepresentations by them or their agents as to the heated square footage contained in the house they sold the plaintiff could not be the basis of an action against them by the plaintiff. In support of this contention, the defendants point out that the contract for the purchase and sale of the house made no reference to heated square footage and specifically provided that, "It is understood that no representations other than those expressed herein, either oral or written, are a part of this agreement." The defendants assert that to allow the plaintiff to present evidence concerning the representations made by Hannon as to the heated square footage of the house would be to allow parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the written contract and would violate the parol evidence rule. This argument overlooks the fact that an action for fraudulent misrepresentations inducing the plaintiff to enter a contract is an action in tort and not an action in contract, and the rule that prior conversations and negotiations are merged into the writing does not apply. *See Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E. 2d 522 (1965).

Fraud alleged as a defense to the enforcement of a written contract is not an attempt to vary or contradict the terms of the contract, for if the fraud is proven it nullifies the contract. *White v. Products Co.*, 185 N.C. 68, 116 S.E. 169 (1923). We do not find that the clause of the contract relied upon by the defendants so closely relates to the *precise* subject matter of the defendants' alleged misrepresentations of heated square footage as to preclude the plaintiff's action based upon these alleged misrepresentations. *See Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E. 2d 522 (1965). Parol evidence was, therefore, admissible to show that the written contract was procured by the prior alleged misrepresentations of Hannon as to the heated square footage contained in the house.

[2] Having so decided, we are confronted with the issue of whether as a matter of law the plaintiff could reasonably rely on the alleged prior representations, or, on the other hand, this was an issue for the jury. We hold that the trial court correctly determined as a matter of law that the plaintiff could not reasonably rely on the alleged prior misrepresentations as to heated square footage, and that the granting of summary judgment for the defendants was not error.

We note that in cases involving misrepresentations as to quantity or acreage, our courts appear to have taken a somewhat more tolerant attitude toward those contending they have been defrauded than is apparent in cases involving misrepresentations as to patent or latent defects or the quality or character of property purchased. *Compare Shell v. Roseman*, 155 N.C. 90, 71 S.E. 86 (1911); *Hill v. Brower*, 76 N.C. 124 (1877); and, *Parker v. Bennett*, 32 N.C. App. 46, 231 S.E. 2d 10 (1977); *with Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); and, *Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E. 2d 65 (1974). *But see Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965). Perhaps a reason for any such distinction arises from the fact that the acreage of property within given boundaries is not apt to be as obvious to or as readily ascertainable by the buyer as are the true facts in many cases involving patent or latent defects or the quality or character of property. The science of surveying land and determining the acreage contained within boundaries, which frequently create forms unknown to students of geometry, remains beyond the abilities of the ordinary buyer in sales of real

property. The precise acreage of a given tract of land is often so difficult to determine that a general custom of drafting deeds and other legal documents to convey a stated amount of acreage "more or less" has developed in this and other jurisdictions. When these facts are combined with the former custom still frequently followed of conveying land according to old deeds and without a survey, it would appear that our courts have properly imposed upon sellers of real property a requirement that any representations they make, as to the acreage of a tract of land with which they are more familiar than the buyer either is or may reasonably become, be correct and that they be bound by such representations. *See Walsh v. Hall*, 66 N.C. 233 (1872) (location of real property).

We do not think the same reasoning should be applied to alleged misrepresentations as to the square footage contained in a house. This is particularly true where, as here, the person seeking to bring an action for the alleged misrepresentations of square footage had full opportunity to and in fact did inspect the house and could have determined the square footage therein for himself by simple measurements and mathematical computations. Absent facts to the contrary made known to a seller at the time of his representations as to the square footage of a house to be sold, the seller is entitled at this point in the history of public education to assume that his prospective buyer possesses the mathematical skills required for determining the square footage contained in the house. The seller is also entitled to assume that his buyer will make such determination during his actual inspection of the house if he believes it material. The same is not true, however, where the much more difficult and precise science of surveying a tract of land and determining its acreage is involved.

We are well aware that the point at which reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery is difficult to determine and, in close cases, should be resolved in favor of the party alleging reasonable reliance upon fraudulent misrepresentations. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965). Nevertheless, "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him." *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E. 2d 881, 886 (1957). If the party seeking

to bring an action for fraud based upon misrepresentations of a seller has not reasonably relied upon those representations, he has no claim upon which relief can be granted. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953).

The plaintiff here did not rely upon the representations of Hannon or any other representations to such extent as to forego making his own investigation of the interior of the house which he proposed to purchase. It must be assumed that he possessed the necessary skills to make any measurements which he deemed material during the course of his investigation. There is no indication from the record on appeal that the plaintiff was any less able to make a determination as to square footage than Hannon or that any representation was made to him which caused him to reasonably forego measuring the house and computing its square footage if he felt it was a material matter. After walking through and viewing the interior of the house, the plaintiff engaged in further arms length bargaining with the defendants resulting in his offering and their accepting a purchase price below the listed price.

We do not think that a statement by a seller as to the square footage contained in a house he sells constitutes, under ordinary circumstances, that type of "artifice" which induces reasonable reliance causing a prospective buyer to forego further investigation. *See Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957), *and Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E. 2d 65 (1974).

[3] The plaintiff also contends the trial court erred in denying his motion and request for findings of fact and conclusions of law made pursuant to G.S. 1A-1, Rule 52. This contention is without merit. Trial courts are not required to make findings of fact when granting motions for summary judgment. 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. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E. 2d 527 (1978).

The action of the trial court in granting summary judgment in favor of the defendants was without error and is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

JENNY C. TUTTLE v. BILLY E. TUTTLE AND SHIRLEY D. TUTTLE

No. 7721SC1047

(Filed 21 November 1978)

1. **Fraudulent Conveyances § 3.4— retaining sufficient property to pay debts—sufficiency of evidence**

In an action to set aside a conveyance allegedly fraudulent as to creditors, the trial court did not err in denying defendants' motions for directed verdicts where the evidence tended to show that the male defendant had debts of $31,300 and assets of $34,500, that half of everything he had belonged to the female defendant, and that he had $20,000 in judgments against him, since the jury could have found from this evidence that, in transferring the property in question, the male defendant failed to retain sufficient assets to pay his then existing indebtedness.

2. **Fraudulent Conveyances § 3.4— voluntary conveyance—sufficiency of evidence**

In an action to set aside a conveyance from defendant husband to himself and defendant wife as tenants by the entirety which was allegedly fraudulent as to creditors, evidence was sufficient to present a jury question as to whether the conveyance was voluntary where it tended to show that the deed had no excise stamps affixed thereto; the recited consideration was "Ten Dollars and other valuable considerations"; and defendant husband testified that he did not know whether $12,000 allegedly contributed by defendant wife came from her salary or from their business and that he did not apply money his wife gave him towards payments on the property in question.

3. **Fraudulent Conveyances § 3.4— fraudulent conveyance by husband—wife's knowledge—no directed verdict for wife**

In an action to set aside a conveyance by defendant husband to himself and his wife as being allegedly fraudulent as to creditors, the trial court properly denied defendant wife's motion for a directed verdict where the evidence that defendant wife knew of defendant husband's support obligations to plaintiff, his arrearage and the lawsuit against him therefor, coupled with the relationship between defendants and the evidence that the conveyance was voluntary, was sufficient to submit the case to the jury.

4. **Fraudulent Conveyances § 3— lack of consideration—definition favorable to defendant**

In an action to set aside a conveyance allegedly fraudulent as to creditors, the trial court's instruction pertaining to lack of consideration, "that is, if the grantee, or a person receiving the conveyance, gave nothing of value for it," was more favorable to defendants than the Supreme Court's definition of voluntary conveyance as one which "is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud."

5. **Fraudulent Conveyances § 3.2— valuable consideration—shifting burden of proof**

In an action to set aside a conveyance allegedly fraudulent as to creditors, the trial court properly instructed the jury that the burden of proof to show valuable consideration was on the plaintiff if the jury found that defendant husband retained sufficient other property to pay his debts but was on the defendants if the jury found that defendant husband did not retain sufficient other property to pay his debts.

6. **Fraudulent Conveyances § 3.3— defendant's debt to plaintiff at time of trial—failure to object to evidence**

In an action to set aside a conveyance allegedly fraudulent as to creditors, the trial court did not err in allowing plaintiff to testify concerning what defendant owed her at the time of the trial rather than at the time of the conveyance in question, since similar evidence had earlier been admitted without objection.

7. **Fraudulent Conveyances § 3.3— consent order showing checking account balance—order too remote in time—evidence properly excluded**

Trial court in an action to set aside an allegedly fraudulent conveyance did not err in excluding from evidence a consent order entered subsequent to the conveyance in question showing that defendant had a substantial amount of money in a checking account, since the order was too remote in time and would not have a logical tendency to prove that defendant, at the time of the conveyance made several months before entry of the order, had sufficient property available to satisfy his debts.

APPEAL by defendants from *Long, Judge.* Judgment entered 16 September 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 September 1978.

Plaintiff Jenny C. Tuttle, former wife of defendant Billy E. Tuttle, brought this action to set aside a conveyance allegedly fraudulent as to creditors. The conveyance was made by Billy Tuttle to himself and his second wife, defendant Shirley D. Tuttle, as tenants by the entirety.

Plaintiff presented evidence tending to show that: she and Billy Tuttle were divorced in November 1975, after 25 years of marriage; in September 1974, the parties entered into a separation agreement whereby Billy Tuttle was to pay plaintiff $700 per month alimony and $500 per month child support; he paid this amount until March 1976 when he ceased payments; as of 27 July 1976, the date of the conveyance in question, Billy Tuttle was $4,800 in arrears; in July 1976, Billy Tuttle individually owned a house and ten acres of land in Clemmons; on 27 July, he deeded

this property to himself and the new Mrs. Tuttle; the deed had no revenue stamps on it and was stamped "gift deed"; and the approximate value of the property was $85,000 - $90,000.

Defendants' evidence tended to show that: as of 27 July 1976, Billy Tuttle owed $4,800 to plaintiff, $7,500 to Northwestern Bank, and $19,000 to First Union National Bank, for a total of $31,300; as of the same date, he had funds in First Union amounting to $20,326.99, accounts at Northwestern of $736.83 and $8,280.54, and $5,160.50 out-of-state for a total of $34,504.86; Shirley Tuttle had put approximately $12,000 into the property in question; and Shirley Tuttle did not know that her husband was in arrears in his payments to plaintiff and that he had other creditors.

The jury answered all issues in favor of plaintiff, and judgment was entered setting aside the conveyance. Defendants appeal.

White & Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, David R. Tanis, and R. E. Shea, for plaintiff appellee.

Moore & Keith, by Thomas W. Moore, Jr., for defendant appellants.

ERWIN, Judge.

Defendants present five questions on this appeal, and after carefully considering all of them, we find no error in the trial below.

[1] The first contention is that the trial court erred in denying defendants' motions for directed verdicts at the close of all the evidence. On a motion by a defendant for a directed verdict pursuant to G.S. 1A-1, Rule 50(a), testing the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiff, plaintiff's evidence must be taken as true and considered in the light most favorable to plaintiff. *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).

As to defendant Billy Tuttle, we note that he testified that as of 27 July 1976, he owed plaintiff $4,800, Northwestern Bank $7,500, and First Union National Bank $19,000 for a total of $31,300. While the figures might be taken to indicate that defend-

ant Billy Tuttle's assets at the time apparently exceeded the indebtedness, he testified that "I consider everything I've done as partnership with Shirley [defendant Shirley D. Tuttle] . . . . Everything that we made at Country Music Bar was half Shirley's and half mine. . . . I made the statement earlier that everything I had was half Shirley's." Further, there was evidence tending to show that he had $20,000 in judgments against him. Thus, the jury could have found that defendant Billy Tuttle failed to retain sufficient assets to pay his then existing indebtedness. If a conveyance is voluntary, and the grantor fails to retain sufficient assets to pay his then existing indebtedness, such conveyance is invalid as to creditors. *Everett v. Gainer*, 269 N.C. 528, 153 S.E. 2d 90 (1967); *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914).

[2] Defendants contend that the conveyance was for a good and valuable consideration. We conclude, however, that there was sufficient evidence tending to show that the conveyance was voluntary to present a jury question. We note that the deed has no excise stamps affixed thereto, and the recited consideration is "Ten Dollars and other valuable considerations." Justice Branch, speaking for our Supreme Court in *Everett v. Gainer*, *supra* at 532, 153 S.E. 2d at 94:

> "In the case before us it is apparent that if the sole consideration is $100, this is a grossly inadequate consideration, which would constitute the conveyance voluntary. Does the addition of the words 'and other valuable consideration' make the conveyance valid as to then existing creditors? We think not."

As to the issue of internal revenue stamps, the Court held:

> "[T]he amount of internal revenue stamps, or the absence of internal revenue stamps, is some evidence of the amount of consideration actually paid for the conveyance. In the instant case the recital in the deed of $100 and other valuable consideration considered with the absence of internal revenue stamps is evidence that the consideration was not more than $100." 269 N.C. at 533, 153 S.E. 2d at 95.

Defendants maintain that the evidence shows that the conveyance was for a valuable consideration in that there was testimony that Shirley Tuttle contributed $12,000 toward the completion of the house, made mortgage payments thereon, and

assumed the indebtedness owing on the property. We note, however, that no accounting of the $12,000 was given, that defendant Billy Tuttle did not know whether this sum came from his wife's salary or from their business, the Country Music Bar, and that Billy Tuttle testified as follows:

> "I didn't apply any money that she gave me toward my loans. It was used for current day-to-day expenses and all of the money that she gave me did not go into the house. I can't explain how much of the money went into the house, but she did borrow some money on several occasions."

The jury answered issues finding that defendant Billy Tuttle failed to retain sufficient assets to pay his then existing debts and that the conveyance was not for valuable consideration. The evidence was sufficient to submit such issues to the jury and to support its verdict.

The third issue called upon the jury to determine whether defendant Billy Tuttle executed the deed "with intent to delay and hinder or to defraud his creditors." The jury answered the issue in plaintiff's favor. Again, we find the evidence sufficient to submit this issue to the jury and support its verdict. *See Everett v. Gainer, supra; Sills v. Morgan,* 217 N.C. 662, 9 S.E. 2d 518 (1940).

[3] As to defendant Shirley Tuttle, the trial court likewise properly refused to grant her motion for a directed verdict. Defendant Billy Tuttle testified for plaintiff as follows:

> "At the time of my marriage to Shirley Tuttle, she knew of my previous marriage to Jenny Tuttle and knew about the separation agreement. She knew that I had an obligation under the agreement and how much I was supposed to pay. She knew I was behind and she knew about the lawsuit."

This, coupled with the relationship between defendants and the evidence that the conveyance was voluntary, was sufficient evidence to submit the case to the jury as to defendant Shirley Tuttle. *See Everett v. Gainer, supra; Bank v. Pack,* 178 N.C. 388, 100 S.E. 615 (1919).

Defendants next argue that the trial court erred in failing to instruct the jury on: G.S. 39-15 *et seq.* and the law applicable to

voluntary conveyances; the definitions of various terms such as "voluntary conveyance" and "hinder, delay or defraud creditors"; and circumstantial evidence and its meaning.

Under G.S. 1A-1, Rule 51(a), the judge "shall declare and explain the law arising on the evidence given in the case." The trial court is not required, however, to read to the jury technical statutory language. *Cowan v. Transfer Co.* and *Carr v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228 (1964). Our examination of the charge has led us to the conclusion that the trial court adequately explained to the jury the law of fraudulent conveyances, relating it to the evidence in the case.

[4] Nor do we see error in the court's instructions on the various terms which defendants assert the trial judge failed to define adequately. Our Supreme Court has defined the term "voluntary conveyance" as follows in *Gas Co. v. Leggett*, 273 N.C. 547, 549, 161 S.E. 2d 23, 25 (1968): "A conveyance is voluntary when it is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." (Citations omitted.) That portion of the trial court's charge pertaining to lack of consideration, "that is, if the grantee, or person receiving the conveyance, gave nothing of value for it," appears more favorable to defendants.

Considering the charge contextually as a whole, as we must do, we conclude that it presented the law of the case in such a manner as to avoid misleading or misinforming the jury and find no error sufficiently prejudicial to warrant a new trial. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967).

[5] Defendants next contend that the trial court erred in instructing the jury that the burden of proof was upon defendants to show valuable consideration. A pertinent portion of the instructions reads as follows:

> "So, the burden of proof on this issue will be placed upon the plaintiff or the defendant depending on how you answer the first issue. If you answer the first issue 'Yes,' finding that Billy Tuttle retained sufficient other property to pay his debts, the burden of proof on this issue would be on the plaintiff, Jenny Tuttle. If you answer the first issue 'No,' finding that Billy Tuttle did not retain sufficient other prop-

> erty to pay his debts, then the burden of proof would be upon the defendants to show that valuable consideration was given for the conveyance."

Our Supreme Court held in *Peeler v. Peeler*, 109 N.C. 628, 631, 14 S.E. 59, 61 (1891):

> "Where an insolvent husband has conveyed land to his wife, and a preexisting creditor brings an action to impeach the deed for fraud, the *onus* is upon her to show that a consideration actually passed . . . To this extent she is required to assume a burden not placed upon other grantees."

See also Everett v. Gainer, supra; Eddleman v. Lentz, 158 N.C. 65, 72 S.E. 1011 (1911). The trial court properly instructed the jury as to the shifting burden of proof.

[6] Defendants' fourth argument is that the trial court erred in overruling their objection to a question asked of plaintiff, "How much does he [defendant Billy Tuttle] owe you at this time?" Defendants maintain that the issue at trial was the amount of debts of defendant Billy Tuttle on 27 July 1976, the date of the conveyance, not at the time of trial, and that such testimony served to inflame the jury. We see no prejudicial error. Plaintiff testified, without objection, that she obtained a consent judgment against defendant Billy Tuttle for arrearages of $9,400 on 10 November 1976, three and one-half months after the conveyance. The consent judgment was received into evidence without objection. Defendant Billy Tuttle admitted the entry of the consent judgment, again with no objection being made. "It is well settled that exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection. *Glace v. Pilot Mountain*, 265 N.C. 181, 143 S.E. 2d 78 (1965)." *Gaddy v. Bank*, 25 N.C. App. 169, 173, 212 S.E. 2d 561, 564 (1975).

[7] The remaining argument of defendants is that the trial court erred in not admitting into evidence a certain exhibit and testimony relating thereto. The exhibit was an order of Judge Collier in the previous consent judgment matter ordering that certain bank accounts be transferred to the Forsyth County Sheriff's Department to be applied to judgments against defendant Billy Tuttle. Defendants assert that the bank accounts in-

volved were the same ones in which defendant Billy Tuttle had a balance of over $29,000 at the time of the conveyance. They contend, therefore, that this evidence was relevant to show that Billy Tuttle had property which could be reached by creditors for the satisfaction of his debts. We agree with plaintiff that the order, entered 6 December 1976, was too remote in time and would not have a logical tendency to prove that Billy Tuttle had property, several months before the order's entry, available to satisfy his debts. The issue was not whether defendant Billy Tuttle merely had property at the time of the conveyance, but whether he retained sufficient assets to pay his then existing indebtedness.

Accordingly, in the trial below, we find

No error.

Judges MORRIS and MITCHELL concur.

DONALD SHAPIRO AND HAROLD SHAPIRO v. TOYOTA MOTOR COMPANY, LTD., TOYOTA MOTOR SALES, USA, INC., TOYOTA MOTOR DISTRIBUTORS, INC., NORTH CAROLINA TELEPHONE COMPANY, AND THE TOWN OF MATTHEWS

No. 7826SC118

(Filed 21 November 1978)

1. **Municipal Corporations § 14.2— state highway within city limits—no liability of town for dangerous conditions**

In the absence of any control over a state highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition; therefore, the trial court properly granted summary judgment for defendant town in an action to recover damages for injuries sustained by plaintiff in an automobile accident which occurred on a state road within the city limits.

2. **Telecommunications § 3— telephone pole 12½ inches from curb—no interference with traffic—no negligence**

The placing and maintenance of a telephone pole by defendant telephone company in the Town of Matthews with the Town's permission in the arc of a curve in the right-of-way of a state road approximately twelve and one-half inches from the curb line was not negligence since the pole did not constitute a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a proper manner.

APPEAL by plaintiffs from *Griffin, Judge*. Judgments entered 15 and 16 August 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1978.

On the night of 19 September 1973 plaintiff Donald Shapiro was a passenger in the left rear seat of a Toyota when it collided head on with a telephone pole beside a street in the Town of Matthews and Shapiro was injured. Shapiro and his father instituted the present action against the manufacturer and the distributor and the seller of the Toyota, against North Carolina Telephone Company (which erected and maintained the telephone pole), against Duke Power Company (which maintained a light on the telephone pole), and against the Town of Matthews. Plaintiffs accused the Telephone Company of failing to put markers or reflectors on the pole and of "negligent placement of said telephone pole on a dangerous curve, after knowledge of numerous prior accidents involving other vehicles and other poles located in virtually the same exact location." Plaintiffs' claim against Duke Power has been voluntarily dismissed. Plaintiffs accused the Town of negligently failing to erect appropriate signs to warn motorists of the dangerous curve. Both the Town and Telephone Company answered, denying negligence and asserting contributory negligence. Additionally, the Town alleged that it was entitled to governmental immunity and that the street where the accident occurred was maintained exclusively by the State.

It is undisputed that the Toyota entered Matthews traveling eastward on RPR 1009; that at about 2,310 feet inside the Town limits RPR 1009 curves to the left and immediately widens from two lanes to four lanes and changes into John Street; that N.C. Highway 51 intersects from the right in the middle of this curve and has a stop sign for its traffic; that a telephone pole was located in the curve, just beyond the intersection with Highway 51 and within the right-of-way of RPR 1009 and approximately twelve and one-half inches (12½") beyond the curb along the outside eastbound lane of RPR 1009; that the Toyota left the roadway and struck the pole and cut it in two; that there was a 35 m.p.h. speed limit sign at the Town limits and another at about 100 feet before the curve; and that there was a street light on the telephone pole but no reflectors or other warnings.

Interrogatories to the Telephone Company tended to show that it had erected and maintained the pole, that it knew of one

prior accident in 1972 involving a pole at this location, and that it replaced the pole after it was broken in this accident. When asked about governmental regulations, the Telephone Company produced a Rural Electrification Administration Telephone Engineering and Construction Manual which requires a clearance of only six inches (6″) between a curb and telephone pole, subject to local requirements if more stringent. In response to a similar interrogatory, Duke Power produced State Department of Transportation Policies and Procedures which provide that "[t]here is no single minimum dimension for setback of poles behind curbs; however, where there are curbed sections and no sidewalks, 6′ will be used as a design safety concept guide." Interrogatories to the Town revealed that it denied any responsibility for traffic signs at the scene of the accident, that it asked the State to study the interesection after this accident and that the State installed a "blinker light" in February 1974.

The Telephone Company moved for summary judgment; in support it submitted the 1951 ordinance under which the town authorized erection of telephone poles and an affidavit showing that this pole was located twelve and one-half inches (12½″) beyond the curb of RPR 1009. The Town moved for summary judgment on the basis of an affidavit from its clerk to the effect that RPR 1009 was part of the State highway system and was maintained by the State and that the Town had taken no part in erection of the telephone pole. In response plaintiffs filed three affidavits. One was from a photographer identifying the photographs of RPR 1009. An affidavit from engineer Rolf Roley, an expert in automobile accidents, tended to show that the intersection "was inherently dangerous and extremely hazardous in that it had been constructed as an angle," that there were inadequate warnings leading up to the intersection and inadequate lane markings in the intersection, that there was no reason for placing this telephone pole at its existing location, that if Roley "were called upon to place a pole at a point most likely to be involved with vehicular problems and impacts, I would select the exact spot where this pole is placed," and that the Toyota involved in this accident would have missed nearby trees and "would have done nothing more than run into the yard . . . if the pole had not been at that location." Finally plaintiffs presented, by way of an affidavit from one of their attorneys, Department of Motor

Vehicles records showing seven accidents at this intersection since 1967, four of which involved telephone poles at this same location, and a newspaper story referring to this intersection as "dead man's curve."

Judge Griffin allowed summary judgment in favor of the Telephone Company and the Town and plaintiffs have appealed.

Helms, Mullis & Johnston, by N. K. Dickerson III, and Robert B. Cordle; and Karsman, Brooks, Doremus, by Stanley M. Karsman, for the plaintiffs.

Golding, Crews, Meekins, Gordon & Gray, by Marvin K. Gray and Harvey L. Cosper, Jr., and Robert L. Chapman, for defendant North Carolina Telephone Company.

Wade and Carmichael, by R. C. Carmichael, Jr., for the defendant Town of Matthews.

MARTIN (Robert M.), Judge.

The question for decision is whether the trial court erred in entering summary judgment in favor of defendants Town of Matthews and North Carolina Telephone Company.

Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Stoltz v. Hospital Authority, Inc.*, 38 N.C. App. 103, 247 S.E. 2d 280 (1978).

Issues of negligence are ordinarily not susceptible of summary adjudication either for or against claimant, but should be resolved by trial in the ordinary manner. It is only in exceptional negligence cases that summary judgment is appropriate. This is because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

[1] While plaintiffs recognize that G.S. 136-66.1 and 160A-297(a) absolve the Town of responsibility for maintaining and improving RPR 1009, nevertheless, they contend the Town and Board of Transportation share a dual responsibility for erecting appropri-

ate highway signs pursuant to G.S. 136-30 and 31. Hence, they argue that the Town was negligent for failing to post adequate warning signs, for failing to light the intersection adequately, and for allowing the pole to be placed where it was. We disagree. Under the cited statutes together with G.S. 136-93, when a city street becomes a part of the State highway system, the Board of Transportation is responsibile for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. Therefore, in the absence of any control over a state highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition. That authority precedes responsibility, or that control is a prerequisite of liability, is a well recognized principle of law as well as of ethics. *Taylor v. Hertford*, 253 N.C. 541, 117 S.E. 2d 469 (1960). The court correctly allowed summary judgment in favor of defendant Town of Matthews.

[2] The action of the court in granting summary judgment in favor of defendant North Carolina Telephone Company presents the question as to whether the placing and maintenance of its telephone pole in the Town of Matthews with the Town's permission, in the arc of a curve in the right-of-way of RPR 1009 approximately twelve and one-half inches (12½") from the curb line could be held to be negligent of itself. If there was a total lack of negligence on movant's part, no issue is raised for the jury to consider.

G.S. 62-180 provides that operators of telephone lines have the right to construct and maintain lines along a public highway but may not obstruct or hinder unreasonably the usual travel on such highway.

In *Wood v. Carolina Telephone & Telegraph Co.*, 228 N.C. 605, 46 S.E. 2d 717 (1948), the minor plaintiff sought to recover damages for personal injury sustained when his arm was caught between the automobile he was driving and a telephone pole maintained by the defendant telephone company and located six inches (6") beyond the curb of the street. Plaintiff's automobile never crossed the curb or left the traveled portion of the street. Plaintiff asserted that defendant's maintenance of the pole in such proximity to the roadway constituted a hazard to persons traveling on the street.

In affirming the trial court's judgment sustaining defendant's demurrer, the Court, through Justice Barnhill, held that defendant's maintenance of the pole located six inches (6") from the paved surface of the highway did not obstruct the free use of the vehicular lane of traffic or constitute a hazard to motorists using the highway in a proper manner.

Although the pole involved in the *Wood* case was located off the left side of the street, the Supreme Court stated the following principles which are clearly applicable in the case at bar:

> Surely all portions of a public way, from side to side and end to end, are for public use in the appropriate and proper method. (Citation omitted.) But this does not mean that a motorist is at liberty to drive his vehicle over and across the sidewalk or the grass plot between the sidewalk and street or to complain that objects there maintained obstruct his free use of the vehicular lane of travel.
>
> . . . The maintenance of an object in the public way in no event constitutes an act of negligence unless it renders the way unsafe for the purposes to which such portion of the street is devoted. (Citations omitted.)
>
> In almost every hamlet, town and city in the State the space between the sidewalk proper and the street is used for the location and maintenance of telephone and telegraph poles, traffic signs, fire hydrants, water meters, and similar structures. It is a matter of common knowledge that this space is so used. (Citation omitted.) In no sense do such structures constitute a hazard to or in any wise impede the free use of the vehicular lane of travel.

In effect, the Court held that the maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a *proper manner*.

The Toyota failed to negotiate the curve and crashed into the telephone pole located twelve and one-half inches (12½") beyond the elevated curbing forming the southern edge of the outside eastbound lane of travel for vehicles approaching downtown Matthews from the west. Obviously, the pole would not have been

struck had the Toyota been operated in a proper manner. Thus, the maintenance of the pole did not constitute an act of negligence.

Viewing the evidence offered by plaintiffs in the light most favorable to them and drawing all inferences of fact against defendants, we conclude that it established a total lack of negligence on defendants part and entitled it to a judgment as a matter of law.

The order of the trial judge entering summary judgment in favor of North Carolina Telephone Company is affirmed; the order of the trial judge entering summary judgment in favor of the Town of Matthews is affirmed.

Judges VAUGHN and MITCHELL concur.

RAINTREE CORPORATION v. JAMES B. ROWE, SR. AND WIFE, NINA F. ROWE

No. 7825DC46

(Filed 21 November 1978)

1. **Rules of Civil Procedure § 56.1— summary judgment hearing—waiver of notice**

Where the trial court treated defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim for relief as a motion for summary judgment, plaintiff waived the 10 day notice required by Rule 56(c) for a summary judgment hearing by participating in the hearing and failing to request a continuance or additional time to produce evidence.

2. **Deeds § 20.6; Rules of Civil Procedure § 24— covenant to pay assessments for common areas—real party in interest—intervention in suit**

A homeowners' association, not a subdivision developer, was the party entitled to maintain an action against the owners of a lot in the subdivision to collect assessments for maintenance of common areas where the recorded covenants required that such assessments be paid to the homeowners' association. Furthermore, the trial court did not err in refusing to permit the homeowners' association to intervene in the action instituted by the developer where the motion for intervention was not accompanied by a pleading as required by G.S. 1A-1, Rule 24(c), the association failed to show why it should be allowed to intervene, and there was no allegation or admissible evidence that the association ratified the developer's action or that the developer was acting as agent of the association.

3. Deeds § 19.3— covenants running with land

Covenants that run with the land are real as distinguished from personal covenants that do not run with the land, and a provision that a covenant is to run with the land is not binding unless the covenant possesses the characteristics of a real covenant.

4. Deeds § 19.3— real covenants—prerequisites

Three essential requirements must concur to create a real covenant: (1) the intent of the parties as determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and (3) there must be privity of estate between the parties to the covenant.

5. Deeds § 19.5— restrictive covenants—real or personal—burden of proof

Ordinarily, restrictions in a deed are regarded as for the personal benefit of the grantor, and the party claiming the benefits of the restrictions has the burden of showing that they are covenants running with the land.

6. Deeds § 19.2— covenant of membership in country club—personal covenant

A covenant requiring the owners of lots in a subdivision to be members of a country club located in the subdivision and to pay country club dues does not touch and concern the land and is a personal covenant which does not run with the land and which is not assignable by the original grantor.

APPEAL by plaintiff from *Sentelle, Judge*. Summary judgment entered 11 October 1977 and order denying plaintiff's motions entered 17 October 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1978.

Plaintiff, Raintree Corporation, filed this action on 31 January 1977 against defendants, James B. Rowe, Sr. and Nina F. Rowe, for the balance due on maintenance assessments, country club dues, interest, and attorneys' fees. Plaintiff also sued to enforce a claim of lien by execution and sale it had filed with the clerk of court.

Sometime prior to February 1973, defendants purchased a lot in "The Village of Raintree." The Village of Raintree is a planned residential community originally developed by The Ervin Company. On 30 May 1975, The Ervin Company's interest in the Raintree development was conveyed to ARDC Franciscan Terrace, Inc., a North Carolina corporation. The corporate name was changed to "Raintree Corporation."

The lots in The Village of Raintree are subject to recorded covenants, conditions and restrictions. Covenants, conditions and

restrictions pertinent to this action provide (1) property owners have rights of enjoyment in common areas, (2) each owner and each subsequent owner covenants to pay assessments for maintenance of common areas and other purposes by accepting a deed, (3) every owner is a mandatory member of Raintree Country Club and must pay club dues, (4) unpaid maintenance assessments and unpaid club dues subject the owner's lot to a lien.

Defendants moved to dismiss on the ground that Raintree Corporation was not the real party in interest, contending Raintree Homeowners Association, Inc. (hereinafter "Association") was the party to enforce the claim for maintenance assessments and the manager of Raintree Country Club was the party to enforce the claim for country club dues.

On 6 May 1977, the Association moved to intervene because disposition of this action might impede its ability to protect its interest in the collection of maintenance assessments.

On 15 September 1977 motions to dismiss were heard before Judge Sentelle. The motions to dismiss were treated as summary judgment and the action dismissed. On 11 October 1977, Judge Sentelle signed an order incorporating his ruling of 15 September 1977 that there were no genuine issues of material fact as between the plaintiff and the defendants, and striking and vacating the claim of lien filed in the clerk's office.

When defendant Nina F. Rowe presented proposed order to the court, plaintiff objected to the form of order and moved to file affidavits by the president of Association and by an officer of Raintree Corporation to demonstrate that Association had authorized this action and therefore Raintree Corporation was the proper party. On 17 October 1977, the court denied plaintiff's motion to file affidavits tendered after the court allowed defendants' motions for summary judgment. The court overruled plaintiff's objection to the form of the order and denied Association's motion to intervene. Association did not appeal. Plaintiff appeals.

Kennedy, Covington, Lobdell & Hickman, by Edgar Love III and James C. Hord, for plaintiff appellant.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant appellee Nina F. Rowe. McConnell, Howard, Johnson, Pruett, Jenkins & Bragg, by Carl W. Howard and Mary Jean Hayes, for defendant appellee James B. Rowe, Sr.

MARTIN (Harry C.), Judge.

Plaintiff's appeal raises four assignments of error.

[1] Plaintiff's first assignment of error was the trial court's treating of defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted as motions for summary judgment. Plaintiff complains it did not have 10 days' notice as required by Rule 56(c), nor was it given a reasonable opportunity to present all material made pertinent to the motions.

At the hearing of defendants' motions to dismiss, the trial court considered matters outside pleadings.

> If, on a motion asserting the defense, numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. 1A-1, Rule 12(b). At the hearing on the motions to dismiss, plaintiff stipulated to the use of documents outside the pleadings, participated in oral arguments, entered into a stipulation of facts, and responded in writing. Plaintiff did not make a timely objection to the hearing on 15 September 1977. Plaintiff did not request a continuance. Plaintiff did not request additional time to produce evidence pursuant to Rule 56(f). On the contrary, plaintiff participated in the hearing through counsel. The 10-day notice required by Rule 56 can be waived by a party. *Story v. Story*, 27 N.C. App. 349, 219 S.E. 2d 245 (1975). The notice required by this rule is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law. By attending the hearing of the motion on 15 September

1977 and participating in it and failing to request a continuance or additional time to produce evidence, plaintiff waived any procedural notice required. For an excellent discussion of notice in civil actions, see the opinion of Justice Ervin in *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). This assignment of error is overruled.

[2] Plaintiff's second and third assignments of error are to the trial court's dismissal on the ground that the action was not prosecuted in the name of the real party in interest.

The second assignment of error raises the question of the real party in interest as to the maintenance assessment. The Declaration of Covenants, Conditions and Restrictions, introduced in evidence as an exhibit, provides that annual assessments for maintenance are to be paid to Association. The bylaws of Association also provide that annual assessments for maintenance are to be paid to it. Therefore, the Raintree Corporation is not the proper party to bring this action to collect maintenance assessments. We affirm the trial court's decision that the Raintree Corporation is not the real party in interest to collect the maintenance assessments.

On this second assignment of error, plaintiff further contends that the trial court erred in not allowing Association to intervene in the action commenced by plaintiff. The motion for intervention was not accompanied by a pleading as required under N.C. Gen. Stat. 1A-1, Rule 24(c). Association failed to show why it should be allowed to intervene. There was no allegation or admissible evidence that Association ratified the action of plaintiff or that plaintiff was acting as the agent of Association. Association did not appeal this order of the court. The trial court properly denied the motion to intervene. This assignment of error is overruled.

The third assignment of error challenges the dismissal of the complaint for the collection of country club dues because the plaintiff is not the real party in interest. "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Insurance Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E. 2d 206, 209 (1977). Two things must be considered to determine if plaintiff has a substantive legal claim to enforce. First, the covenant to pay country club dues must be characterized as either a covenant that runs with the land or one

that does not. Second, the character of the covenant must allow assignee, plaintiff, to enforce it.

[3, 4] A covenant is either real or personal. Covenants that run with the land are real as distinguished from personal covenants that do not run with the land. 21 C.J.S. Covenants § 22 (1940). The Declaration of Covenants, Conditions and Restrictions filed in the Register of Deeds' office provides in Article X that restrictions on Raintree are to run with the land. "[I]t appears that if a man covenants for himself and his assigns, yet if the thing to be done be merely collateral to the land, and does not concern the thing demised in any sort, the assignee shall not be charged." *Nesbit v. Nesbit*, 1 N.C. 490, 494 (1801). The provision that the covenant is to run with the land is not binding unless the covenants possess the characteristics of a real covenant. *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66, 102 A.L.R. 773 (1935). Three essential requirements must concur to create a real covenant: (1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant. 20 Am. Jur. 2d Covenants, Conditions, Etc. § 30 (1965).

[5] The Declaration of Covenants, Conditions and Restrictions contains the recital that the covenants are to be construed to run with the land. There is no doubt that the developer intended the covenant to run. This recital is not controlling. The express intent of the parties can prohibit a covenant from running with the land, but it cannot make a personal covenant run with the land. 7 Thompson on Real Property § 3155 (1962). Intent alone is not sufficient to make the covenant run. The other legal requirements must be met. *Neponsit Property Owners' Ass'n v. Bank*, 278 N.Y. 248, 15 N.E. 2d 793 (1938). Ordinarily, restrictions in a deed are regarded as for the personal benefit of the grantor. The party claiming the benefits of the restrictions has the burden of showing they are covenants running with the land. These principles apply with especial force to persons who (such as Raintree) are not parties to the instrument containing the restrictions. *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E. 2d 824 (1971).

The historical tests for the second requirement, that the covenant touch and concern the land, have been based on several

formulae. "[I]t may be laid down as a rule without any exception, that a covenant to run with the land, and bind the assignee, must respect the thing granted or demised, and that the act covenanted to be done or omitted, must concern the lands or estate conveyed." *Nesbit v. Nesbit, supra* at 495. To touch and concern the land, the object of the covenant must be "annexed to, inherent in, or connected with, land or other real property," or related to the land granted or demised. 20 Am. Jur. 2d Covenants, Conditions, Etc. § 29 (1965). At common law, the running of covenants depended upon whether the covenanted act created a negative or affirmative duty. A negative covenant prohibited something and ran with the land. An affirmative covenant required a positive act and did not run. This blanket limitation on the running of affirmative covenants has not as a general rule been adopted in the United States. Mann, *Affirmative Duties Running with the Land*, 35 N.Y.U. L. Rev. 1344 (1960). As a result of the common law rule on affirmative covenants, the requirements for a covenant to run are to be more strictly applied to affirmative covenants than negative covenants.

[6] This covenant creates an affirmative duty, a charge or obligation to pay money, *i.e.*, country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The defendants are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. *Nesbit v. Nesbit, supra.* Courts have generally held that covenants to pay money do not touch and concern the land. *Neponsit Property Owners' Ass'n v. Bank, supra.* The court in *Neponsit* quoted Clark on Covenants & Interests Running with Land, p. 76: " 'It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case.' " We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree.

For a covenant to run, all three requirements must concur, intent, touch and concern, and privity of estate. Since the covenant does not touch and concern the land, an essential requirement is absent and it is not necessary to discuss the question of

privity of estate. We hold that the covenant to be a member of the country club and to pay country club dues is a personal covenant.

The second question to be considered on the third assignment of error is whether or not this covenant could be assigned and therefore enforced by the plaintiff assignee. The original grantor and party with whom the defendants purportedly covenanted was The Ervin Company. In a deed made 30 May 1975, filed 3 June 1975, The Ervin Company transferred all of its rights, title and interest in the Raintree Development to ARDC Franciscan Terrace, Inc., a North Carolina corporation. The ARDC Franciscan Terrace, Inc. subsequently changed its name to Raintree Corporation.

Personal covenants are not assignable. "A restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only." *Stegall v. Housing Authority, supra* at 100, 178 S.E. 2d at 827. "It is elemental that a personal covenant does not run with the land." *McCotter v. Barnes*, 247 N.C. 480, 486, 101 S.E. 2d 330, 335 (1958).

> "One cannot at common law maintain any action upon a personal covenant merely by force of the fact that he is the successor in title of the owner with whom such covenant was made."
>
> . . . "A personal covenant, upon the death of the obligee, goes to his administrator, and he alone is entitled to maintain suit upon the agreement."

Maples v. Horton, 239 N.C. 394, 399, 80 S.E. 2d 38, 42 (1954) (citations omitted). The rights and interests of The Ervin Company in this covenant were not assigned or conveyed to Raintree Corporation. Raintree Corporation is not the real party in interest.

Fourth. Plaintiff assigns as error the striking of the claim of lien from the records of the Clerk of Superior Court of Mecklenburg County. This document shows plaintiff, Raintree Corporation, as the person claiming the lien for past due maintenance assessments and country club dues. We have affirmed the action of the trial court granting summary judgment for the defendants as to these charges. Plaintiff's filing of a claim of lien for these charges against defendants' land was improper. We affirm the

order of the trial court striking and vacating the claim of lien. The assignment of error is overruled.

For the reasons given, the summary judgment is

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. ROLAND DAVIS AND DONALD GENE WOLFE

No. 7815SC612

(Filed 21 November 1978)

1. **Criminal Law §§ 22, 91 — right not to be tried same week as arraignment — waiver**

Defendant waived his right under G.S. 15A-943(b) not to be tried in the week in which he was arraigned where he failed to move for a continuance under the statute but moved for a continuance only on the ground that a subpoena had been issued but not served on an essential defense witness.

2. **Criminal Law § 91.7 — unavailability of witness — denial of continuance**

The trial court did not err in the denial of defendants' motion for a continuance for an indefinite time because of the unavailability of an essential defense witness where the motion was not supported by an affidavit showing what defendants expected to prove by the witness or how the absence of the testimony would be prejudicial to them, and an inquiry by the court showed that no one present knew the whereabouts of the witness or had seen him in six months.

3. **Criminal Law § 7.1 — no entrapment as matter of law**

The evidence did not show entrapment as a matter of law by an undercover officer in this prosecution for possession of marijuana with intent to sell and sale of marijuana.

4. **Criminal Law § 126.2 — acceptance of verdict after correction**

The trial court properly accepted a verdict of guilty of possession of marijuana with intent to sell where the jury foreman first stated that the jury found defendant guilty of possession of more than one ounce of marijuana, the foreman then corrected the verdict to guilty of possession of marijuana with intent to sell, and the corrected verdict was confirmed by a poll of the jury.

State v. Davis

APPEAL by defendants from *Ervin, Judge*. Judgment entered 11 November 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 24 October 1978.

Defendant Davis was indicted and convicted of possession of marijuana with intent to sell and deliver, and sale of marijuana. Defendant Wolfe was indicted and convicted of two charges of possession of marijuana with intent to sell.

Defendant Davis was arraigned and pled not guilty 9 November 1977. Defendant Wolfe waived arraignment and entered a plea of not guilty 15 August 1977.

A third defendant, Floyd Wolfe, was also charged with possession of marijuana with intent to sell, sale of marijuana, and conspiracy. He pled not guilty and all charges against him were dismissed at the close of the State's evidence.

On 9 November 1977, the day of Davis's arraignment, the cases were called for trial. Prior to empanelling the jury, State moved to consolidate the cases of defendants Roland Davis, Donald Wolfe, and Floyd Wolfe. Defendant Davis objected to consolidation on the ground his defense would substantially differ from the other defendants. Defendant Davis's objection was overruled and State's motion to consolidate cases for trial was granted.

Before trial, defendants Davis and Donald Wolfe moved for a continuance, or in the alternative, a dismissal of charges, on the ground a subpoena had been issued but not served at the time case was called, for a Mr. Thomas V. Busky, alias Thomas V. Parker, and also known as "T," an essential witness in defendants' case. The witness T had not been served because he could not be located. The motion was denied.

State offered evidence that R. L. Newton was working as an undercover drug investigator for the Durham Police Department. In the line of investigation, officer Newton initially met defendant Roland Davis at defendant's house on 18 February 1977. Newton returned to defendant Davis's house on several occasions prior to the date in question, 25 February 1977. Newton's reason for visiting was to acquire drugs. Newton met Phyllis Hilton while visiting at defendant Davis's residence.

On 25 February 1977, defendant Davis drove his car with Miss Hilton, officer Newton, and T, a police informer, to Alamance County to acquire drugs. Newton gave defendant Davis $380.00 cash to purchase marijuana. They drove to a barn and defendant Davis got out of the car. Defendant Donald Wolfe came out of the barn and talked with defendant Davis. Defendant Donald Wolfe went behind one of the sheds and returned with a brownish-green substance in both hands. An unidentified third person appeared at this time. Defendant Davis returned to the car with the brownish-green substance in a paper bag. They returned to defendant Davis's house and officer Newton departed with the substance in the bag. The substance was analyzed by the SBI as being marijuana. It was introduced into evidence.

At the close of State's evidence, the trial court granted a motion for judgment of nonsuit in each of the cases against Floyd Wolfe. Like motions on behalf of Donald Wolfe and Roland Davis were denied. Defendant Davis presented evidence. At the close of all evidence, defendants Donald Wolfe and Davis renewed their motions. All motions were denied.

From judgments of imprisonment, defendants appeal.

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

Ridge, Roberson & Richardson, by R. Nelson Richardson, for defendant appellant Roland Davis. Mitchell M. McEntire for defendant appellant Donald Wolfe.

MARTIN (Harry C.), Judge.

[1] Defendant Davis assigns as error the trial court's denial of his motion for continuance on the day of his arraignment, in violation of N.C. Gen. Stat. 15A-943(b).

> § 15A-943. Arraignment in superior court—required calendaring.—(a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calen-

> dared for the day or portion of a day during which arraignments are calendared.
>
> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

In *State v. Shook*, 293 N.C. 315, 319, 237 S.E. 2d 843, 846 (1977), the Supreme Court construed the statute to give the defendant a statutory right, " 'not [to] be tried without his consent in the week in which he is arraigned.' " The Court further stated:

> [T]he provision vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. To require a defendant to show prejudice when asserting the violation of this statutory right which he has insisted upon at trial would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him *unless he consents* to an earlier trial. Prejudice under these circumstances must necessarily be presumed.

At trial, defendant Davis did not move for a continuance under N.C. Gen. Stat. 15A-943(b), but moved for a continuance on the very narrow ground that a subpoena had been issued but not served on an essential defense witness.

"[I]t is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E. 2d 778, 781 (1970); *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977). In *State v. Shook, supra*, the North Carolina Supreme Court concluded the defendant had not waived his statutory right under N.C. Gen. Stat. 15A-943(b) and stated that he "asserted the right and raised the issue before the trial court—a prerequisite for his assertion of the right on appeal." Davis did not raise this issue before the trial court.

The statute requires the defendant's consent before he may be tried the week of his arraignment. Defendant Davis consented by failing to assert his right under the statute in the trial court. After the denial of the motions to continue on the ground that a witness was unavailable and in the alternative, to dismiss, the

trial judge asked if there were any other pretrial motions. Defendants' attorneys responded in the negative. We hold defendant Davis waived his statutory right not to be tried the week he was arraigned. With this holding, we do not reach the intriguing question as to the constitutionality of the statute. Defendant Wolfe did not challenge this ruling on appeal.

[2] Defendants Davis and Wolfe assign as error the trial court's denial of their motions to continue because of the unavailability of an essential witness, Mr. T. The continuance was requested "until we . . . locate this witness." The trial court inquired about knowledge of the whereabouts of the witness. The inquiry yielded that no one had seen the witness in six months, nor knew of his whereabouts. Continuance was requested for an indefinite time. Counsel did not support this motion with an affidavit showing sufficient grounds. Counsel did not show what they expected to prove by the witness or how the lack of the testimony would be prejudicial to them. There is no evidence that the absent witness would ever be present for trial.

A motion for continuance is ordinarily addressed to the discretion of the trial judge, and his ruling is not subject to review absent abuse of discretion. Continuances should not be granted unless the reasons therefor are fully established. Motions for continuance should be supported by an affidavit showing sufficient grounds. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). No such abuse of discretion is shown. The assignment of error is overruled.

[3] Defendant Davis assigns as error the trial court's denial of his motions for judgment as of nonsuit on the ground the evidence established entrapment as a matter of law. Mere initiation, instigation, invitation, or the exposure to temptation by enforcement officers without fraud or persuasion is not sufficient to constitute the defense of entrapment. *State v. Love*, 229 N.C. 99, 47 S.E. 2d 712 (1948).

> [A] verdict of not guilty should be returned if an officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit but for the persuasion, encouragement, inducement, and importunity of the officer or agent. If the officer or agent does nothing more than afford to the person charged an op-

> portunity to commit the offense, such is not entrapment. The courts do not attempt to draw a definite line of demarcation between what is and what is not entrapment. Each case must be decided on its own facts.

State v. Caldwell, 249 N.C. 56, 59, 105 S.E. 2d 189, 191 (1958). The evidence falls far short of establishing entrapment as a matter of law. This assignment of error is overruled.

Defendant Davis assigns as error the trial court's denial of his motion to vacate and set aside the verdict of the jury as contrary to the evidence and the law. This assignment of error is without merit and is overruled.

[4] Defendant Donald Wolfe assigns as error the trial court's allowing the foreman of the jury to change the verdict on the charge of possession of marijuana with intent to sell after he had announced the verdict in open court. Defendant wolfe contends this denied him his constitutionally protected right against double jeopardy. The following dialogue occurred between the trial court and the jury foreman:

> COURT: All right. In the case in which Donald Gene Wolfe is charged with possession of marijuana with the intent to sell it, do you find the defendant, Donald Gene Wolfe, guilty of possession of marijuana with the intent to sell the marijuana or do you find him guilty of possession of more than one ounce of marijuana or do you find him not guilty?
>
> FOREMAN: Guilty, sir.
>
> COURT: You find the defendant, Donald Gene Wolfe, guilty of what offense?
>
> FOREMAN: Of having in excess of one ounce.
>
> COURT: All right. Now, —
>
> FOREMAN: I'm sorry. Now, would you restate that?
>
> COURT: All right, sir. In the case in which he is charged with possession of marijuana with intent to sell it, do you find him guilty of possession of marijuana with intent to sell it or do you find him guilty of possession of more than one ounce of marijuana or do you find him not guilty?

FOREMAN: Guilty of possession with intent to sell.

COURT: All right. You find the defendant, Donald Gene Wolfe, guilty of possession of marijuana with the intent to sell it?

FOREMAN: Yes, sir.

COURT: This is your verdict and so say you all?

(Jurors answered in the affirmative.)

In *State v. Webb*, 265 N.C. 546, 548, 144 S.E. 2d 619, 620-21 (1965), a similar case, the Supreme Court said:

> A jury has full control of its verdict up until the time it is finally delivered to the court and ordered recorded by the judge. Accordingly, if the foreman makes a mistake in announcing it, he may correct himself or any one of the jurors may correct him. To preclude mistake, the Clerk's inquiry "So say you all?" is directed to the panel immediately after their spokesman has declared the verdict. *State v. Young*, 77 N.C. 498. Even if all 12 jurors nod their assent, either the solicitor or counsel for defendant may then and there require that the jury be polled. The dissent of any juror at that time would be effectual. *State v. Dow*, 246 N.C. 644, 99 S.E. 2d 860; *State v. Cephus*, 241 N.C. 562, 86 S.E. 2d 70.

In the present case, as in *State v. Webb, supra*, the foreman merely made a slip of the tongue which he immediately corrected before the verdict was accepted by the court and ordered recorded. The jury was then polled. The true verdict was confirmed by the affirmative response of the jury when polled. We find no error in this assignment.

We have examined defendants' other assignments of error and find in them no merit.

No error.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. STARLIN WAYNE GOSNELL AND JUNIOR LYNN HIPPS

No. 7824SC544

(Filed 21 November 1978)

1. **Criminal Law § 92.1— consolidation of charges against two defendants**

The trial court did not err in consolidating for trial charges against two defendants for the same offenses of breaking or entering a hardware store and larceny of property therefrom, although fragments of glass from the store were found on the person of only one defendant.

2. **Criminal Law § 61.2— shoeprint testimony—prints not matched to defendants' shoes**

An officer's testimony concerning shoeprints which he followed from a pickup truck which had fled from the crime scene and thereafter wrecked was not inadmissible because there was no attempt to fit the prints to shoes worn by defendants where the officer saw defendants leaving the wrecked pickup truck and followed the tracks he saw them make.

3. **Arrest and Bail § 3.5; Searches and Seizures § 8— *search incident to* warrantless arrest**

An officer had probable cause to arrest defendants without a warrant, and a shirt was lawfully seized from one defendant as incident to his lawful arrest, where the officer chased a pickup truck from the scene of a break-in; the truck turned over in a creek and the officer saw two persons run from the truck; later that day the officer saw defendants in the custody of the sheriff of another county; defendants were dressed in the same manner as the persons the officer had seen flee from the overturned truck; the officer observed that defendants had scratches and bruises on their hands and faces and that their clothing was damp, soiled, and rumpled; and the officer seized the shirt at the county jail after defendants were arrested.

4. **Criminal Law § 138.4— counts consolidated for judgment—maximum sentence**

When different counts are consolidated for judgment, the total sentence may not exceed the greatest statutory penalty applicable to any one of the counts.

APPEAL by defendants from *Ferrell, Judge*. Judgment entered 17 November 1976, Superior Court, YANCEY County. Heard in the Court of Appeals 17 October 1978.

Defendants were each indicted for breaking or entering and larceny. Each was convicted by the jury, and each appeals from the judgment entered on the verdict which sentenced them to imprisonment "for the term of not less than 12 nor more than 15 years".

Evidence for the State is summarized as follows: When the True Value Hardware Store in Burnsville was closed after business on the 29th of October, 1975, the doors were locked, and the burglar alarm was set. A showcase containing guns was near the front door and was locked. Another case contained ammunition. When the manager returned to the store the next morning at eight o'clock, all the glass was broken out of the left door, a 3' x 7' door. Someone had tampered with the locks on the showcases. The glass in both showcases was broken. Several guns were missing, some electric razors were gone, and a safe weighing about 150 pounds had been stolen. The market value of the items taken was approximately $2,500. A deputy sheriff responded to a burglar alarm which sounded in the Sheriff's Department at 12:40 a.m. He saw a 1970 Chevrolet pickup with license No. AB 2080 on the bypass, and there was no other traffic in the lot where the truck was parked. The truck pulled out on the highway and headed west. The officer turned on the blue light on his vehicle and started to chase the truck. They were joined in the chase by the sheriff, and they got up to speeds of more than 100 miles per hour for several miles until the truck left the road and turned over in a creek. The stolen items spilled out of the truck into the creek and on the roadway. Two persons jumped out of the truck and ran. A third was found lying near the truck. From the headlights of his vehicle, the sheriff was able to see the persons who ran. He followed them into the woods and called a deputy to bring the bloodhound. Later that morning he saw the two men with Sheriff E. Y. Ponder, Sheriff of Madison County, and Deputy Sheriff Sellers of Yancey County. They were arrested and carried to the Yancey County Sheriff's Department. Deputy Sheriff Sellers had met Sheriff Ponder at the Madison-Yancey County line. As result of their search and investigation, the defendants were found talking to a man at a house in Madison County. The men had fresh scratches on their faces and hands, and their clothing was damp, soiled, and "rumpled". Two fragments of glass were found in the pocket of Gosnell's shirt and in his boots. The fragments matched the glass which came from the door at the hardware store.

Defendants did not put on any evidence.

Attorney General Edmisten, by Assistant Attorney General Amos C. Dawson III, for the State.

I. C. Crawford for defendant appellants.

MORRIS, Judge.

[1] By their first assignment of error, defendants argue that the court committed reversible error in consolidating the charges against the defendants for trial.

> "Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. *State v. Taylor, supra*; *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972)." *State v. Brower*, 289 N.C. 644, 658-659, 224 S.E. 2d 551, 561-562 (1976).

Obviously the charges against these two defendants are of the same class. It is difficult to imagine offenses more connected in time or in place. The two were seen jumping from the pickup truck and together running in the woods. They were together when apprehended. The evidence was the same as to both with the exceptions of the evidence relating to glass fragments found in Gosnell's pocket and boots. Testimony with respect to finding the fragments of glass came in without objection. When the expert was allowed to testify that the fragments matched fragments from the store door, defendant, although he did object, did not request the court to give the jury limiting instructions that the jury not consider that testimony as to defendant Hipps. Defendant Gosnell has shown neither abuse of discretion nor prejudice to his defense by reason of the trial court's consolidating for trial the charges against these defendants.

By their assignments of error Nos. 2, 3, and 4, defendants contend that incompetent evidence was admitted. They refer to

testimony the State attempted to elicit with respect to the use of bloodhounds. However, defendants' objections were sustained, and the State was never able to lay a proper foundation for the admission of the evidence. Nor did defendants move to strike the voluntary information given in response to a question by the solicitor. The court denied defendants' motion for mistrial. Defendants have shown no sufficient prejudice or abuse of discretion to warrant a new trial.

[2] Defendants next (assignments of error Nos. 5, 6, 7 and 8) urge that the court committed reversible error in allowing Deputy Sheriff Arrowood to testify with respect to footprints. He testified that he followed two sets of footprints from the overturned pickup truck; that one set was made by about a size 8 or 9 shoe with a reasonably high heel and the other, by "just an ordinary shoe approximately 9 or 10". He followed these tracks to the hard-surfaced road, picked them up again on the other side in a church yard, followed them to the road and up the road to a house owned by a Mr. Carr on the left of Indian Creek Road, across Indian Creek, and back across Indian Creek coming back into Indian Creek Road across from Mr. Carr's residence. He observed the same tracks near Metcalf Creek, on the Yancey County side, "going up Shepard Hollow on Indian Creek into what is known as the Grady Robinson Farm on the head of Indian Creek, leading around to a gap going down into Metcalf Creek". A good part of this testimony came in without objection, and defendants vigorously cross-examined the witness, going over his testimony as to the size of the shoes worn by the people and the directions travelled. On appeal, they urge that the evidence was not competent because it did not comply with the requirements of *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960). There the Court said that shoeprint evidence has no logical tendency to identify a defendant as the one who committed the crime with which he is charged unless "the attendant circumstances support this triple inference: (1) That the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime." *Id.* at 322 (quoting from *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949)). Here there was no attempt to fit the prints to the shoes worn by defendants at the time. However, here the defendants were seen

leaving the overturned pickup truck on foot and running into the woods. These were the tracks the witness followed. In *Bass*, the defendant was not seen leaving footprints at the scene of the crime—peeping into an occupied lady's bedroom at night. A similar situation obtained in *Palmer*; *i.e.*, there was no witness who saw the person make the shoeprints which were followed. We think the situation here is sufficiently different than *Bass* and *Palmer* that the failure of the State to introduce evidence that the prints corresponded to shoes worn by defendants at the time is not fatal and does not result in the inadmissibility of the shoeprint evidence. The weight of the evidence is for the jury. *See State v. Mays*, 225 N.C. 486, 35 S.E. 2d 494 (1945).

[3] Assignments of error Nos. 9 through 17, and the exceptions which support them, "pertain solely to evidence offered by (sic) the State over objection by defendants". Defendants' contention, as we understand it from their brief, is that the evidence was obtained "directly or indirectly by the illegal arrest of the defendants and for that reason the evidence under all these exceptions is incompetent". The record indicates that when the State attempted to question Sheriff Banks with respect to the shirt worn by defendant Gosnell when arrested, defendants objected, and the court conducted a *voir dire* directed to the legality of the search and seizure, as he was required to do. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974); *State v. Basden*, 8 N.C. App. 401, 174 S.E. 2d 613 (1970). The court, upon conclusion of the evidence on *voir dire*, found facts as follows:

> "Let the record show that on voir dire examination in the absence of the jury, based upon the competent evidence offered on the voir dire examination, the Court finds as a fact that the witness Banks, having observed two individuals flee from the scene of the pickup truck collision and having observed that the individuals were dressed one in his shirt sleeves and one in dark clothes and having observed the—having participated in a search for such individuals who had fled from the scene and having the following morning observed two individuals in the company of Sheriff E. Y. Ponder of Madison County and having at that time observed that the defendants had scratches and bruises about their faces and hands; that one of the defendants was dressed in his shirt sleeves—short sleeved shirt; that the defendants

were dressed in clothes in the manner of the individuals the witness had observed fleeing the scene; that they appeared to be tired; that the witness Banks took the defendants and each of them into custody without a warrant; that he transported the same to the county jail at Burnsville, Yancey County; that there he took in his possession a shirt identified as State's Exhibit No. 5 and there removed from the shirt pocket certain apparent fragments of glass. Based upon the foregoing findings of fact, the Court concludes as a matter of law that the witness Banks had probable cause at the time of the arrest to believe that the individuals in his custody were one and the same as the individuals he had observed leaving the scene of the wreck of the pickup truck; that he had probable cause to believe that a felony had been committed; that the search of the defendant Gosnell and removal of fragments from the shirt worn by the defendant Gosnell was incident to and subject to a search pursuant to lawful arrest; that the same therefore is admissible into evidence on the trial of this cause."

Defendants do not contend the facts are not supported by the evidence, a position which would not be well taken. The evidence amply supports the facts found, and the facts support the court's conclusion that there was probable cause to make the arrest. When the findings are supported by competent evidence, as here, the findings are conclusive and binding on appeal. *State v. Crews, supra,* and cases there cited.

Assignments of error Nos. 6 and 17 through 24 relate to the defendants' contention that the court erred in failing to grant their motions for nonsuit, timely made. We do not deem discussion of these assignments of error necessary. Suffice it to say that our review of the evidence clearly shows that the State's evidence was sufficient to submit the charges to the jury and support guilty verdicts.

[4] We have carefully reviewed all the remaining assignments of error and find them to be without merit, with one exception. By assignment of error No. 33, defendants say that "this judgment is void for the reason that the prison term was in excess of the prison term authorized by law". In their brief, defendants do not refer to this assignment of error (indeed their brief does not

refer to *any* assignments of error as required by Rule 28(b)(3), North Carolina Rules of Appellate Procedure) or to any exception which might support it. Nor does the record contain any exception to the judgment. Nevertheless, as suggested by the State in its brief, there is an obvious inadvertence in the judgment which should be corrected even in the absence of an exception. It is perfectly permissible to consolidate for judgment, as the court did here, the counts of felonious breaking and entering and larceny and pronounce one sentence, but the total sentence may not exceed " 'the greatest statutory penalty applicable to any of the counts'. *State v. Austin*, 241 N.C. 548, 549, 85 S.E. 2d 924, 926." *State v. Stafford*, 274 N.C. 519, 536, 164 S.E. 2d 371, 383 (1968); *State v. Crabb*, 9 N.C. App. 333, 176 S.E. 2d 39 (1970), and cases there cited. Both G.S. 14-54 (breaking or entering) and G.S. 14-70 (larceny) provide that violations are punishable under G.S. 14-2 (1977 Cum. Supp.) which provides:

> "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison."

Here the court entered judgment as to each defendant providing for imprisonment "for the term of not less than 12 nor more than 15 years. . . ." Obviously the judgment was an inadvertence. It must be vacated and the matter remanded for resentencing.

No error in the trial.

Remanded for resentencing as to both defendants.

Judges VAUGHN and WEBB concur.

Godwin v. Tew

HOMER PATRICK GODWIN, JR., AND JANICE LUCAS, PLAINTIFFS v. CHARLES L. TEW, JOHN J. TEW, AND BETTY BAKER GURKIN (TEW) DEFENDANTS AND R. ALLEN LYTCH, ADMINISTRATOR C.T.A. OF THE ESTATE OF FANNIE J. TEW THIRD-PARTY DEFENDANTS

No. 7711SC885

(Filed 21 November 1978)

1. **Executors and Administrators § 24.1— personal services rendered decedent—door opened for testimony about contract**

The trial court erred in excluding testimony by defendant on redirect examination concerning a contract with decedent to perform personal services, since plaintiffs by cross-examining defendant as to the personal services she rendered deceased opened the door to testimony as to why she rendered those services.

2. **Evidence §§ 11, 33— testimony about what deceased said—exclusion as hearsay**

Testimony by one defendant that the deceased, who was his mother, had told him that she did not owe the other defendant anything was not excluded by G.S. 8-51, since the testimony was not offered against the administrator, but the testimony was hearsay and should have been excluded on that ground.

3. **Evidence § 34.1— deceased's declaration against interest—admissibility**

The trial court erred in excluding testimony as to what the testatrix told the witness concerning money owed by testatrix to defendant, since the testimony was a declaration against interest and thus an exception to the hearsay rule.

4. **Evidence § 15.2— civil action—evidence of character irrelevant**

In a trial on defendant's claim against decedent's estate, the trial court erred in permitting a witness to testify concerning defendant's shooting of his wife, since evidence of the good or bad character of either party to a civil action is generally inadmissible.

APPEAL by defendants from *McLelland, Judge*. Judgment entered 24 June 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 17 August 1978.

This is an action commenced by the plaintiffs who were beneficiaries under the will of Fannie J. Tew. After the death of Fannie J. Tew, but before her will was admitted to probate, John J. Tew received $4,500.00 from funds belonging to the estate, and Betty Baker Gurkin Tew received $8,000.00 from funds belonging to the estate. John J. Tew and Betty Baker Gurkin Tew filed answers in which each contended the estate was indebted to them

in the amount each had received from the estate. The court directed a verdict ordering John J. Tew and Betty Baker Gurkin Tew to pay over to the estate the money which they had received from it. It was stipulated between the parties that the case would be tried on the claims against the estate of each of the original defendants. From a jury verdict of $4,364.00 in favor of Betty Baker Gurkin Tew and a verdict awarding nothing to John J. Tew, both of the original defendants have appealed.

McLeod and McLeod, by Max E. McLeod, for plaintiff appellees.

Morgan, Bryan, Jones, Johnson, Hunter and Greene, by Robert C. Bryan, for defendant appellants.

WEBB, Judge.

All questions presented on this appeal pertain to questions of evidence.

BETTY BAKER GURKIN TEW APPEAL

[1] Betty Baker Gurkin Tew contends the court erred in two respects. She first contends the court committed error by not letting her testify as to certain transactions she had with Fannie J. Tew. On direct examination of Betty Baker Gurkin Tew, no testimony was elicited as to transactions between her and the deceased. On cross-examination, the plaintiff elicited testimony from Betty Baker Gurkin Tew that she had brought groceries and personal toilet articles for Mrs. Tew, had prepared meals for Mrs. Tew, and had served Mrs. Tew meals in her room. On redirect examination, Betty Tew offered testimony, which was excluded, that she did these things for Mrs. Tew pursuant to an agreement that she was to be paid $400.00 per week for her services. G.S. 8-51 prohibits testimony by a person interested in the event against the administrator of a deceased person as to personal transactions with the deceased person. The performance of services by a witness for the deceased has been held to be a personal tranaction. *See* 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 73, p. 221 and cases cited therein. Betty Baker Gurkin Tew contends that the plaintiffs opened the door for her to testify as to why she performed the services by cross-examining her as to performance of the services. The incompetence of the adverse party to testify

may be removed by her being cross-examined as to the transaction in question. *Smith v. Dean*, 2 N.C. App. 553, 163 S.E. 2d 551 (1968). When the door is thus opened for the adverse party, it is only opened to the extent that he may testify as to the transaction about which he was cross-examined. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 75, p. 231. The question before us is whether the plaintiffs in this case by cross-examining Betty Baker Gurkin Tew as to the personal services she rendered Fannie J. Tew, opened the door to the extent Betty Baker Gurkin Tew could testify as to a contract to perform those services. No cases cited in the brief are directly on point, and we can find none in our research. We hold that when the plaintiffs cross-examined Betty Baker Gurkin Tew as to personal services rendered Fannie J. Tew, testimony as to why she rendered the services involved the same transaction, and it was error not to admit it into evidence.

[2] Betty Baker Gurkin Tew next contends that it was error to admit certain testimony by Charles Tew. Charles Tew was allowed to testify, over objection, that his mother, Fannie J. Tew, had told him that she did not owe Betty Baker Gurkin Tew anything. All parties in their briefs treat the question of the admissibility of this testimony as being governed by rules pertaining to transactions with a deceased person. The testimony was not offered against the administrator of the deceased person and is not excluded by G.S. 8-51. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 71, p. 216. The testimony is hearsay, however, and should have been excluded on that ground. *Gurganus v. Trust Co.*, 246 N.C. 655, 100 S.E. 2d 81 (1957). We also note it was evidence offered on behalf of the administrator as to whether Fannie J. Tew owed anything to Betty Baker Gurkin Tew. Betty Baker Gurkin Tew had completed her testimony at this stage of the trial. Since the question is not before us, we do not pass on whether this would have opened the door for Betty Baker Gurkin Tew to testify that there was an agreement by Fannie J. Tew to pay for her services. *See Batten v. Aycock*, 224 N.C. 225, 29 S.E. 2d 739 (1944).

JOHN TEW APPEAL

[3] John J. Tew's first assignment of error deals with the exclusion of testimony of Doris Wimberly, one of his witnesses. When Mrs. Wimberly was on the stand, the record shows the following:

"Q. Did Mrs. Tew make any statement to you relative to owing John twenty-five hundred dollars?

MR. MCLEOD: Objection.

A. Yes.

COURT: Sustained.

Q. Did she make any statements to you relative to a loan on the Stony Run parsonage?

MR. MCLEOD: Objection.

COURT: Sustained.

(THE FOLLOWING TESTIMONY WAS GIVEN IN THE ABSENCE OF THE JURY:)

Q. What, if anything, did Mrs. Tew tell you about the loan on the Stony Run parsonage?

OBJECTION. OBJECTION SUSTAINED.

If allowed to answer, the witness would have testified:

A. George Jernigan had secured a loan—

Q. Is this what Mrs. Tew told you?

OBJECTION. OBJECTION SUSTAINED.

If allowed to answer, the witness would have testified:

A. Yes. From John Tew, her son, concerning the Stony Run parsonage, and he paid the money back to Mrs. Tew instead of John because John wasn't there.

Q. What, if anything, did she say to you relative to the purchase of the real estate on North King Avenue in Dunn?

OBJECTION. OBJECTION SUSTAINED.

If allowed to answer, the witness would have testified:

A. That she needed some extra money, the sum of two thousand dollars, I believe. Anyway, she needed a sum of money to finish the purchase of the real estate on North King and Granville, and she borrowed it from John. It was twenty-five hundred dollars, I believe.

Q. This is what she told you?

OBJECTION. OBJECTION SUSTAINED.

If allowed to answer, the witness would have testified:

A. Yes, sir.

Q. To your knowledge, did she ever repay it?

OBJECTION. OBJECTION SUSTAINED.

If allowed to answer, the witness would have testified:

A. No, not to my knowledge. She told me she owed it to him."

The above testimony was offered to prove Fannie J. Tew said that she owed money to John Tew. It is hearsay testimony, but should have been admitted as a declaration against interest. The following is true in regard to this excluded testimony: (1) The declarant was dead. (2) The facts stated by Fannie J. Tew were against her interest when made and she must have been conscious this was so. (3) Fannie J. Tew had competent knowledge of the facts declared. (4) There was no probable motive for her to falsify. (5) The interest was a pecuniary one. The five things make this offered testimony a good example of a declaration against interest and an exception to the hearsay rule. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 147, pp. 493-95. It was error to exclude it.

[4] John J. Tew's last assignment of error deals with a question asked on cross-examination of Doris Wimberly, one of John J. Tew's witnesses. She had been called to testify that Fannie J. Tew was indebted to John J. Tew. On cross-examination the record shows the following question was asked:

"Q. You know of your own knowledge that Mr. John J. Tew shot his wife, don't you?

MR. BRYAN: Objection.

COURT: Overruled.

A. Yes, sir, I heard about it."

To allow the plaintiff to offer through Doris Wimberly's testimony that John J. Tew had shot his wife was error. It had no relevance to this case and could only prejudice John J. Tew.

1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 103, at pages 324 and 325 says:

> "Evidence of the good or bad character of either party to a civil action is generally inadmissible. Such evidence is regarded as being too remote to be of substantial value, as tending to confuse the issues and unduly protract the trial, and (most important of all) as offering a temptation to the jury to reward a good life or punish a bad man instead of deciding the issues before them."

For the reasons stated in this opinion as to the claims of John J. Tew and Betty Baker Gurkin Tew, there must be a new trial.

New trial.

Judges MORRIS and HEDRICK concur.

CAVELL A. PARRISH v. DAVID WAYNE COLE

No. 7710DC968
No. 7710DC1029

(Filed 21 November 1978)

1. **Appeal and Error § 16; Rules of Civil Procedure § 52— notice of appeal—subsequent motion to amend findings**

A notice of appeal does not bar a subsequent timely motion to amend the court's findings of fact pursuant to G.S. 1A-1, Rule 52(b).

2. **Divorce and Alimony §§ 24.1, 24.10— child support—portion of annual bonus—expenses of child after majority**

The trial court did not err in ordering defendant father to pay a percentage of his annual bonus into an account for the support of his children; however, the court erred in ordering that any surplus funds in the account be used for the education of each child after the child reaches the age of eighteen, and that each child is to receive his portion of the surplus upon reaching the age of twenty-one.

Parrish v. Cole

APPEAL by defendant from *Bullock, Judge*. Order entered 21 September 1977; Amendment to Order entered 2 November 1977 in District Court, WAKE County. Heard in the Court of Appeals 29 August 1978.

Plaintiff, Cavell Parrish, brought an action against defendant, David Wayne Cole, seeking child support for their two minor children. The only contested issue at trial was the amount of support to be awarded. The court directed defendant to pay the sum of $185.00 per month per child from his net monthly wages and, in addition, thirty-five percent of any net bonus received by the defendant from his employer. In paragraph 14 of the order, the court made the following provisions: the funds from the bonus are to be placed in an interest bearing savings account; any surplus funds are to be used for the education of each child after that child reaches age eighteen. Upon reaching age twenty-one, each child is to receive any surplus funds in his portion. When the oldest child reaches age eighteen the percentage of the bonus is to be reduced to twenty-five percent. The plaintiff was ordered to give a complete accounting of the use of these funds to the defendant.

On 22 September 1977, the defendant, David Wayne Cole, filed notice of appeal.

On 26 September 1977, within ten days of the entry of judgment, the plaintiff, Cavell Parrish, filed a motion, pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure, to amend the findings of fact to include findings as to the reasonable needs of the children and their expenses, the earning capacity of the defendant, the assets and liabilities of the defendant, and the plaintiff's income and ability to defray the expenses of this action. On 2 November 1977, the court amended its order of 21 September 1977 to include these additional findings of fact based upon the evidence produced at trial.

The defendant appeals from both orders contending that the court had no jurisdiction to amend its order as a notice of appeal had been filed and that the imposition of this percentage of income is improper.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Steven L. Evans, for plaintiff appellee.

Ragsdale & Kirschbaum, by William L. Ragsdale, for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the amendment to the order was improper because the trial court lacked jurisdiction. The issue presented is whether a notice of appeal bars a subsequent but timely motion to amend the findings of fact pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure. Rule 52(b) states that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." Although the general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court, *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659 (1963), we feel that the best result is reached by holding that a notice of appeal will not bar a party from making a timely motion pursuant to Rule 52(b).

North Carolina's Rule 52(b) mirrors Rule 52(b) of the Federal Rules of Civil Procedure; thus federal court decisions are pertinent. The Seventh Circuit, in *Elgen Manufacturing Corporation v. Ventfabrics, Inc.*, 314 F. 2d 440 (1963), faced a situation similar to the present case. In *Elgen*, the defendant, pursuant to Rule 52(b), timely moved to delete or amend a finding of fact after the plaintiff had filed notice of appeal. The Court acknowledged established precedent that filing of a notice of appeal terminates the jurisdiction of the trial court except insofar as jurisdiction is reserved by statute or rule. The Court continued, however, to qualify this rule by stating that "we have never held that a quick filing of notice of appeal by one party could defeat the adverse party's right to have the district court consider the merits of a timely filed motion under Rule 52(b)." 314 F. 2d at 444. *But see Fiske v. Wallace*, 115 F. 2d 1003 (8th Cir. 1940), *cert. den.*, 314 U.S. 663 (1941). We believe this approach is sound when considered in light of the results if a 52(b) motion is barred.

As stated by Professor Wright, "the primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." C. Wright, *Law of Federal Courts*, § 96, at 478 (3d ed. 1976). If a trial court has omitted certain essential findings of fact, a timely motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings and, perhaps, avoid multiple appeals. Furthermore, a Rule 52(b) motion must be made within ten days, a period which cannot be expanded by the trial judge. Rule 6(b), North Carolina Rules of Civil Procedure. Thus, a party must make a motion under Rule 52(b) within ten days or his motion will be barred. This ten day grace period is unlikely to disrupt the appellate process. A complete record on appeal, resulting from a Rule 52(b) motion, will provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process.

This result does not prejudice the defendant because he has not lost his right of appeal. Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a motion pursuant to Rule 52(b) tolls the ten day period for notice of appeal. This period begins to run anew upon entry of the order on that motion. If a party objects to the new or amended findings, he may still appeal. If, however, the amended findings overcome his objections, the necessity of appeal has been removed.

We also note that a trial judge will often announce his decision prior to writing his order. If an oral notice of appeal is given as the decision is announced, the trial judge continues to have jurisdiction to write his order. Allowing the ten day period for a 52(b) motion does not significantly differ from this process.

In the present case, allowing the 52(b) motion and the resulting amendment to the order is reasonable. The original findings of fact were deficient in that they did not set forth the needs of the children, the earning capacity of the defendant, or establish a basis for awarding attorney's fees. If the amendment to the order were not allowed, the case would have to be remanded for further findings, thus opening the door to additional appeals. Allowing a 52(b) motion in this case gives the plaintiff her opportunity to reform the findings of fact and does not prejudice the defendant.

The defendant, in objecting to the 52(b) motion, relies on *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971). *Wiggins* is distinguishable in that the Supreme Court was ruling on a Rule 60(b)(2) motion which can be made within *one year* of the entry of judgment. A motion under Rule 60(b) does not toll the time for notice of appeal as does a Rule 52(b) motion. Rule 3(c), North Carolina Rules of Appellate Procedure. Thus a Rule 60(b) motion has a greater potential for disrupting the appellate process because an appeal may have been substantially advanced at the time the motion is made. Under Rule 52(b), the time limit is ten days and the notice of appeal period does not begin to run until entry of an order upon that motion. This scheme results in a system in which the trial court has jurisdiction to reform, amend, or alter its decision prior to an appeal in order to give the appellate court a clearer understanding of the trial court's decision. We, therefore, hold that a timely motion, pursuant to Rule 52(b), will not be barred by an earlier notice of appeal.

[2] Defendant also excepts to that part of the order directing him to pay a percentage of his annual bonus into an account for the use of his children. In undisputed findings of fact the court found that $361.75 was needed monthly for the support of each child and that plaintiff was without the means to support them. It was well within the judge's discretion to order defendant to pay $185.00 of the amount monthly and allow a portion of the deficit to be paid annually from defendant's bonus. The court, however, was without the power to, in effect, attempt to create a savings account for the use of the children after they reach legal maturity at the age of 18. The judgment is, therefore, modified by striking therefrom paragraph 14 and all subparagraphs thereof of the findings of fact and paragraph 5 and all subparagraphs thereof of the adjudicative part of the judgment. The result is that defendant will provide thirty-five percent of his annual bonus for the support of his children as ordered by the court. If it should subsequently appear that all of that amount is not needed for the support of his children, defendant will be at liberty to make an appropriate motion in the cause to reduce his obligation. Except as modified here, the judgment is affirmed.

Modified and affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

BESSIE LEATHERMAN v. FLOYD HERMAN LEATHERMAN AND LEATHERMAN, INC.

No. 7725SC871

(Filed 21 November 1978)

1. **Husband and Wife § 1— *wife's services in business gratuitous—no ownership* interest in business by wife**

Plaintiff wife's claim that her bookkeeping, supervision of employees and running of errands in defendant husband's land clearing business entitled her to an ownership interest in the business when funds derived from the business and placed in joint bank accounts were used to capitalize the business is without merit, since plaintiff failed to overcome the presumption that her services were rendered gratuitously, and since there was no showing that defendant intended to make a gift to his wife of the funds derived from his business which he placed in the joint accounts.

2. **Trusts § 14.2— fiduciary relationship between husband and wife—use of funds to capitalize business—no constructive trust on stock for wife**

The trial court erred in imposing a constructive trust on the stock of a business which had been capitalized with funds derived from the business and placed in joint bank accounts of plaintiff wife and defendant husband, even though plaintiff had contributed her services to the building up of the business and even though a fiduciary relationship existed between the parties, since there was no evidence that defendant failed to disclose any material fact with respect to use of the funds to capitalize and there was no showing of any wrongdoing on defendant's part.

Judge MARTIN (Robert M.) dissents.

APPEAL by defendants from *Lewis, Judge*. Judgment entered 11 July 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 16 August 1978.

Plaintiff, Bessie Leatherman, seeks a declaration that she is entitled to one-half of the stock of Leatherman, Inc. owned by the defendant, Floyd Leatherman.

Plaintiff and defendant were divorced in 1975 after twenty-eight years of marriage. The evidence at trial showed that during this period of marriage, the defendant was engaged in a land clearing business that was started as a small proprietorship in 1951 but was incorporated as Leatherman, Inc. in 1965. From 1951 until their separation in 1974, plaintiff worked with the defendant in this business keeping books, supervising employees, and carrying supplies to various job sites. Plaintiff testified that by 1963

her duties constituted a full-time job. She, nevertheless, drew no personal salary until 1971. Funds derived from the business between 1951 and 1965 were deposited in joint bank accounts in the names of the plaintiff and the defendant. Personal expenses as well as business expenses were paid out of these accounts. When the business was incorporated in 1965, the funds in these accounts, $32,382.02, were used to capitalize the business. The total value of the accounts comprised one-third of the value of the business. All stock was issued in the name of the defendant, Floyd Leatherman.

The trial court held that the plaintiff owned an one-half interest in the bank accounts which were used to capitalize Leatherman, Inc. The court then imposed a constructive trust in the amount of $16,191.01 upon the defendant's stock holdings in Leatherman, Inc. Defendant appealed.

Rudisill & Brackett, by J. Steven Brackett, for plaintiff appellee.

Patton, Starnes & Thompson, by Thomas M. Starnes, for defendant appellants.

VAUGHN, Judge.

[1] The first issue we address is whether the plaintiff had any ownership rights in the joint bank accounts which would entitle her to an interest in the stock. The funds in the bank accounts, $32,382.02, provided consideration for part of the stock of Leatherman, Inc. If the plaintiff owned part of these funds, then it is possible that a resulting trust could be imposed upon the stock. Where a party gives valuable consideration for property but title is put in the name of another, a resulting trust may be imposed on this property in favor of the paying party if no gift were intended. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954). We hold that the trial judge erred when he concluded that the plaintiff had an ownership interest in the funds.

In *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1961), the Court held that the income and profits from the husband's business are the property of the husband and the wife's rights therein are limited.

> "The husband has the duty to provide necessaries for his wife and must support and maintain her in accordance with his means and station in life. North Carolina has no community property law. The domestic services of a wife, while living with her husband, are presumed to be gratuitous, and the performance of work and labor beyond the scope of her usual household and marital duties, in the absence of a special contract, is also presumed to be gratuitous." *Smith v. Smith, supra*, at 155-56.

See also Sprinkle v. Ponder, 233 N.C. 312, 64 S.E. 2d 171 (1951); *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541 (1922). Thus, plaintiff's claim that her work in her husband's business entitles her to an ownership interest is unfounded. The presumption that such services were rendered gratuitously has not been overcome by any evidence of a special contract to pool their labors into a partnership.

The Court in *Smith* further held that, absent evidence to the contrary, the depositor of funds in a joint bank account is deemed to be the owner of the funds. Thus, if a husband deposits his money into a joint account, the money remains his property, absent evidence to the contrary. By putting his money into a joint account, the husband has not made a gift to the wife; rather he has designated his wife as an agent with the power to withdraw the funds.

Plaintiff, here, therefore, cannot base an ownership claim on the existence of a joint account which was used to capitalize the business. The plaintiff testified that she deposited no personal funds into these accounts and that the sole source of the jointly held accounts was the business. There is no evidence that the defendant intended to make a gift of the funds to the plaintiff or in any way endow her with an ownership interest. Thus, the evidence is insufficient to support plaintiff's claim to ownership of part of Leatherman, Inc.

[2] Plaintiff further contends that an ownership interest is not required in order for the court to impose a constructive trust on the stock.

> "A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the

> holder of title to, or of an interest in, property which such holder *acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it* against the claim of the beneficiary of the constructive trust. . . . [T]here is a common indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is *some fraud, breach of duty or other wrongdoing* by the holder of the property." (Emphasis added.)

Wilson v. Crab Orchard Development Co., 276 N.C. 198, 211-12, 171 S.E. 2d 873, 882 (1970). In the present case, the trial court found no evidence of fraud on the part of the defendant. Indeed, there is no evidence of any misrepresentation on his part. The Court, however, based the imposition of a constructive trust on the confidential relationship between the plaintiff and the defendant at the time of the incorporation of Leatherman, Inc. and the issuance of the stock. In *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951), the Court considered the effect of a confidential relationship upon the dealings between the parties. The Court held that, when a confidential relationship exists, the person in whom the confidence is placed is required to exercise good faith in his dealings with the other and to refrain from taking advantage of the other at the other party's expense. If a fiduciary relationship exists, the fiduciary is required to disclose facts which he would be under no duty to disclose if no such relationship existed. In the present case, even though a confidential relationship existed between the plaintiff and the defendant, there is no evidence that the defendant failed to disclose any material fact in the transaction in question. That, subsequent to the issuance of the stock, defendant executed a will leaving all of his property to his wife, does not show an acknowledgment of plaintiff's legal interest in the business, but instead, shows an acknowledgment of his wife as the natural object of his testamentary bounty. There is nothing in the evidence or the findings of fact to show any wrongdoing on the defendant's part which would support a constructive trust in plaintiff's favor on the stock he owns in Leatherman, Inc.

For the reasons stated, the court erred in concluding that the stock owned by defendant is subject to any trust in favor of plaintiff. The judgment is, therefore, reversed.

Reversed.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) dissents.

ROSANNA CRUMP MOORE v. ALTON MONROE MOORE

No. 7810SC35

(Filed 21 November 1978)

Husband and Wife § 13; Divorce and Alimony § 21 — separation agreement — no right to specific performance

A separation agreement which has not been incorporated into a court order may not be enforced by specific performance, since the purpose of a specific performance decree would be to compel the defendant to comply with the agreement under threat of being jailed for contempt, and such an agreement is not enforceable by contempt proceedings.

Judge WEBB dissenting.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 20 October 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1978.

Plaintiff seeks specific performance of a separation agreement entered into by plaintiff and defendant on 24 April 1972. In that agreement, defendant agreed to pay $250.00 a month for the support of the plaintiff. Defendant complied with the terms of this agreement until 15 July 1975, after which time he ceased to make payments.

On 27 January 1976, plaintiff obtained a judgment against the defendant for arrearages in the payments. Execution was issued in February but was returned unsatisfied. In July 1976, defendant was ordered to appear for supplemental proceedings to testify as to his property and earnings. Later, however, plaintiff apparently abandoned the supplemental proceedings and started the present action seeking specific performance of the agreement. The trial court denied that relief, and plaintiff appealed.

Smith, Anderson, Blount & Mitchell, by James G. Billings, for plaintiff appellant.

R. C. Soles, Jr., for defendant appellee.

VAUGHN, Judge.

The issue in this case is whether this separation agreement, which has not been incorporated into a court order, may be enforced by specific performance. It is apparent that, due to the defendant's prior history of nonpayment, plaintiff seeks a specific performance decree to compel the defendant to pay under threat of being jailed for contempt. Our courts have previously ruled that separation agreements which have not been incorporated into a judgment cannot be enforced by contempt proceedings. The root of this premise is Article I, Section 28 of the North Carolina Constitution which prohibits imprisonment for debts. Imprisonment for debt by contempt order, therefore, may only be accomplished through the enforcement of a judicial order warranting such a remedy. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946). In *Stanley*, the Supreme Court stated that a consent judgment, wherein the court approved a separation agreement but did not adopt it as its order, could not be enforced through contempt proceedings. The Court held that the separation agreement "was an extrajudicial transaction, and although between husband and wife, and relating to the support of the wife, had no more sanction for its enforcement than any other civil contract; certainly not that of imprisonment through civil contempt for noncompliance." *Stanley v. Stanley, supra*, at 133. Again, in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), Justice (now Chief Justice) Sharp stated that agreements approved but not adopted by the court cannot be enforced by contempt proceedings. *See also Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). The thrust of these holdings is that a court must order and direct a supporting spouse to pay alimony before that spouse will be subjected to contempt proceedings for failure to pay. *See Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882 (1961). Other jurisdictions have also held that separation agreements cannot be enforced by contempt proceedings unless they are incorporated into a decree and ordered by the court. *See, e.g., Wright v. Stidham*, 95 Ariz. 316, 390 P. 2d 107 (1964), *Plumber v.*

Superior Court, 50 Cal. 2d 631, 328 P. 2d 193 (1958), *Dickey v. Dickey*, 154 Md. 675, 141 A. 387 (1928).

This Court addressed a similar situation in *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E. 2d 809 (1977), where plaintiff sought an injunction to enjoin her ex-husband from violating their separation agreement. This Court held that a separation agreement which has not been incorporated into a judgment may not be enforced by contempt proceedings. The plaintiff's obvious purpose for requesting injunctive relief was to enforce the agreement by contempt proceedings, and the court reasoned that injunctive relief was not available. We reach similar conclusions in the case before us and hold that plaintiff's prayer for specific performance was properly denied.

We note that, in an earlier ruling, the court had apparently offered to have a receiver appointed to inquire into the defendant's assets. The record indicates that the plaintiff did not pursue this remedy. Where an execution is returned unsatisfied, a receiver may be appointed to afford the most thorough means of scrutiny, legal and equitable, in reaching such property as the debtor has that ought justly to go to the creditor. *Massey v. Cates*, 2 N.C. App. 162, 162 S.E. 2d 589 (1968).

Affirmed.

Judge MORRIS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. It is apparent from the record that the defendant in this case is determined not to abide by the separation agreement he has made. I do not believe the courts are powerless to enforce the contract. I would hold that the plaintiff has shown that she does not have an adequate remedy at law and the superior court should enter such equitable remedy as will give her relief. The cases cited by the majority are different on the facts from this case. In *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E. 2d 809 (1977), a judgment was reversed which ordered the defendant not to breach a separation agreement as he was

threatening to do. In *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118 (1946), a judgment was reversed which held the defendant in contempt for failure to pay a judgment for accrued support. In *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), a judgment was affirmed which denied the plaintiff's motion to strike a previous order of the court reducing alimony payments. In *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967) and *Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882 (1961), it was held that contempt proceedings are appropriate where the court has awarded alimony as a part of the judgment.

There are cases in which contracts may be enforced by specific performance. 71 Am. Jur. 2d, Specific Performance, § 5, p. 14. I believe this is one of them. The record shows the defendant entered into a separation agreement; he is able to make his payments; he refuses to do so; and when the plaintiff reduces the accrued alimony to judgment, he handles his affairs in such a manner that execution cannot be had against his assets. I believe this is a sufficient showing that the plaintiff does not have an adequate remedy at law and equitable relief is appropriate.

STATE OF NORTH CAROLINA v. CHARLES FRANKLIN FORNEY

7826SC609

(Filed 21 November 1978)

1. Criminal Law § 34.7— guilt of other offense—admissibility to show intent

In a prosecution for possession with intent to sell and sale of heroin, evidence of defendant's stated desire to purchase cocaine shortly before the crimes charged was competent to show his intent, motive and guilty knowledge, and it additionally tended to show a course of dealing by the defendant with undercover agents which shed light upon their transactions concerning the crimes charged.

2. Narcotics § 3.3— tester—opinion as to definition—admissibility

In a prosecution for possession and sale of heroin, the trial court did not err in permitting a State's witness to give an opinion as to the meaning of the word "tester" as used by defendant since defendant objected but made no request for a finding by the trial court as to the witness's expertise, and the trial court's finding that the witness was an expert was implicit in its ruling on the admissibility of the evidence.

3. Narcotics § 4.3— possession of heroin—actual possession by one other than defendant—control and dominion by defendant

In a prosecution for possession of heroin where the evidence tended to show that an unidentified black man actually had the heroin in his possession and sold it to undercover agents, the trial court did not err in denying defendant's motion to dismiss, since evidence was sufficient to permit the jury to conclude that defendant was able easily to cause the unidentified black man to appear and produce heroin for customers and that defendant exercised dominion and control over the man and the drugs he physically possessed.

4. Criminal Law § 102.3— prosecutor's jury argument— no error

In a prosecution for possession and sale of heroin, the district attorney's remark in his jury argument that defendant was in the dope business was supported by the evidence; the trial court properly instructed the jury to disregard the district attorney's statement that defendant ran a heroin network; and any objections to remarks made by the prosecutor to which no objections were made at trial are not considered on appeal.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 31 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1978.

The defendant was indicted for felonious sale and delivery of the controlled substance heroin and felonious possession of the controlled substance heroin with the intent to sell and deliver. Upon his pleas of not guilty to both charges, the jury returned a verdict of not guilty on the charge of felonious sale and delivery of heroin and guilty on the charge of felonious possession of heroin with intent to sell and deliver. From judgment sentencing him to imprisonment for a term of seven years, the defendant appealed.

The State's evidence tended to show that on 25 May 1976, two undercover narcotics agents employed by the State Bureau of Investigation, John Prillaman and Shirley LeFeavers, met the defendant at a grocery store and told him they wanted to buy some heroin. The defendant told the agents to go to a particular service station and he would join them shortly. The agents complied with his directions and met the defendant at the service station shortly thereafter. The defendant then told the agents that he had to leave and would be back in a few minutes. While the agents were waiting for the defendant's return, a man known as Lilly approached them and asked if they had seen the defendant. Agent LeFeavers testified that on a prior occasion she had heard the defendant say that Lilly was his "tester." She then testified that a "tester" was a person who sampled drugs for a purchaser.

About fifteen minutes after the defendant left the service station, he returned in the company of a black male whose identity was unknown to the agents. The two men got out of their car and Agent Prillaman got out of his. A conversation between Prillaman and the unidentified black male as to the price of the heroin to be bought and sold ensued. The man offered to sell Prillaman "half a load" or fifteen glassine bags of heroin. Prillaman agreed and the man sat down on the sidewalk and counted out fifteen glassine bags of heroin. He handed the bags of heroin to Prillaman in exchange for the agreed upon price. The bags were chemically examined and the contents were found to contain heroin.

The defendant did not elect to present evidence at trial.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Norman M. York, Jr., for the State.

Steve Dolley, Jr., for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the admission of evidence tending to show that, on the night prior to the alleged sale of heroin giving rise to the charges against the defendant, Agents Prillaman and LeFeavers had first met the defendant and been informed by him that he wished to purchase cocaine. As a general rule, evidence is not properly admitted which tends to show that the defendant has committed a criminal offense other than that for which he is being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). "However, such evidence is competent to show 'the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.' *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241." *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518, *cert. denied*, 414 U.S. 1042, 38 L.Ed. 2d 334, 94 S.Ct. 546 (1973). The evidence of this defendant's stated desire to purchase cocaine shortly before the crimes charged was competent to show his intent, motive, and guilty knowledge. *State v. Logan*, 22 N.C. App. 55, 205 S.E. 2d 558, *cert. denied*, 285 N.C. 666, 207 S.E. 2d 752

(1974). It additionally tended to show a course of dealing by the defendant with the agents which shed light upon their transactions concerning the crime charged. If this evidence was in fact evidence of a prior criminal offense, it was, nonetheless, properly admitted.

[2] The defendant next assigns as error the admission into evidence of the opinion of the State's witness as to the meaning of the word "tester" as used by the defendant. The defendant made a timely objection to the testimony but did not state the ground for his objection or request a finding by the trial court as to the witness' expertise. In the absence of a request for a finding by the trial court as to the qualifications of the witness as an expert, the record need not reflect that a specific finding on the subject was made. The trial court's finding that the witness is an expert is implicit in the ruling on the admissibility of the evidence. *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423 (1971), *cert. granted*, 280 N.C. 724, 186 S.E. 2d 926, *appeal dismissed*, 281 N.C. 761, 191 S.E. 2d 364 (1972).

Findings as to the competency of a witness to testify as an expert lie within the trial court's discretion. In the absence of a showing of abuse of discretion or insufficient evidence to support the finding, the trial court's determination is conclusive. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956). The finding of the trial court was sufficiently supported by evidence, and there was no showing of an abuse of discretion. The evidence was properly admitted.

[3] The defendant next contends that the trial court erred in denying his motion to dismiss on the ground that there was no evidence tending to show that he had possession of the heroin. We do not agree. Possession can be shown by the exercise of dominion and control. *United States v. Jones*, 308 F. 2d 26 (2nd Cir. 1962). Dominion and control can be exercised directly or through an employee or agent whom one dominates or whose actions one can control. 28 C.J.S. Drugs and Narcotics Supplement § 205, p. 303. Such domination or control over an agent having physical custody of drugs is exercised by one who is sufficiently associated with the agent to be able to easily cause him to produce the drugs for a customer. *United States v. Baratta*, 397 F. 2d 215 (2d Cir. 1968), *cert. denied*, 393 U.S. 939, 21 L.Ed. 2d 276, 89

S.Ct. 293 (1968), *reh. denied,* 393 U.S. 1045, 21 L.Ed. 2d 597, 89 S.Ct. 613 (1969); *Cellino v. United States,* 276 F. 2d 941 (9th Cir. 1960); Annot., 42 A.L.R. 3d 1072 (1972). The evidence tended to show that the defendant was able to produce the unidentified man in physical possession of the drugs on short notice at a place of the defendant's choosing. The record further reveals that the unidentified man arrived in possession of the amount of heroin desired by the agents and with apparent prior knowledge that the agents were the individuals who wished to make the purchase. He immediately entered into negotiations concerning the price of the fifteen glassine bags of heroin and made the requested sale immediately to individuals apparently previously unknown to him. This evidence was sufficient to support a conclusion by the jury that the defendant was able to easily cause the unidentified man to appear and produce heroin for customers and exercised dominion and control over the man and the drugs he physically possessed.

[4] The defendant also assigns as error certain remarks made by the district attorney in his argument to the jury. At one point in the closing argument for the State, the defendant's objection to a statement that he was in the dope business was overruled. As sufficient evidence was introduced to show that the defendant was in possession of heroin with the intent to sell, the remark was supported by the evidence. The objection was properly overruled.

The defendant also objected to a statement by the prosecutor that the defendant ran a heroin network. The objection was sustained, and the trial court immediately instructed the jury to disregard the statement. Any error was, therefore, cured by the trial court's prompt actions.

The defendant additionally excepts in his case on appeal to other remarks made by the prosecutor to which no objection was made at trial. Objections to the arguments of the prosecutor must be made before the case goes to the jury in order to provide the trial court with an opporutnity to take appropriate corrective action. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied,* 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969).

Furthermore, appellate courts ordinarily do not interfere with the trial court's control of jury arguments unless the im-

propriety of remarks by counsel is extreme and clearly calculated to prejudice the jury in its deliberations. *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159 (1978). We have reviewed the argument of the prosecutor in its entirety, and find that it does not warrant our intervention.

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

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

BOARD OF TRANSPORTATION, PLAINTIFF v. CHARLOTTE PARK AND RECREATION COMMISSION; A. L. PURRINGTON, JR.; JOSEPH B. CHESHIRE, JR.; HENRY HAYWOOD, JR., TRUSTEES OF THE DIOCESE OF NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH; RT. REV. THOMAS A. FRAZIER, BISHOP OF THE DIOCESE OF NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH, DEFENDANTS

No. 7826SC59

(Filed 21 November 1978)

1. **Deeds § 15— restriction on use of land—decision to condemn—separate municipal entities**

   The Charlotte Park and Recreation Commission and the City of Charlotte were separate entities so that a decision by the City to condemn for a street project a portion of land conveyed to the Commission for use only as a park was not in effect a decision by the Commission to alter the use of the land which would bring the restrictive clause of the deed into play.

2. **Deeds § 15; Eminent Domain § 16.1— compensation for condemnation—owner of right of re-entry**

   The owner of a right of re-entry for breach of condition has no compensable interest in a condemnation award if the fee owner had no intention to abandon the permitted use of the property.

APPEAL by defendants from *H. Martin, Judge.* Order entered 31 October 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1978.

On 19 November 1973 the State Board of Transportation brought this action to determine just compensation for a tract of land it had condemned. Both the Charlotte Park and Recreation

Commission (Commission) and the trustees and bishop of the Diocese of North Carolina of the Protestant Episcopal Church (Diocese) filed answers; each denied that the other had any interest in the property. The Commission moved for the court to determine the issue between it and the Diocese as to which was entitled to any damages awarded in the condemnation action.

The parties stipulated that the property in question had been conveyed for a consideration of $2500 to the Commission in 1943 by the Diocese and the Thompson Orphanage and Training Institution. By the terms of that deed, the property was to be used only as a park, and "[i]f the [Commission], its successors or assigns, fails to continue to use said property for playground purposes then, in that event, before said property can be used for any other purpose it must be offered in writing to the [grantors] at a purchase price of Twenty-five Hundred ($2500.00) Dollars, without interest thereon. . . ." Since the conveyance, the Commission has operated the Pearl Street Park on the property.

On 8 July 1971, the Commission informed the Diocese that the City of Charlotte had indicated its intention to acquire part of the property by condemnation for street relocation. On 16 July 1972 the City of Charlotte and the State Highway Commission entered into an agreement that the State would acquire the necessary right-of-way for the street relocation project and the City would reimburse the State for 1/3 of its expenditures.

At the hearing on its motion, the Commission presented the affidavits of three of its members that the land involved had been continuously used as a park, and that as of the date of the condemnation suit the Commission had no intention to cease using it as such. The trial court found that the Commission was the only party having an interest in the condemned land and that it was entitled to the entire condemnation award. The Diocese appeals.

Moore & Van Allen, by James O. Moore and Jeffrey J. Davis, for defendant appellants.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by William L. Rikard, Jr., for defendant appellees.

ARNOLD, Judge.

[1] The Diocese first argues that the Commission and the City of Charlotte were not separate entities, and therefore a decision by the City to condemn the park land for street relocation was in effect a decision by the Commission to alter the use of the land, bringing the restrictive clause of the deed into play. In connection with this argument the Diocese asserts that the City is merely trying to avoid its obligations by agreeing with the State for the State to condemn the property. We disagree on both points.

The Commission was not, as the Diocese argues, merely an alter ego of the City of Charlotte. The Commission was created in 1927 by an act of the General Assembly, Chapter 51, Private Laws of the State of North Carolina, Session 1927, and is a separate public entity. The General Assembly continued the existence of the Commission as a public corporate body in 1965. Ch. 713, Ch. V, Subch. C, 1965 Session Laws of North Carolina. The excerpts from the Charter of the City of Charlotte introduced by the Diocese at the hearing on the motion merely copy verbatim from the 1965 Session Laws and recognize the existence of the Commission as already created.

Since the Commission was an entity separate from the City of Charlotte, it is irrelevant here whether it was the City or the State that brought the condemnation action. However, we do not agree with the contention of the Diocese that the agreement between the City and the State, whereby the State would acquire the necessary property for the street relocation, was a sham. It is clear that the State intended to construct a highway project, and the City agreed to pay part of the expenses of the project because of the benefits it would receive.

Our determination that the City and the Commission were separate entities also negates the contention of the Diocese that it is entitled to the condemnation proceeds because the Commission intended to cease using the property for a park. The only evidence offered in support of that position was that the *City* planned to condemn the property for a street project. The intentions of the City are not imputed to the Commission. Moreover, three members of the Commission testified that there was no intention to abandon the park at all. Our Supreme Court in *Charlotte v. Recreation Commission,* 278 N.C. 26, 178 S.E. 2d 601

(1971), indicated that where the conveyance was a fee simple determinable with a possibility of reverter, "[t]he taking of the land under the power of eminent domain does not . . . cause a reversion of the title to the grantor. . . ." *Id.* at 32, 178 S.E. 2d at 605.

Even if it is not entitled to the entire condemnation award, the Diocese argues that it is at least entitled to the difference between the fair market value of the property restricted for park use and the fair market value of the property unrestricted. In disputing this issue, each party relies on *Charlotte v. Recreation Commission, supra,* for its respective position, but that case is not on point. At issue in that case was the method of measuring damages; title to the condemnation award was not disputed.

[2] As the Diocese admits, the weight of authority is that the owner of a right of re-entry for breach of condition has no compensable interest in a condemnation award if the fee owner had no intention to abandon the allowed use of the property. 27 Am. Jur. 2d, Eminent Domain § 251. Exceptions to this rule have generally occurred in situations where the vested future interest had some special value to its owners, see 81 A.L.R. 2d 575, which is not the case here. However, in support of its rationale, the Diocese cites two cases which go against the weight of authority. The first, *Ink v. City of Canton,* 4 Ohio St. 2d 51, 212 N.E. 2d 574 (1965), is not on point. The conveyance there was a gift, and the Ohio court, while giving the grantor part of the condemnation award in that situation, went on to say that where the grantee had paid the grantor the full value of the determinable fee, as apparently was the case here, "giving the grantor any part of the eminent domain award would represent a windfall to the grantor." *Id.* at 55, 212 N.E. 2d at 577. The case of *State v. Independence School Dist. No. 31,* 266 Minn. 85, 123 N.W. 2d 121 (1963), on the other hand, supports the position of the Diocese. The Minnesota court, while recognizing that the weight of authority was otherwise, decided that "[i]n all cases . . . some amount, however nominal, should be allowed to the owner of a possibility of reverter when his interest is extinguished by condemnation," *id.* at 95-96, 123 N.W. 2d at 129, and that where the fair market value of the highest and best use was higher than the restricted use value, the owner of the possibility of reverter was entitled to the difference between those values.

We reject the reasoning of the Minnesota court, and adopt the rule stated in the Restatement of Property and in accord with the majority of other jurisdictions, that where no intention to abandon the restricted use is shown, the owner of the fee is entitled to the entire condemnation award.

Affirmed.

Judges CLARK and ERWIN concur.

ALMA MAE KENNEDY SHEPPARD v. DAVID PHILLIP SHEPPARD, CLIFFORD GENE SHEPPARD AND JEWEL HARE SHEPPARD

No. 7819DC32

(Filed 21 November 1978)

1. **Infants § 6.3— child custody—contest between mother and grandmother—evidence of deceased father's character irrelevant**

In a child custody proceeding where the natural mother and the paternal grandmother sought custody, the trial court properly excluded a letter allegedly written by plaintiff's deceased husband to plaintiff while he was incarcerated while awaiting trial for assault upon plaintiff, since the letter was irrelevant, the character of the natural father not being in issue.

2. **Appeal and Error § 49.1; Rules of Civil Procedure § 43— objection to question properly sustained—answer in record unnecessary**

In actions tried without a jury it is not necessary to place answers in the record after objections to questions have been properly sustained if the evidence is clearly not admissible on any grounds. G.S. 1A, Rule 43(c).

3. **Trial § 14— order of proof—discretionary matter**

Plaintiff was not prejudiced by the trial court's ruling that plaintiff could not call defendant as a witness in the case in chief but must wait and cross-examine her when she testified in support of her own prayer for child custody, since plaintiff was afforded ample opportunity to cross-examine defendant, and the order of the presentation of evidence was within the trial court's discretion.

4. **Adoption § 1— confidentiality of records—attorney's files subpoenaed—circumvention of protection statute**

The trial court in a child custody proceeding properly excluded from evidence the files which plaintiff had subpoenaed of plaintiff's former counsel concerning adoption by plaintiff and her deceased husband of their first child since plaintiff could not circumvent G.S. 48-26, the statute protecting the final order of adoption and all papers and reports filed pursuant to G.S. Chapter 48, under the guise of a waiver of the attorney-client privilege.

APPEAL by plaintiff from order of *Faggart, Judge*. Judgment entered 30 July 1977 in the District Court, RANDOLPH County. Heard in the Court of Appeals 17 October 1978.

This case involves a child custody action initiated by the natural mother of three minor children. The action is filed against the deceased natural father's mother and two brothers. The paternal grandmother took custody of the three children 1 April 1977, when the natural father, Charles Jerry Sheppard, was shot and killed by John Hall, a companion of the plaintiff. Defendant, Jewel Hare Sheppard, answered the complaint praying that she be given legal custody of the children. After trial in the district court without a jury, the court ordered that the children's paternal grandmother, Jewel Hare Sheppard, be given custody of the three children.

From signing and entry of the order of custody the plaintiff appeals.

Other evidence necessary for this decision will be set out in the opinion below.

Ottway Burton for plaintiff appellant.

Floyd, Baker & Tennant, by James L. Tennant, for defendant appellees.

MORRIS, Judge.

[1] We will first address the plaintiff's assignments of error relating to the admission of evidence. We note at the outset the established principle of appellate review of cases tried before a judge without a jury that the technical rules of evidence will not be controlling on the trial court absent a clear showing of prejudice by the complaining party. *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974); *Board of Transportation v. Greene*, 35 N.C. App. 187, 241 S.E. 2d 152 (1978).

Defendant's objection to the admission into evidence of a letter allegedly written by plaintiff's deceased husband was properly sustained. The letter, sent to plaintiff by her now deceased husband who was then incarcerated while awaiting trial for assault upon the plaintiff, contained an offer to "go to church and help [plaintiff] to raise [the] children right" if the plaintiff would

refrain from prosecuting the assault charge. We find the relevance of the letter too tenuous to require admission into evidence. The paternal grandmother is seeking custody to the exclusion of the natural mother. Thus, the trial court is faced with the delicate task of ordering custody in such person as will, in the opinion of the judge, best promote the interest and welfare of the child. G.S. 50-13.2. The character of the natural father is not in issue. Nevertheless, the letter's contents had, through oral testimony, come before the trial judge. We find no prejudice to plaintiff because of the exclusion of the writing.

The plaintiff has excepted to and assigned as error numerous rulings by the trial court excluding evidence concerning the character and reputation of the male defendants, the records of the business of the male defendants, and criminal records of the male defendants. Plaintiff further excepted to the exclusion of evidence concerning alleged threats upon a witness by Gene Sheppard and the death of David Sheppard's wife following a child custody action filed by his deceased spouse. Although the male defendants are nominal parties to this action, their reputation has an insufficient nexus to the narrow issue of the fitness of defendant Jewel Hare Sheppard to require the trial court's consideration of such evidence. We note that plaintiff made no direct attack upon the fitness of the feme defendant—the only defendant seeking custody of the children.

[2] Plaintiff has assigned as error the trial court's refusal to permit answers to be placed into the record after objections to the questions had been properly sustained. In actions tried without a jury, such evidence need not be placed into the record if it is clearly not admissible on any grounds. G.S. 1A-1, Rule 43(c). *See e.g., State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977) (not error to refuse to insert irrelevant matter into the record).

[3] Plaintiff assigns as error the trial court's ruling that plaintiff could not call defendant, Jewel Hare Sheppard, as a witness in the case in chief. The trial court ruled that, since the witness would testify in support of her own prayer for custody of the child, plaintiff could cross-examine her at that time. Although it would perhaps have been better practice for the court to have allowed plaintiff to call the defendant as an adverse witness, the order of developing a case is within the discretion of the trial

judge. The customary order of the presentation of evidence is a rule of practice, not law. *In Re Westover Canal*, 230 N.C. 91, 52 S.E. 2d 225 (1949). The plaintiff was afforded ample opportunity to cross-examine the feme defendant. We cannot say that plaintiff, especially in a trial without jury, was prejudiced by the order of presentation of witnesses in this case.

[4] Plaintiff subpoenaed the files of plaintiff's former counsel who were employed to aid plaintiff and her deceased husband in adopting their first child who was born out of wedlock. The trial court sustained objections to the introduction of those records on the grounds that plaintiff was attempting to avoid the special procedures for opening court files of adoption proceedings. *See* G.S. 48-26. Although we are unable to perceive from the record precisely what matter within the attorney's file plaintiff sought to introduce, we note that the final order of adoption and all papers and reports filed pursuant to G.S. Chapter 48 are protected by the statute. G.S. 48-24, 48-25, 48-26. We cannot say that the trial court erred in refusing to permit the attorney's files, which most likely contained duplicates of many of the papers protected by the statute, to become a matter of public record through admission into evidence at trial. The trial court was correct in preventing circumvention of G.S. 48-26 under the guise of a waiver of the attorney-client privilege. In so holding we note the mandate of G.S. 48-1(3) that when the interest of a child and adult conflict, resolution should be in favor of the child. *See generally Matter of Adoption of Spinks*, 32 N.C. App. 422, 232 S.E. 2d 479 (1977). We express no opinion concerning whether, if proper procedures had been followed, the plaintiff would have been entitled to open the official adoption records.

The plaintiff's remaining assignments of error relate to the trial court's findings of fact. The trial court in child custody cases is vested with broad discretion. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *King v. Allen*, 25 N.C. App. 90, 212 S.E. 2d 396 (1975). The trial judge's decision will not be upset, in the absence of a clear abuse of discretion, if the findings are supported by competent evidence. *Matter of Custody of Williamson*, 32 N.C. App. 616, 233 S.E. 2d 677 (1977); *King v. Allen, supra.* The plaintiff's contentions have been carefully reviewed, and we conclude that there is competent evidence to support the findings of fact. There is testimony, which if believed, supports the findings

that David Phillip Sheppard lived in California and that the plaintiff left her husband and children for another man. The court's findings that the minor children were of sufficient age to understand the nature of the proceedings and its implied finding of competency are within the sound discretion of the trial judge. *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977). The remaining findings are supported by the evidence with the exception of finding No. 13. That finding, insofar as it incorrectly recites that defendant David Sheppard was represented by James L. Tennant, is inconsequential and clearly harmless error.

In many child custody cases, there is seldom an entirely satisfactory resolution. However, the trial court carefully considered the best interests of the children involved. We find no prejudicial error in the procedure the trial court followed in reaching its decision.

Affirmed.

Judges VAUGHN and WEBB concur.

THELMA HARRIS AND HUSBAND, JOE HARRIS v. FAMILY MEDICAL CENTER, DUKE UNIVERSITY MEDICAL CENTER, ANN MOORE, M.D., WILLIAM KANE, M.D. AND GREGRAPHY SOLOBRIEFF

No. 7814SC122

(Filed 21 November 1978)

1. **Rules of Civil Procedure § 15— judgment on the pleadings—no subsequent right to amend**

The granting of defendants' motion to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(c) foreclosed plaintiffs' right to amend their complaint pursuant to G.S. 1A-1, Rule 15(a).

2. **Rules of Civil Procedure § 60.2— motion to set aside judgment—newly discovered evidence**

Plaintiffs were not entitled to have an order dismissing their medical malpractice complaint set aside under G.S. 1A-1, Rule 60(b)(2) on the ground of newly discovered evidence where the evidence, a birth certificate, could have been obtained prior to the hearing on the motion to dismiss.

3. Pleadings § 38.3— judgment on pleadings—good cause of action by amendment—statute of limitations

The rule that an action should not be dismissed on the basis that the facts alleged are insufficient to state a cause of action if the plaintiff can allege facts to state a cause of action in an amendment to the complaint does not apply where the complaint was dismissed because the suit was filed after the statute of limitations had run.

APPEAL by plaintiffs from *Bailey, Judge*. Judgment entered 5 December 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 26 October 1978.

On 31 August 1977, plaintiffs brought an action against defendants for damages arising out of the negligent medical treatment of plaintiff-wife during childbirth on 30 August 1974. The defendants filed a motion to dismiss pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure on the grounds that the action was barred by the three-year statute of limitations, G.S. 1-52. The motion was heard on 31 October 1977 and on 7 November 1977 an order was entered dismissing plaintiffs' case.

Plaintiffs filed a motion pursuant to Rule 60(b)(1), and (2), of the North Carolina Rules of Civil Procedure to set aside the judgment, and filed a motion to amend the complaint to correctly state the date of the injury as 31 August 1974.

On 5 December 1977, the plaintiffs' motion was heard. Plaintiffs introduced a certified copy of the death certificate of the plaintiffs' child, which showed that the child's death occurred on 31 August 1974; plaintiffs contended that the action did not accrue until that date. The motions were denied, and plaintiffs appealed.

Henry D. Gamble for plaintiff appellants.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon by E. C. Bryson, Jr. for defendant appellees.

CLARK, Judge.

[1] Plaintiffs contend that they are entitled to amend their complaint as a matter of course prior to the filing of a responsive pleading, pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure. The plaintiffs contend that the defendants' Rule

12(c) motion was not a responsive pleading and therefore they are entitled to amend after the court granted the Rule 12(c) motion in favor of defendants.

Rule 15(a) provides:

> "*Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . ."

Plaintiffs argue that the motion to dismiss pursuant to Rule 12(c) was not a responsive pleading and cite *Clardy v. Duke University*, 299 F. 2d 368 (4th Cir. 1962) as authority. The court in *Clardy*, however, held that once a summary judgment motion is granted, the plaintiffs' right to amend pursuant to Rule 15(a) is foreclosed. In *Clardy*, the plaintiff filed a medical malpractice action, alleging that on or before April 1955, he sustained brain damage as a result of the defendant's negligent treatment. His complaint was filed on 22 July 1960. Defendants moved for a dismissal, or, in the alternative, for summary judgment, on the basis that the action was barred by the statute of limitations. The court granted summary judgment for defendants. Plaintiff moved to amend the complaint pursuant to Rule 15(a), contending that a motion for summary judgment was not a responsive pleading and that therefore he was entitled to amend the complaint as a matter of course. The court noted:

> "[T]here is no requirement that a responsive pleading be served before moving for summary judgment. . . . If it should be held that plaintiff could amend without leave after a hearing and the granting of summary judgment against him, the effect would be to clothe a litigant with the power, at any time, to reopen a case. . . . Rule 15(a) is not to be construed so as to render Rule 12 meaningless and ineffective." *Clardy, supra*, at 369-370.

The court held that the plaintiff was not entitled to amend the complaint pursuant to Rule 15(a), once summary judgment had been entered in favor of the defendants. We hold that the granting of defendants' motion to dismiss pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure foreclosed the plaintiffs' right to amend their complaint pursuant to Rule 15(a).

The plaintiffs also contend that the court erred in refusing to set aside the Order of Dismissal on 7 November 1977. The order of the court entered on 7 November 1977, however, is not before this court. The plaintiffs appealed from the 5 December 1977 Order denying their motion to amend, they did not appeal from the 7 November 1977 order, and are therefore bound by that order. *See, Haiduven v. Cooper*, 23 N.C. App. 67, 208 S.E. 2d 223 (1974); 7 Moore's Federal Practice, § 60.30[1].

[2] Plaintiffs also contend that the order dismissing their complaint should be set aside pursuant to Rule 60(b)(2) on the grounds that new evidence had been discovered. Rule 60(b)(2) provides:

> "*Relief from judgment or order.*
>
> * * *
>
> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . ."

Appellants, however, have failed to establish that the evidence could not have been discovered within ten days after judgment was entered on 7 November 1977. "[F]or relief to be granted under Rule 60(b)(2) the failure to produce the evidence at the [Rule 12(b) hearing] must not have been caused by the moving party's lack of due diligence. The evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding." 7 Moore's Federal Practice § 60.23[4] at 273. In the case *sub judice*, the plaintiffs could have obtained a copy of the birth certificate prior to hearing, and therefore the plaintiffs were not entitled to the relief under Rule 60(b)(2). *See, Grupen v. Thomasville Furniture Industries*, 28 N.C. App. 119, 220 S.E. 2d 201 (1975), *cert. denied* 289 N.C. 297, 222 S.E. 2d 696 (1976). We find no merit in plaintiffs' third contention.

[3] Plaintiffs finally contend that the complaint should not be dismissed because it alleged a defective statement of a good cause of action. Plaintiffs cite *Woodruff v. State Farm Mutual Auto. Ins. Co.*, 260 N.C. 723, 133 S.E. 2d 704 (1963); *Sale v. Johnson, Commissioner of Revenue*, 258 N.C. 749, 129 S.E. 2d 465 (1963); and *Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961) in support of their contention. These cases held that an action should not be dismissed on the basis that the facts alleged are insufficient to state a cause of action, if the plaintiff can allege facts to state a cause of action in an amendment to the complaint. In the case *sub judice*, however, the complaint was dismissed because the suit was filed after the statute of limitations had run, and not because of the manner in which the causes of action were set forth in the complaint.

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

CLYDE JOYNER, JR. v. WILSON MEMORIAL HOSPITAL, INC., AND MARGARET A. GOODWIN, EXECUTRIX OF THE ESTATE OF CLEON W. GOODWIN

No. 787SC48

(Filed 21 November 1978)

1. **Executors and Administrators § 36— final account filed by executrix—no discharge orders—service of process on executrix proper**

In an action by plaintiff against the executrix of the estate of a doctor who allegedly negligently failed to provide proper treatment for plaintiff, the trial court erred in dismissing the complaint as to the executrix on the basis of improper service of process since the executrix, who had filed her final account but for whom no formal orders of discharge had been entered, was still empowered to act as executrix on the day the summons and complaint were served.

2. **Rules of Civil Procedure §§ 33, 56— interrogatories unanswered—summary judgment improper**

In an action by plaintiff against a hospital and a doctor's executrix for allegedly negligent failure to provide proper treatment for plaintiff, the trial court erred in granting summary judgment for defendant hospital before the hospital answered plaintiff's interrogatories which attempted to discover the facts relating to who treated plaintiff and the relationship between the doctor and the hospital.

APPEAL by plaintiff from *Martin (Perry), Judge*. Judgment entered 14 September 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 18 October 1978.

On 3 November 1973, plaintiff was injured in an automobile accident and was admitted into the emergency room at Wilson Memorial Hospital, Inc., where he was treated by Dr. Cleon Goodwin. On 24 November, Dr. Goodwin died and Margaret A. Goodwin was appointed as executrix of his estate. The executrix filed her final account on 19 January 1976.

On 3 November 1976, plaintiff filed this action against the hospital and the executrix of Dr. Goodwin's estate. Plaintiff alleged that the defendants negligently failed to provide proper treatment in that they failed to provide debridement and surgery for plaintiff's compound fracture, and negligently failed to refer the plaintiff to an orthopedic specialist.

On 4 November 1976, plaintiff obtained an order from the Clerk of Superior Court of Wilson County, reopening the estate of the defendant, Dr. Goodwin. The order was vacated on 30 August 1977.

The executrix filed an answer denying negligence and alleging that she had been discharged as executrix because she had already filed the final account, and was therefore not subject to service of process. In addition, she alleged that the plaintiff had failed to file a notice of claim against the estate pursuant to G.S. 28A-19-3 within six months after she had published a notice to creditors of the estate. On 16 August 1977, the executrix filed a notice pursuant to Rule 12(d) of motion to dismiss the complaint for improper service of process. The hospital also filed an answer denying negligence and on 8 December 1976, defendant hospital moved for summary judgment. The hospital supported the motion with an affidavit by hospital administrator McGoogan. The affidavit tended to show that on 3 November 1973, Dr. Goodwin had staff privileges at the defendant hospital which entitled him to utilize the hospital facilities, but that he was not an employee or agent of the hospital, even though he and other physicians shared emergency room duty.

On 6 September 1977, plaintiff filed an affidavit in opposition to defendants' motion for summary judgment. Plaintiff stated that

he was incapacitated when he was admitted to the emergency room, that the following day his face had not been washed nor his clothes removed. He also stated that he had not been fed or cared for by the hospital staff, and that the nurses refused to give him any pain medication.

On 6 September 1977, plaintiff filed interrogatories with the defendants. On 13 September 1977, a hearing was held on the defendant hospital's motion for summary judgment and the executrix's motion to dismiss pursuant to Rule 12(b)(1), (2), (4), and (5). The judge granted both motions.

Farris, Thomas & Farris by Thomas J. Farris for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by C. Ernest Simons, Jr. for defendant appellee, Wilson Memorial Hospital, Inc.

Lucas, Rand, Rose, Meyer, Jones & Orcutt, by Z. Hardy Rose for defendant appellee, Margaret A. Goodwin.

Amicus Curiae brief submitted by Harris & Bumgardner by Tim L. Harris, of counsel; North Carolina Academy of Trial Lawyers.

Amicus Curiae brief submitted by Harris, Poe, Cheshire & Leager by W. C. Harris, Jr. for the North Carolina Hospital Association.

CLARK, Judge.

[1] Plaintiff first contends that the court erred in dismissing the complaint as to the Executrix Margaret A. Goodwin on the basis of improper service of process. We agree. Under North Carolina law, the filing of a final account does not discharge an executor or administrator. "The general rule is that, after an executor or administrator is appointed and qualified as such, his authority to represent the estate continues until the estate is fully settled . . . or unless the letters be revoked in a manner provided by law." *Edwards v. McLawhorn*, 218 N.C. 543, 546, 11 S.E. 2d 562, 564 (1940). "By the weight of authority the removal or discharge of an executor or administrator is not effected by the approval of his final account without a formal order of discharge." *Edwards, supra*, 218 N.C. at 547, 11 S.E. 2d at 565. *Best v. Best*, 161 N.C.

513, 77 S.E. 762 (1913). Annot., 8 A.L.R. 175 at 185 (1920). Although the executrix, Margaret A. Goodwin, had filed her final account, there were no formal orders of discharge entered by the clerk of court. Therefore, Margaret A. Goodwin was still empowered to act as executrix on the day the summons and complaint were served.

We find that the service of process was proper; the court's order dismissing the plaintiff's cause of action against the defendant executrix is reversed.

[2] Plaintiff's second contention is that the court erred in granting defendant hospital's motion for summary judgment when the defendant had not yet answered the plaintiff's interrogatories and not filed any objection to the questions in the interrogatories. "[A]lthough unanswered interrogatories will not, in every case, bar the trial court from acting on a motion for summary judgment . . . doing so prior to the filing of objections or answer to the interrogatories in the present case was improper." *Lee v. Shor*, 10 N.C. App. 231 at 236, 178 S.E. 2d 101 at 105 (1970). *See also, Bane v. Spencer*, 393 F. 2d 108 (1st Cir. 1968), *cert. denied* 400 U.S. 866, 27 L.Ed. 2d 105, 91 S.Ct. 108 (1970); Wright & Miller, Federal Practice and Procedure, § 2741 at 731 (1973). It is axiomatic that should a genuine issue of material fact exist in a dispute, the case cannot be ripe for disposition via summary judgment. "[I]t should be fundamental that a defendant who has failed to answer relevant and timely interrogatories is, at least normally, in no position to obtain summary judgment.", *Bane v. Spencer, supra*, at 109, especially where all the facts are within the defendant's control. Wright & Miller, *supra, Quaker Chair Corp. v. Litton Business Systems, Inc.*, 71 F.R.D. 527 (S.D. N.Y. 1976).

In the case *sub judice*, the information relating to which persons treated the plaintiff, the working relationship between Dr. Goodwin and defendant hospital, and what treatment, if any, was provided, is solely within the control of the hospital. This is especially true since Dr. Goodwin is now unavailable to testify as to his working relationship with the hospital. The interrogatories probed into all of these issues. Ordinarily, discovery is required prior to granting summary judgment so that a party can explore issues of malpractice. *See, Hoover v. Gaston Memorial Hospital, Inc.*, 11 N.C. App. 119, 180 S.E. 2d 479 (1971). It is equally impor-

tant to probe the relationship between the parties defendant if the theory of *respondeat superior* may apply, since issues of agency and control are questions of fact and the information is peculiarly within the defendant's knowledge. *Costlow v. United States*, 552 F. 2d 560 (3d Cir. 1977).

Although defendants contend that plaintiff had sufficient time to utilize discovery and failed to do so, we find that the plaintiff was not precluded from utilizing discovery at the time the interrogatories were served. Since plaintiff has not had his interrogatories answered, which interrogatories attempt to discover the facts relating to who treated the plaintiff and the relationship between the defendant-physician and the hospital, it is clear that the court's granting of defendants' motion for summary judgment was premature. We do not say that after discovery is complete that summary judgment is precluded.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

IN THE MATTER OF THE ADOPTION OF RANDALL PRESTON MAYNOR

No. 7816SC62

(Filed 21 November 1978)

1. Adoption § 2.2— abandonment—father in prison—insufficiency of evidence

In an adoption proceeding where petitioners alleged that the child's natural parents had abandoned him, evidence of respondent, the child's natural father, tending to show that he was not aware that the child had been placed in the custody of the Department of Social Services, that he was unable to locate his son, and that as a result of his imprisonment he was unable to make any payments to support the child was inconsistent with a willful intent to abandon his son.

2. Adoption § 2.2— abandonment alleged—evidence of unfitness not considered

Petitioners' contention in an adoption proceeding that the fact that respondent, the child's natural father, had committed the crime against nature, was found guilty and was incarcerated evinced a willful intent to forego any responsibility to the child was without merit, since evidence of respondent's commission of the crime might be relevant or determinative on the issue of whether a parent forfeited parental rights because of unfitness, but in this pro-

ceeding the pleadings presented only the issue of abandonment and that single issue was presented to the jury.

APPEAL by respondent, Randall Preston Courson, from *Lee, Judge.* Judgment entered 29 August 1977 in Superior Court ROBESON County. Heard in the Court of Appeals 19 October 1978.

On 30 January 1976, petitioners filed a petition seeking to adopt Randall Preston Maynor, alleging that the child's natural parents had abandoned him. The respondent, the child's natural father, was joined as a party by order dated 30 January 1976. The respondent filed an answer contesting the adoption and denying that he had willfully abandoned his child.

At trial, the petitioners testified that the child was placed in the custody of the Social Services Department between March and September of 1975, and that the child had lived with petitioners since September 1975. Respondent had contributed no money to support the child and did not write or communicate with the child while the child was in the custody of petitioners.

Respondent testified that he had lived with his wife and son until February 1975. Since that date he had been in prison serving an eight-to-ten-year sentence for a conviction of crime against nature. Until he was served with the petition in this case, he had thought that his son was living with his wife; that he had tried to contact his son and had written to the Social Services Department in Cumberland County to help locate his son but had received no answer; and that he was unable to earn any money as a result of his incarceration. Respondent was eligible for parole in May 1978.

Harold Sadler, an employee at the prison college, testified that the respondent was an honor prisoner and had spoken with Sadler about locating his son. Respondent's father also testified that respondent had made efforts to locate his son.

At trial the respondent moved for a directed verdict at the close of petitioner's evidence and at the close of all the evidence. Both motions were denied. The jury found that the respondent had abandoned the child and the court entered a judgment appointing the Superintendent of the Department of Social Services as guardian ad litem, granting him the authority to act in place of the respondent in giving or withholding consent to the adoption. From this judgment, respondent appeals.

Seawell, Pollock, Fullenwider, Robbins & May by Bruce T. Cunningham, Jr. for respondent appellant.

Locklear, Chavis & Strickland by Horace Locklear for petitioner appellee.

CLARK, Judge.

Respondent contends that the petitioners presented insufficient evidence of willful abandonment to withstand the respondent's motion for directed verdict.

G.S. 48-2(3a) provides:

> "For the purpose of this Chapter, an abandoned child shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. . . ."

"[A]bandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E. 2d 597, 608 (1962). *See, In re Dinsmore*, 36 N.C. App. 720, 245 S.E. 2d 386 (1978).

[1] "Wilfulness is as much an element of abandonment within the meaning of G.S. § 48-2, as it is of the crime of abandonment." *In re Adoption of Hoose*, 243 N.C. 589, 594, 91 S.E. 2d 555, 558 (1956). The word "willful" means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*. *State v. Whitener*, 93 N.C. 590 (1885). Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so. *See, Lamm v. Lamm*, 229 N.C. 248, 49 S.E. 2d 403 (1948). A mere failure to provide support does not, in and of itself, constitute abandonment since explanations could be made which would be inconsistent with the willful intent to abandon. *Pratt, supra.* In the case *sub judice* the respondent's evidence tends to show that he was not aware that the child had been placed in the custody of the Department of Social Services, that he was unable to locate his son, and that as a result of his incarceration, he was unable to make any payments to support the child. Under the principles of *Pratt, supra*, the fact that the respondent was unable to locate his son and was unable

to make support payments as a result of his incarceration, is inconsistent with a willful intent to abandon his son.

[2] Petitioners contend that the fact that respondent committed the felony of crime against nature, was found guilty and was incarcerated, evinces a willful intent to forego any responsibility to the child. We cannot agree. "[T]he termination of parental rights is a grave and drastic step." *In re Dinsmore, supra,* at 726, 245 S.E. 2d at 389. The legislature recognized this by requiring that the abandonment must be willful. The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a "settled purpose to forego all parental duties." *Pratt, supra.*

The commission of a crime may be relevant, or even determinative, on the issue of whether a parent forfeits parental rights because of unfitness under the provisions of G.S. §§ 7A-289.32(2) and 278(4). But in the case *sub judice,* the pleadings presented only the issue of abandonment and that single issue was submitted to the jury. The record on appeal indicates that the victim of respondent's crime against nature was his daughter. We do not speculate upon the result if the pleadings had been cast to present the issue of unfitness. Nor do we speculate upon the right of the petitioners to proceed anew for the purpose of presenting the issue of respondent's unfitness.

In addition to the definition of "abandonment" contained in G.S. 48-2(3a), as clarified by case law, we find that G.S. 48-2(3b) contains another definition of abandonment applicable to those cases in which the parent places the child in the custody of the Department of Social Services. The statute provides as follows:

> "[A]n abandoned child . . . shall be a child who has been placed in the care of a childcaring institution or foster home, and whose parent . . . has failed substantially and continuously for a period of more than six months to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child, although physically and financially able to do so. In order to find an abandonment under this subdivision, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child-placing agency to encourage the parent . . . to

strengthen the parental or custodial relationship to the child."

The petitioners presented no evidence that the Department of Social Services made any contact whatsoever with the respondent, and the trial judge failed to instruct the jury on this additional element of the definition of abandonment.

Since the evidence is not sufficient to support the verdict, the judgment is

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

JANE GADDY HOGLEN v. MYRTLE M. JAMES

No. 7830SC93

(Filed 21 November 1978)

1. **Rules of Civil Procedure § 7— failure of motion to state rule number—waiver of right to challenge**

Where defendant failed to challenge plaintiff's motion to set aside an order of dismissal on the ground that the motion failed to specify the number of the rule under which plaintiff was proceeding as required by Rule 6 of the General Rules of Practice for Superior and District Courts Supplemental to the Rules of Civil Procedure, the trial court should have treated plaintiff's motion as one filed pursuant to G.S. 1A-1, Rule 60(b).

2. **Rules of Civil Procedure § 60— motion to set aside order—court's erroneous belief as to authority**

A superior court judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one superior court judge from reviewing the decision of another, and plaintiff is entitled to a proper hearing on a Rule 60(b) motion to set aside an order of dismissal where the court denied the motion because he erroneously believed that he lacked the power to grant it.

APPEAL by plaintiff from orders of *Griffin, Judge*, entered 21 September 1977 and 8 November 1977 in Superior Court, HAYWOOD County. Heard in the Court of Appeals on 25 October 1978.

This is a civil action instituted by plaintiff on 2 November 1973 to recover damages for personal injuries sustained in an automobile accident that occurred on 9 July 1973. An answer was filed by defendant on 27 December 1973. The case was first set for trial on 6 January 1975, but was continued and a new trial date of 5 May 1975 was set. When the case was called for trial, plaintiff's attorney was not present in court and by Order filed 7 May 1975 plaintiff's action was dismissed with prejudice under G.S. § 1A-1, Rule 41(b) by Judge Robert D. Lewis *ex mero motu* for failure to prosecute the action. On 9 May 1975, plaintiff filed the following motion:

That plaintiff through her counsel, respectfully shows:

1. That the plaintiff's counsel, W. C. Palmer of Wilson, Palmer and Simmons, Lenoir, N. C. was seriously injured in his person by an assault by two North Carolina State Highway patrolmen, which assault occurred about 4:30 p.m. on May 4, 1975, in Iredell County, North Carolina; that the said counsel was able to get to his home near Lenoir, N. C. at about midnight of May 4, 1975; that the said counsel was suffering extension [sic] bruises, abrasions and from heavy blows on the head to such an extent that he was unable to sleep nor rest during the balance of that night; that on Monday, May 5, 1975, the undersigned counsel at about 8:45 o'clock a.m. telephoned Mr. O. E. Starnes, Jr., the attorney for defendant and told him (Mr. Starnes) that plaintiff's counsel could not attend the session of court in Haywood County, North Carolina, on May 5, 1975, and asked Mr. Starnes to relay that message to the Court; that the undersigned is advised by Mr. O. E. Starnes, Jr., that the Court was so advised.

2. That a motion was pending in the case which was filed on April 30, 1975, and plaintiff had not yet filed answer thereto.

3. That on May 9, 1975, counsel for plaintiff personally attended the Court and further explained to the court the nature and extent of counsel's injury and the reason for his failing to attend the Court on May 5, 1975.

4. That until the time of the said counsel's injury the plaintiff was in all respects ready for trial, but assumed that

the Court would hear the pending motion on motion day which was set by the Court for Friday, May 9, 1975.

5. That the plaintiff has a meritorious cause of action against the defendant in this cause; that the cause was dismissed through no fault of plaintiff nor plaintiff's counsel.

WHEREFORE, plaintiff prays that the court set aside the order of dismissal in this cause and reinstate the same upon the trial calendar.

On 19 September 1977, a hearing on plaintiff's motion was held before Judge Kenneth Griffin.

After hearing the evidence, Judge Griffin entered an Order on 21 September 1977, stating in pertinent part:

[T]his Court has examined the Court file and Judge Lewis' Order, and does not find reason to overrule, or alter the Order of Judge Lewis, and further does not have authority to pass upon or reconsider Judge Lewis' Order.

Now, therefore, Plaintiff's Motion to set aside Judge Lewis' Order, and reinstate this case is hereby denied.

An "Amended Order" identical to the first Order was signed by Judge Griffin on 8 November 1977.

From the orders denying her motion to set aside the judgment, plaintiff appealed.

Wilson and Palmer, by W. C. Palmer and Bruce L. Cannon for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by O. E. Starnes, Jr., for defendant appellee.

HEDRICK, Judge.

[1] Unless the court in its Order of dismissal for failure to prosecute the action otherwise specifies, the dismissal under Rule 41 operates as an adjudication on the merits. G.S. § 1A-1, Rule 41(b). Plaintiff's motion, filed 9 May 1975, to "set aside the order of dismissal in this cause" does not specify the number of the rule under which plaintiff was proceeding as required by Rule 6 of the General Rules of Practice for Superior and District Courts supplemental to the Rules of Civil Procedure; however, since defendant failed to challenge this omission at the hearing on the motion,

see Byerly v. Byerly, filed in this Court on 7 November 1978, the trial judge should have treated plaintiff's motion as one filed pursuant to G.S. § 1A-1, Rule 60(b), which provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect."

It is the duty of the judge presiding at a Rule 60(b) hearing to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment or order. *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). A motion for relief under Rule 60(b) is addressed to the sound discretion of the judge hearing the motion. *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976). Where a judge refuses to entertain such a motion because he labors under the erroneous belief that he is without power to grant it, then he has failed to exercise the discretion conferred on him by law. *Hudgins v. White*, 65 N.C. 393 (1871).

[2] In the present case, plaintiff's motion to "set aside the order of dismissal" was made pursuant to G.S. § 1A-1, Rule 60(b). The judge had the authority to grant the relief requested and it was his duty to rule on the motion. The statement in the order "that this Court . . . does not have authority to pass upon or reconsider Judge Lewis' Order" discloses that the hearing Judge erroneously believed that he lacked the power to grant the motion. A Superior Court judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one Superior Court judge from reviewing the decision of another. *See, e.g., Charleston Capital Corp. v. Love Valley Enterprises, Inc.*, 10 N.C. App. 519, 179 S.E. 2d 190 (1971).

Because Judge Griffin erroneously believed he lacked the power to grant the relief requested, plaintiff has never had the proper hearing on his Rule 60(b) motion to which he is entitled.

Vacated and remanded.

Chief Judge BROCK and Judge PARKER concur.

MILES M., MARY P. & MARK BEAL v. JAMES A. & AMELIA S. DELLINGER

No. 7827SC113

(Filed 21 November 1978)

1. **Boundaries § 8.3— processioning proceeding—sufficiency of allegations**

In a processioning proceeding to establish the true boundary line between the parties' property, respondents' contention that the proceeding should have been dismissed for lack of jurisdiction over the subject matter is without merit, since petitioners alleged a dispute and alleged that the disputed line was the northern boundary of their land as set out in their deed, and these allegations were sufficient to meet the requirements of G.S. 38-3.

2. **Boundaries § 8.3— processioning proceeding—reply by petitioners not required**

Respondents' contention in a processioning proceeding that G.S. 38-3 entitled them to a judgment in their favor before trial because respondents in their answer alleged what they considered to be the correct boundary line but petitioners did not reply and make a denial is without merit, since G.S. 38-3 applies only to a defendant's failure to file an answer, and since a reply would be required only to a counterclaim denominated as such and no counterclaim was made by respondents.

3. **Boundaries § 10—location of boundary is jury question—sufficiency of evidence**

The trial court in a processioning proceeding did not err in refusing to direct verdict for respondents, set aside the verdict as against the greater weight of the evidence or grant a new trial, since the determination of the boundary is for the jury in a processioning proceeding, and petitioners' evidence was sufficient, if believed by the jury, to show that the boundary was as petitioners claimed.

APPEAL by respondents from *Friday, Judge.* Judgment entered 29 September 1977 in Superior Court, LINCOLN County. Heard in the Court of Appeals 25 October 1978.

Petitioners brought a special processioning proceeding under G.S. 38-1 *et seq.* to establish the true boundary line between their property and respondents'. The jury found the boundary to be as petitioners claimed, and respondents appeal.

Jonas and Jonas, by Richard E. Jonas, for petitioner appellees.

Wilson and Lafferty, P.A., by John O. Lafferty, Jr., for respondent appellants.

ARNOLD, Judge.

[1] Respondents contend that this proceeding should have been dismissed for lack of jurisdiction over the subject matter. They rely on *Pruden v. Keemer*, 262 N.C. 212, 136 S.E. 2d 604 (1964), but that case is not on point. In *Pruden*, the Court found a lack of subject matter jurisdiction because the petition had failed to allege what boundary line was *in dispute*, or in fact that *any* boundary line was in dispute. There the petitioners merely had set out what they believed to be the true location of the boundary of their lands and had alleged that respondents' lands would be "affected" by the proceeding. The court said this was insufficient to comply with G.S. 38-1, which provides that these special proceedings are to establish the true location of *disputed* boundary lines.

Here, the petitioners included in their petition the deed description by metes and bounds of the property they owned, then alleged:

> 3. That the defendants are the owners of lands which adjoin the lands of the petitioners along the Northern boundary thereof, described in Deed Book 339 at Page 225, and the defendants dispute the correctness of the boundary lines of the lands of the petitioners as set out in the deeds above referred, the particular boundary lines so disputed by the defendants being the Northern boundary line of the property of the petitioners in the deeds referred to above.
>
> 4. The defendant has constructed a fence which, the petitioners are informed and believe has been constructed across the said boundary line and on property owned by the petitioners.

These paragraphs distinguish the present situation from *Pruden*. They allege a dispute, and they allege that the disputed line is the northern boundary of petitioners' land as set out in the deed. This is sufficient to meet the requirements of the statute and of *Pruden*. "G.S. 38-3 provides that petitioner allege 'facts sufficient to constitute the location of such line as claimed by him.' This provision requires that petitioner allege facts as to the location of the (disputed) line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from

petitioners' description thereof." *Pruden v. Keemer, supra* at 218, 136 S.E. 2d at 608. The trial court correctly denied respondents' motion to dismiss.

[2] There is also no merit in respondents' argument that G.S. 38-3 entitled them to a judgment in their favor before trial. G.S. 38-3 provides that "[i]f the defendants fail to answer, judgment shall be given establishing the line according to petition." In their answer, respondents denied petitioners' claims and alleged what they considered to be the correct boundary line. They would have us view their averment as a petition requiring a responsive pleading, but it is not. The Rules of Civil Procedure apply to a special proceeding, G.S. 1-393; 1A-1, Rule 1, and require a reply only to a counterclaim denominated as such. G.S. 1A-1, Rule 7. No counterclaim appears here, and no reply is required. Respondents' contentions are taken as denied. G.S. 1A-1, Rule 8(d). G.S. 38-3 clearly refers to *defendant's* failure to file an *answer*, and does not apply here.

[3] Finally, respondents contend that they were entitled to a directed verdict, to have the verdict set aside as against the greater weight of the evidence, or to a new trial. We find, first, that the motion for the directed verdict was properly denied. A directed verdict is never proper when the question is for the jury, 12 Strong's N.C. Index 3d, Trial § 31, and in processioning proceedings the determination of the boundary is for the jury. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633 (1945).

Nor do we find error in the court's refusal to set aside the verdict and to order a new trial. In processioning proceedings it is the duty of the jury to locate the boundary. If petitioners fail to carry their burden of proof, the jury need not fix the line according to the respondents' contentions, but may locate the boundary wherever they feel the evidence justifies. *Cornelison v. Hammond, supra; McCanless v. Ballard*, 222 N.C. 701, 24 S.E. 2d 525 (1943). Where a verdict is supported by the evidence, denial of the motion to set it aside will not be disturbed. *Robinette v. Wike*, 265 N.C. 551, 144 S.E. 2d 594 (1965); 12 Strong's N.C. Index 3d, Trial § 48. Here the petitioner presented evidence that the line he claimed as correct began at a stake on the old Keener line and ended at a back corner marked with an iron stake and some rock; that when the surveyor surveyed in 1975, the line he ran

coincided with the fence in places, and in other places the fence was south of the line; that the stakes placed by the surveyor conformed to the understanding of the son of a former owner of the property as to where the boundary was, and that that boundary was north of where the fence was erected. This was sufficient evidence, if believed by the jury, to show that the boundary was as petitioner claimed. Respondents argue at length that the petitioners' evidence is not credible, but "[t]he credibility of the testimony and the propriety of drawing therefrom inferences which it will support were for the jury. . . ." *Robinette v. Wike, supra* at 553, 144 S.E. 2d at 596. As petitioners point out, respondents' argument and analysis merely represent a contrary inference which the jury *could* have drawn had it chosen to do so.

No error.

Judges MORRIS and ERWIN concur.

STATE OF NORTH CAROLINA v. ULYSSES PERRY

No. 788SC560

(Filed 21 November 1978)

Robbery § 5.4— failure to submit misdemeanor larceny

In this prosecution for robbery of a service station attendant, the trial court erred in failing to submit to the jury the lesser included offense of misdemeanor larceny where defendant presented evidence from which the jury could infer that defendant and the service station attendant acted in collusion in taking $57.00 from the station.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 19 January 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 18 October 1978.

Defendant was indicted for armed robbery of $57.00 from gas station attendant Jerry Crawford. The State presented evidence that on the night of 21 November 1977 the defendant made three trips to the Kayo Station where Jerry Crawford worked. On the first trip he apparently borrowed a pack of cigarettes, and on the second trip $2.00 from Crawford. During the first visit defendant

carried a shotgun with him into the station. Jerry Crawford testified that when defendant came to the station the second time, he was carrying the gun in his left hand, pointed toward the ground. At no time did defendant point the gun at Crawford or threaten him. Defendant was at the station for five to ten minutes. On the way to the Kayo station for the third time, defendant put a shell into the gun. When they arrived, defendant called Crawford over to the car and asked him "How much money you got?" Crawford then gave defendant the money out of a pouch at his waist. During this time the gun was in defendant's hand at his side, pointing down. Defendant took the money and counted it, leaving the gun on the floor inside the car. He told Crawford they were going to split the money, and counted out Crawford's half, but Crawford didn't take it.

The defendant testified that on previous occasions he had had discussions with Jerry Crawford about stealing the money that Crawford collected at the service station. He testified that the $60.00 was Crawford's own money, given to the defendant for him to use to purchase reefers. He found the gun in a ditch that night and kept it because he thought it might be valuable; he never threatened Crawford with it, or even took it out of the car.

The defendant was found guilty of common law robbery and sentenced to 7-10 years. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

Kornegay & Rice, P.A., by Robert T. Rice, for defendant appellant.

ARNOLD, Judge.

The sole question on this appeal is whether the court erred in failing to charge the jury, as requested, on misdemeanor larceny as a lesser included offense, and to submit it as a possible verdict.

The defendant was found guilty of common law robbery, which is defined as "the felonious taking of goods or money from the person or presence of another by means of force or intimidation." 77 C.J.S., Robbery § 1, p. 446. He requested an instruction

on misdemeanor larceny, apparently on the basis that the property involved was worth less than $200, pursuant to G.S. 14-72(a). "[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E. 2d 406, 413 (1977).

According to the State's evidence, the defendant took the money from the person of Jerry Crawford, which would bring G.S. 14-72(b)(1) into play and make an instruction on misdemeanor larceny unnecessary. G.S. 14-72(b)(1) provides that "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . from the person. . . ." However, defendant testified that on previous occasions he and Jerry Crawford had discussions about stealing the money that Crawford collected at the service station. According to defendant, about three weeks before the robbery, Crawford had said, "Well, you come by one night and I'll let you have the money and I'll tell the people, the company, that I was robbed." Defendant's testimony presents evidence from which the jury might infer that he and Crawford acted in collusion in taking the money from the Kayo station, in which case the larceny would not be "from the person." Thus, there was evidence of misdemeanor larceny, a lesser offense, and the failure to submit this issue for the jury's consideration entitles defendant to a

New trial.

Judges CLARK and ERWIN concur.

CITY OF THOMASVILLE v. LEASE-MARTIN AFEX, INC.

No. 7722SC835

(Filed 21 November 1978)

1. Trial § 3.2— motion for continuance—time for making

The trial court did not err in refusing to grant plaintiff's oral motion to continue so that other discovery might be completed, since the motion, made on the very day of a summary judgment hearing, came over three years after the fire giving rise to this action, twelve months after the suit was started and nearly two months after defendant had moved for summary judgment.

2. Sales § 22.2— fire suppression system on bulldozer—failure to work—summary judgment—reliance on complaint insufficient

In an action to recover for damages to a bulldozer which occurred when a fire suppression system installed by defendant allegedly did not work, the trial court properly entered summary judgment for defendant where the motion was supported by affidavits of two of defendant's employees who saw the bulldozer after the fire and who stated that the fire suppression system did work, and plaintiff relied only on the allegation in its complaint that the system did not work.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 24 June 1977 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 14 August 1978.

Plaintiff brought this action for damages to a bulldozer used in its landfill operation. The machine was damaged by fire on 29 March 1974. Defendant, prior to that time, had sold and installed on the bulldozer a fire suppression system which included both automatic and manual activation devices. This system operated by spraying a fire suppressing powder over the bulldozer.

In its complaint filed 27 May 1976, plaintiff presented claims based on strict liability, negligent manufacture, and breach of both implied and express warranties and asked for over $8000 in damages. Each claim was based upon plaintiff's allegations that "the fire suppression system did not activate automatically and could not be activated manually."

The defendant answered pleading limitations of the express and implied warranties, denying that the system failed to activate and raising other defenses.

On 29 April 1977, defendant moved for summary judgment. The motion was supported by the depositions of two of plaintiff's employees. When the motion came on for hearing on 6 June 1977, plaintiff moved for a continuance. The motion to continue was denied, and defendant's motion for summary judgment was subsequently allowed.

Richard M. Pearman, Jr., for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by W. Thompson Comerford, Jr., and Grover G. Wilson, for defendant appellee.

VAUGHN, Judge.

[1] We find no merit in plaintiff's argument that the court erred when it refused to grant his oral motion to continue so that other discovery might be completed. The motion, made on the very day of the hearing, came over three years after the fire, twelve months after the suit was started and nearly two months after defendant had moved for summary judgment. The motion was properly denied. Moreover, it should be noted that plaintiff did not seek to invoke Rule 56(f) by showing by affidavit reasons why he could not at that time present facts essential to justify his opposition to the motion for summary judgment.

[2] We also conclude that the entry of summary judgment for defendant was appropriate for any one of several reasons. We will discuss only one. Although plaintiff alleged several claims for relief, all of them were grounded upon the premise that "the fire suppression system did not activate automatically and could not be activated manually." It appears that the fire suppression system was supposed to discharge a chemical powder from a central tank through a series of nozzles. To negate the allegations that the system "failed to activate," defendant introduced the deposition of plaintiff's employee, Hurst, who was operating the bulldozer when the fire started. Hurst was unable to say whether the fire suppression system activated but did say he thought he saw some powder on the nozzle. Defendant also introduced the deposition of Hurst's supervisor, Lanier. Lanier got to the scene after the fire department extinguished the fire. He said,

> "Where the water had not been sprayed, it was covered with white powder. . . .
>
> From looking at the front of the dozer, you could tell that the system had activated. You couldn't tell one way or another in the rear of the dozer where the firemen had sprayed the water.
>
> I don't know of any reason why the front would activate and the rear would not—it all comes from the same connection from the tank."

Rule 56(e), provides that

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not

rest upon the mere allegations or denials of his 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."

See also Nasco Equipment Co. v. Mason, 291 N.C. 145, 229 S.E. 2d 278 (1976). Plaintiff introduced no affidavits or other materials to show the alleged failure to activate and thereby raise an issue of fact. Neither did plaintiff show by affidavit any reason that he could not provide such evidence, which would justify the court's refusal to enter judgment until discovery might be had. *See* G.S. 1A-1, Rule 56(f). Plaintiff offered nothing beyond its bare allegations that the suppression system did not activate. This was insufficient under Rule 56(e) which "clearly precludes any party from prevailing against a motion for summary judgment through reliance on such conclusory allegations unsupported by facts." *Nasco Equipment Co. v. Mason, supra,* at 152.

Summary judgment for the defendant is affirmed.

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

BOARD OF TRANSPORTATION v. RUBY GRAGG

No. 7828SC134

(Filed 21 November 1978)

Appeal and Error § 6.9— admissibility of evidence—rule of damages—pretrial orders—no immediate appeal

Pretrial orders declaring certain evidence admissible or inadmissible and purporting to fix the rule of damages at the trial are subject to later modification and are not immediately appealable.

APPEAL by defendant from order of *Baley, Judge,* entered 4 November 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 November 1978.

After a pretrial hearing in this condemnation proceeding, the trial judge made the following pertinent conclusion of law:

> That evidence of an oral understanding or agreement with an adjoining landowner for access to subject property is not admissible for the purpose of showing a reasonable probability of securing access to the property nor the reasonable probability of use of the Defendant's property in conjunction with the adjoining property to provide such access for the purpose of showing the effect of said promise and probability upon the market value of the Defendant's property prior to the date of taking because such evidence is too remote, contingent and speculative to be considered in determining the market value of property immediately prior to the date of taking, and such property must be valued without access prior to the date of taking.

Defendant purports to appeal from the following pretrial order entered pursuant to the foregoing conclusion of law:

> That Defendant's motion to admit evidence of the alleged reasonable probabilities of access as above described and said probabilities' effect upon the market value of the property prior to the date of taking is denied and the jury cannot consider said evidence in determining just compensation in the trial of this case.

Attorney General Edmisten, by R. Bruce White, Jr., Senior Deputy Attorney General and Guy A. Hamlin, Assistant Attorney General, for the State.

Patla, Straus, Robinson & Moore, by Jones P. Byrd, for the defendant appellant.

HEDRICK, Judge.

A pretrial order declaring certain evidence admissible or inadmissible is indeterminate and subject to later modification. *Knight v. Duke Power Co.*, 34 N.C. App. 218, 237 S.E. 2d 574 (1977); *Davis Realty, Inc. v. City of High Point*, 36 N.C. App. 154, 242 S.E. 2d 895 (1978). The same is true of a pretrial order purporting to fix what the rule of damages should be at the trial. *Green v. Western & Southern Life Insurance Co.*, 250 N.C. 730,

110 S.E. 2d 321 (1959). Such orders are not immediately appealable. 1 Strong's N.C. Index 3d, Appeal and Error, § 6.9.

Appeal dismissed.

Judges MORRIS and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 NOVEMBER 1978

ELLIOTT v. POTTS No. 7721SC943	Forsyth (75CVS3968)	No Error
GORNTO v. MORRIS No. 7814SC82	Durham (75CVS2361)	No Error
STATE v. BRIDGERS No. 787SC622	Edgecombe (77CRS5946) (77CRS5947)	No Error
STATE v. BOYD No. 7820SC566	Union (77CRS5994)	No Error
STATE v. COX No. 783SC677	Pitt (77CRS15477) (77CRS15478) (77CRS15503) (77CRS15504)	Appeal Dismissed
STATE v. PENNELL No. 7821SC616	Forsyth (76CR44929)	Appeal Dismissed
STATE v. TURNER No. 781SC652	Gates (77CR1700) (77CR1701)	No Error
TOWN OF KILL DEVIL HILLS v. CULBRETH No. 771SC953	Dare (77CVS132)	Reversed

APPENDIXES

AMENDMENT TO RULES
OF APPELLATE PROCEDURE

INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 4(a)(2) is amended by striking "after the last day of the session at which rendered" and inserting in lieu thereof: "after entry of the judgment or order or within ten days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order."

The last paragraph of Rule 27(c) is amended by changing the period after the word "state" to a semicolon and adding immediately thereafter the following: "provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard."

The foregoing amendments were approved by the Court in conference on 4 October 1978 to be promulgated in the next succeeding Advance Sheets of the Court of Appeals and the Supreme Court. The amendments shall become effective on 1 January 1979.

Done by the Court in conference this the 4th day of October, 1978.

EXUM, J.
For the Court

INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

The following rules are hereby adopted to govern the internal operation of the Supreme Court Mimeographing Department:

Pursuant to G.S. 7A-11 and the North Carolina Rules of Appellate Procedure, the Clerk of the Supreme Court is authorized and directed to administer the Mimeographing Department as follows:

1. Receipts by the Mimeographing Department shall be deposited daily or as often as practicable in a checking account entitled "Supreme Court of North Carolina Mimeographing Department," which shall be maintained in the First Citizens Bank and Trust Company, Raleigh, North Carolina. A savings account shall be maintained in the State Employees Credit Union under the same title, to which the Clerk shall transfer excess funds when, in his discretion, such transfer is practicable.

2. The Clerk shall employ the necessary personnel to operate the Mimeographing Department. These persons may be employed on a full or part-time basis, in the discretion of the Clerk, and shall be paid every two weeks out of the Mimeographing Department receipts, at the following rates:

a. For cutting stencils ..... 83¢ per page
b. For proofreading ..... 17¢ per page
c. For mimeographing ..... 15¢ per page
d. For dividing, assembling, collating, and stapling ..... 13¢ per page

3. The Clerk shall make the necessary withholding deductions from compensation paid to Mimeographing Department personnel and shall remit the same monthly to the appropriate agencies.

4. The Clerk shall purchase the necessary supplies and materials for the operation of the Mimeographing Department. He shall also purchase and maintain the necessary equipment and shall make any other expenditures reasonably necessary for the operation of the department.

5. Excess funds accumulated by the Mimeographing Department shall be held in the savings account named above, subject to the order of this Court.

6. The Clerk shall make an annual financial report on the operation of the Mimeographing Department to the Chief Justice and Associate Justices of the Supreme Court.

7. All books and records of the Mimeographing Department shall be open for inspection and audit by the State Auditor.

8. Until such time as this Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be mimeographed, shall be printed at a per page cost of $2.00, effective 1 November 1978.

So ordered this 12 day of September, 1978.

EXUM, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index, e.g. Appeal and Error § 1, correspond with titles and section numbers in the N. C. Index 3d.

ACCOUNTS
ADOPTION
APPEAL AND ERROR
ARREST AND BAIL
ASSAULT AND BATTERY
ATTORNEYS AT LAW
AUTOMOBILES

BETTERMENTS
BOUNDARIES
BROKERS AND FACTORS
BURGLARY AND UNLAWFUL BREAKINGS

COMPROMISE AND SETTLEMENT
CONSTITUTIONAL LAW
CONTRACTS
CORPORATIONS
CRIMINAL LAW

DAMAGES
DEATH
DEEDS
DESCENT AND DISTRIBUTION
DIVORCE AND ALIMONY

EMINENT DOMAIN
EVIDENCE
EXECUTORS AND ADMINISTRATORS

FALSE PRETENSE
FRAUD
FRAUDULENT CONVEYANCES

GAMES AND EXHIBITIONS

HOMICIDE
HUSBAND AND WIFE

INDICTMENT AND WARRANT
INFANTS
INJUNCTIONS
INSANE PERSONS
INSURANCE
INTEREST

JUDGES
JUDGMENTS
JURY

KIDNAPPING

LABORERS' AND MATERIALMEN'S LIENS
LANDLORD AND TENANT
LARCENY
LIMITATION OF ACTIONS

MASTER AND SERVANT
MAYHEM
MORTGAGES AND DEEDS OF TRUST
MUNICIPAL CORPORATIONS

NARCOTICS
NEGLIGENCE
NOTICE

PARENT AND CHILD
PARTITION
PATENTS
PLEADINGS
PROCESS
PROFESSIONS AND OCCUPATIONS
PUBLIC OFFICERS

QUIETING TITLE

RAPE
RECEIVING STOLEN GOODS
ROBBERY
RULES OF CIVIL PROCEDURE

SALES
SCHOOLS
SEARCHES AND SEIZURES

TAXATION
TELECOMMUNICATIONS
TRIAL
TRUSTS

UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE

VENDOR AND PURCHASER
VENUE

WILLS

ACCOUNTS

§ 2. Accounts Stated

Trial court erred in directing a verdict for plaintiff, a Florida attorney, in an action on an alleged account stated against a client in this State. *Mahaffey v. Sodero*, 349.

ADOPTION

§ 1. Operation of Statutes in General

Trial court in a child custody proceeding properly excluded from evidence the files which plaintiff had subpoenaed of plaintiff's former counsel concerning adoption by plaintiff and her deceased husband of their first child since plaintiff could not circumvent G.S. 48-26 under the guise of a waiver of the attorney-client privilege. *Sheppard v. Sheppard*, 712.

§ 2.2. Abandonment of Child

Petitioners' contention in an adoption proceeding that the fact that respondent, the child's natural father, had committed the crime against nature, was found guilty and incarcerated evinced a willful intent to forego any responsibility for the child was without merit. *In re Maynor*, 724.

Evidence was insufficent to show respondent had abandoned his son where the evidence tended to show that respondent was not aware that his child had been placed in the custody of the Department of Social Services, respondent was unable to locate his son, and that as a result of his imprisonment he was unable to make any payments to support the child. *Ibid.*

APPEAL AND ERROR

§ 6.8. Right to Appeal from Denial of Summary Judgment

Defendant's appeal from an order denying her motion for summary judgment is fragmentary and is dismissed. *Hill v. Smith*, 625.

§ 6.9. Right to Appeal from Preliminary Matters

Pretrial orders declaring certain evidence admissible or inadmissible and purporting to fix the rule of damages are not immediately appealable. *Board of Transportation v. Gragg*, 740.

§ 10.1. Motions in Court of Appeals

The question of subject matter jurisdiction may properly be raised for the first time on appeal, and the appellate court may raise the question on its own motion even when it was not argued by the parties in their briefs. *Bache Halsey Stuart, Inc. v. Hunsucker*, 414.

§ 14. Appeal and Appeal Entries

Trial court properly dismissed defendants' appeal where more than 10 days elapsed between the entry of judgment and notice of appeal. *Harrington v. Harrington*, 610.

§ 16. Powers of Trial Court After Appeal

A notice of appeal does not bar a subsequent motion to amend the court's findings. *Parrish v. Cole*, 691.

APPEAL AND ERROR—Continued

§ 16.1. Limitations on Powers of Trial Court After Appeal

Trial court could not properly enter a supplemental order affecting two prior orders where the court had allowed a voluntary dismissal, defendant had given notice of appeal, and the term had expired. *West v. Reddick, Inc.*, 370.

§ 39.1. Time for Docketing Appeal

Appeal is dismissed for failure of appellant to serve and file the record on appeal within the proper time. *City of Hickory v. Machinery Co.*, 387.

ARREST AND BAIL

§ 3.5. Legality of Arrest for Breaking and Entering

An officer had probable cause to arrest defendants without a warrant for breaking or entering and larceny. *S. v. Gosnell*, 679.

§ 6.2. Sufficiency of Evidence of Resisting Arrest

State's evidence was sufficient for the jury in a prosecution for resisting arrest. *S. v. Hill*, 75.

§ 9.1. Revocation of Bail

Where the trial court granted defendant a continuance because defendant's illness and the medication it required impaired his ability to assist counsel, trial court properly revoked defendant's appearance bond and ordered him taken into custody in the prison hospital for safekeeping. *S. v. Brooks*, 445.

ASSAULT AND BATTERY

§ 14.4. Felonious Assault Where Weapon Is a Firearm

State's evidence was sufficient for the jury in a prosecution for felonious assault of a person who had taken a gun away from defendant's companion. *S. v. Blackmon*, 620.

§ 15.1. Instruction on Assault with Deadly Weapon

In a prosecution for assault with a deadly weapon, trial court did not err in failing to define assault. *S. v. Daniels*, 382.

§ 15.5. Instruction on Self-Defense Required

Trial court in a felonious assault case erred in failing to instruct the jury on self-defense. *S. v. Blackmon*, 620.

§ 15.7. Instruction on Self-Defense Not Required

Trial court in a felonious assault case did not err in failing to instruct the jury on self-defense or on defendant's right to use force in defense of his home where defendant testified he did not intentionally shoot the victim. *S. v. Dial*, 529.

§ 16.1. Submission of Lesser Degrees Not Required

Where the evidence tended to show that defendant struck the victim in the head with a blackjack, trial court was not required to charge on simple assault in a prosecution for assault with a deadly weapon. *S. v. Daniels*, 382.

In a prosecution for assault with a firearm upon a law enforcement officer in the performance of his duties, trial court did not err in failing to instruct the jury on the lesser offense of nonfelonious assault. *S. v. Mayberry*, 509.

ATTORNEYS AT LAW

§ 2. Admission to Practice

Defendant was not prejudiced when the trial court permitted defendant's retained attorneys from Alabama to represent defendant at his trial without complying with the statutory requirements that written motions be filed by the foreign attorneys and that local counsel be associated with them. *S. v. Scarboro*, 105.

§ 7.1. Fee Agreements

An attorney discharged with or without cause can recover only the reasonable value of his services as of that date. *Covington v. Rhodes*, 7.

In an action by plaintiff attorney to recover on a contingent fee contract whereby plaintiff was to represent defendants in an action against defendant school board, plaintiff was not entitled to judgment in his favor against the school board by virtue of the charging lien he filed against any recovery defendants might have from the school board. *Ibid.*

Trial court did not err in determining that the fee provided for by a contingent fee contract for an attorney's services in collecting proceeds of a life insurance policy without filing suit was unreasonable and in awarding the attorney an amount in quantum meruit. *Harmon v. Pugh*, 438.

§ 7.4. Fees Based on Provisions of Note

Trial court erred in failing to award plaintiff attorney fees in accordance with provisions of the promissory note sued on. *Bank v. Burnette*, 120.

AUTOMOBILES

§ 3. Driving Without Valid License

Where defendant entered a guilty plea to a charge of driving without a license, the State was precluded by the prohibition against double jeopardy from thereafter prosecuting defendant for driving while his license was permanently revoked. *S. v. Cannon*, 322.

§ 46. Opinion Testimony as to Speed

A witness had an adequate opportunity to observe defendant's automobile in travel so that he was competent to testify that the automobile was "going fast" immediately prior to the accident. *S. v. Brown*, 22.

There was sufficient evidence that a witness knew the speed limit in the area in question to permit him to testify that defendant's automobile was traveling in excess of the speed limit. *Ibid.*

§ 58.2. Turning; Collisions Between Vehicle Going in Same Direction

Plaintiff's evidence was sufficient for the jury on the issue of negligence of defendant driver in making a left turn into the path of an overtaking vehicle without giving a turn signal. *Brown v. Brown*, 607.

§ 63.1. Negligence in Striking Children

Trial court erred in granting a directed verdict for defendant who was the driver of a car which struck a child who ran into the road. *Johnson v. Clay*, 542.

§ 114. Instructions in Manslaughter Cases

Evidence supported the court's instruction that the jury should find defendant guilty of involuntary manslaughter if it found he intentionally or recklessly operated his vehicle in excess of the speed limit. *S. v. Brown*, 22.

AUTOMOBILES—Continued

§ 126.3. Breathalyzer Test; Qualification of Expert

A proper foundation was not laid for the admission of testimony by a breathalyzer operator where the operator only testified that he possessed a valid permit to administer the breathalyzer test in N.C. *S. v. Mullis*, 40.

G.S. 20-16.2(c) does not provide that the "arresting officer" is the sole person authorized to request that a driver submit to a breathalyzer test. *Oldham v. Miller*, 178.

BETTERMENTS

§ 3. Amount of Recovery

Respondents who placed improvements on land under the mistaken belief they were the sole owners were entitled to recover the amount by which the improvements enhanced the value of the land, not the amount they spent on the improvements. *Harris v. Ashley*, 494.

BOUNDARIES

§ 1. General and Specific Descriptions

Trial court properly determined that the metes and bounds description in one family's Land Registration Certificate was controlling, the disputed property was included in that metes and bounds description, and the further reference in the Certificate was inserted merely for the purpose of identifying generally the property that was more specifically described by metes and bounds. *Board of Transportation v. Pelletier*, 533.

§ 8.1. Procedural Requirements

By consent a boundary dispute may be originally tried before a superior court judge. *Wadsworth v. Georgia-Pacific Corp.*, 1.

§ 8.3. Pleadings

Petitioners' allegations in a processioning proceeding that a dispute existed and that the disputed line was the northern boundary of their line as set out in their deed were sufficient to meet the requirements of G.S. 38-3. *Beal v. Dellinger*, 742.

Where respondents in their answer alleged what they considered to be the correct boundary line, petitioners were not required to reply and make a denial. *Ibid.*

§ 10.1. Effect of Evidence Aliunde

The parties had not made a binding agreement as to a boundary line where the agreement was conditioned upon the settlement of a claim by plaintiffs for timber cut by defendant. *Wadsworth v. Georgia-Pacific Corp.*, 1.

§ 10.2. Admissibility of Evidence Aliunde

Opinions or conclusions stated by an expert in surveying were within his field of expertise. *Teague v. Alexander*, 332.

Ambiguities in the description of the land in question were latent, and parol evidence could be received to fit the description to the location of the land. *Maurice v. Motel Corp.*, 588.

§ 13. Maps

A survey map was properly admitted for the purpose of illustrating testimony of a surveyor. *Teague v. Alexander*, 332.

BOUNDARIES—Continued

§ 15.1. Sufficiency of Evidence to Support Judgment

The evidence in an action to determine a boundary line was sufficient to support the trial court's determination that the line was as contended by defendant. *Wadsworth v. Georgia-Pacific Corp.*, 1.

The determination of a boundary is for the jury in a processioning proceeding, and petitioners' evidence was sufficient, if believed by the jury, to show that the boundary was as petitioners claimed. *Beal v. Dellinger*, 742.

BROKERS AND FACTORS

§ 4. Liabilities of Brokers to Principals

In an action for breach of contract arising from the sale of certain commodities options, trial court properly entered summary judgment for defendant broker who accepted the liability for losses incurred beyond a certain amount in plaintiff's purchase of commodities options. *Donayre v. Jones*, 12.

The unfair trade practices statute will not support a cause of action against a commodities broker for activity regulated by the Commodity Exchange Act. *Bache Halsey Stuart, Inc. v. Hunsucker*, 414.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.6. Sufficiency of Evidence Where Target Felony not Accomplished

The jury could properly find that defendant broke into and entered a building with the intent to commit larceny therein although no property was actually taken. *S. v. Hill*, 75.

§ 5.7. Sufficiency of Evidence of Breaking and Entering and Larceny Generally

Defendant made an entry into a van within the meaning of G.S. 14-56 where he was standing on the street at the open door of the van with the upper part of his body in the van. *S. v. Sneed*, 230.

§ 5.9. Sufficiency of Evidence of Breaking and Entering of Business Premises

Evidence was sufficient for the jury where it tended to show that defendant was in possession of goods which had been stolen approximately 45 minutes earlier. *S. v. Earley*, 361.

§ 6.3. Instructions on Felony Committed During Burglary

Trial court in a prosecution for breaking and entering with intent to commit larceny erred in failing to define the crime of larceny in its jury instructions. *S. v. Hammonds*, 385.

COMPROMISE AND SETTLEMENT

§ 6. Admissibility of Evidence

Trial court erred in admitting a letter written by defendant to plaintiff which constituted an offer to compromise the lawsuit. *Mahaffey v. Sodero*, 379.

CONSTITUTIONAL LAW

§ 26.6. Full Faith and Credit in Alimony Actions

An Alabama decree terminating alimony payments took effect immediately in that state and therefore took effect immediately in N. C. since the N. C. courts must give the Alabama decree the same effect which it had in Alabama. *Vincent v. Vincent*, 580.

§ 28. Due Process in Criminal Case

A defendant who appealed to superior court from his conviction in district court of nonfeloniously attempting to break and enter and nonfeloniously peeping secretly into a room occupied by a female person was denied due process by his indictment for burglary and conviction of attempted felonious breaking and entering in superior court based on the same conduct. *S. v. Phillips*, 377.

Defendant was not denied due process by false testimony at his first trial. *S. v. Grady*, 152.

§ 30. Discovery; Access to Evidence

Defendant in a homicide prosecution failed to show how the unavailability of a lost bullet which had been taken from his back denied him material evidence essential to his defense. *S. v. Grady*, 152.

Trial court did not err in denying defendant's motion to compel production of any written statements or reports made by witnesses for the State. *S. v. McDougald*, 244.

Failure of the State to disclose a statement pursuant to a discovery order did not require exclusion of the statement since defendant was granted a recess in order to allow him to prepare for cross-examination of the witness concerning the statement. *Ibid.*

§ 31. Affording Accused the Basic Essentials for Defense

Trial court did not abuse its discretion in denying defendant's motion for payment of fees for a psychiatric examination to determine defendant's ability, at the time of his confession, to waive his rights and make a voluntary statement. *S. v. Shook*, 465.

§ 34. Double Jeopardy

Defendant could not lawfully be sentenced upon conviction of assault with intent to commit rape since the State included that charge as a part of the kidnapping bill of indictment in order to subject defendant to the greater punishment provided under G.S. 14-39(b). *S. v. Gunther*, 279.

§ 48. Effective Assistance of Counsel

Defendant's contention that he was denied adequate assistance of counsel is without merit. *S. v. Brooks*, 48.

§ 50. Speedy Trial

Where the trial court granted defendant a continuance because witnesses had not been subpoenaed and defendant was unable to assist in his defense, court erred in allowing the case to proceed to trial upon defendant's motion for a speedy trial and for leave to withdraw his prior motion for continuance without evidence or findings that the impairments for which the continuance had been granted no longer existed. *S. v. Brooks*, 445.

Trial court did not err in denying defendant's motion to dismiss for failure to provide a speedy trial. *S. v. Fate*, 68.

CONSTITUTIONAL LAW—Continued

§ 74. Self-Incrimination

Trial court properly concluded that a person charged with the same crime for which defendant was on trial and claiming the Fifth Amendment privilege against self-incrimination could not be compelled to testify for defendant. *S. v. Pearsall*, 600.

CONTRACTS

§ 15. Right of Third Person to Sue for Negligent Breach of Contract

An exterminating company is liable to purchasers who bought a house in reliance upon a false or inaccurate termite report provided by the exterminating company to the vendor. *Johnson v. Wall*, 406.

A contractor not in privity with a consulting engineer could not recover against the consulting engineer for negligent inspection. *Drilling Co. v. Nello L. Teer Co.*, 472.

CORPORATIONS

§ 32. Reorganization

A shareholder who dissented from a corporate reorganization lost his right to payment for his shares because of his failure to file a petition for the appointment of appraisers within 60 days after the 30 day negotiating period had ended. *Jackson v. Stanwood Corp.*, 479.

CRIMINAL LAW

§ 7.1. Entrapment

Evidence did not show entrapment as a matter of law by an undercover officer in a prosecution for possession and sale of marijuana. *S. v. Davis*, 672.

§ 15.1. Pretrial Publicity as Ground for Change of Venue

A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage. *S. v. McDougald*, 244.

Defendant failed to show an abuse of the trial court's discretion in denying his motion for change of venue where he showed only that the case received extensive local news coverage and certain newspaper photographs were used at trial. *S. v. Huffman*, 584.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Where defendant entered a guilty plea to a charge of driving without a license, the State was precluded by the prohibition against double jeopardy from thereafter prosecuting defendant for driving while his license was permanently revoked. *S. v. Cannon*, 322.

§ 26.9. Double Jeopardy; New Trial After Appeal

A defendant who appealed to superior court from his conviction in district court of nonfeloniously attempting to break and enter and nonfeloniously peeping secretly into a room occupied by a female person was denied due process by his indictment for burglary and conviction of attempted felonious breaking and entering in superior court based on the same conduct. *S. v. Phillips*, 377.

CRIMINAL LAW—Continued

§ 29. Mental Capacity to Stand Trial

Evidence did not show that defendant was mentally incompetent as a matter of law to stand trial for robbery, and evidence did not support the court's determination that defendant was mentally competent to stand trial where the State's expert witness could not render an opinion as to defendant's mental capacity at the time of trial. *S. v. Reid*, 547.

§ 29.1. Procedure for Determining Issue of Mental Capacity

Trial court did not err in denying defendant's motion for a continuance to allow for a pretrial psychiatric examination to determine her fitness to stand trial, and the hearing on the motion for continuance satisfied the requirements for a hearing on defendant's capacity to stand trial. *S. v. Williams*, 183.

§ 31. Judicial Notice

Trial court did not abuse its discretion in failing to take judicial notice of radio and television broadcasts concerning the case. *S. v. McDougald*, 244.

§ 34.2. Other Offenses; Admission as Harmless Error

Defendant was not prejudiced by a witness's testimony that defendant stated he didn't want to go back to court because he had just got out of prison. *S. v. Sneed*, 230.

§ 34.7. Other Offenses; Competency to Show Intent

In a prosecution for possession and sale of heroin, evidence of defendant's stated desire to purchase cocaine shortly before the crimes charged was competent to show his intent. *S. v. Forney*, 703.

§ 45.1. Experimental Evidence

In a homicide prosecution in which defendant testified that deceased had cut his shirt with a knife during the altercation which resulted in deceased's death, the trial court erred in permitting the district attorney to ask defendant to try to cut the shirt worn by defendant at the time of the incident with deceased's knife. *S. v. Graham*, 86.

§ 46.1. Evidence of Flight

There was ample evidence in the record that a sufficient search was made for defendant after the commission of the crime charged so as to justify the court's instruction on flight. *S. v. Scarboro*, 105.

Trial court properly admitted testimony that defendant fled the courtroom when the case first came on for trial some six months after defendant's arrest. *S. v. DeBerry*, 538.

§ 48. Silence as Implied Admission

Statements made to a witness by defendant's brother in the presence of defendant that defendant had just shot and killed a person because he had beaten him out of some money was admissible as an implied admission by defendant. *S. v. Fewell*, 592.

§ 53. Medical Expert Testimony

Trial court in a homicide prosecution properly allowed expert opinion evidence with respect to deceased's inability to use his hand. *S. v. Grady*, 152.

CRIMINAL LAW—Continued

§ 57. Evidence in Regard to Firearms

Trial court in a homicide prosecution did not err in allowing the testimony of a ballistics expert. *S. v. Grady*, 152.

§ 61.2. Shoe Prints

An officer's testimony concerning shoe prints which he followed was not inadmissible because there was no attempt to fit the prints to shoes worn by defendants. *S. v. Gosnell*, 679.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Although a photographic identification procedure was suggestive, trial court did not err in determining that the photographic procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification, and both the photographic identification and an in-court identification were properly admitted in defendant's robbery trial. *S. v. Williams*, 183.

§ 66.16. Independent Origin of In-Court Identification from Photographic Identification

Evidence was sufficient to support a finding that a robbery victim's in-court identification of defendant was of independent origin and not based on a pretrial photographic identification. *S. v. Fate*, 68.

§ 71. Shorthand Statements of Fact

Testimony that defendant and his companion were laughing immediately after the shooting was competent as a shorthand statement of fact. *S. v. Correll*, 451.

§ 73.3. Statements Showing State of Mind as Exception to Hearsay Rule

A witness's testimony that deceased stated that he was going to pick up the defendant was admissible as an exception to the hearsay rule. *S. v. Fewell*, 592.

§ 73.4. Statements as Part of Res Gestae

Defendant's statement that she was trying to kill herself and deceased tried to stop her was not part of the res gestae. *S. v. Williams*, 138.

§ 74.1. Divisibility of Confession

Defendant's statement that she was trying to kill herself and deceased tried to stop her was not part of defendant's original confession and defendant was not entitled to have it introduced when the State offered the original confession. *S. v. Williams*, 138.

§ 74.2. Confession by Codefendant

Trial court erred in failing to instruct the jury that one defendant's statement was admitted into evidence against only him and could not be considered against a codefendant. *S. v. Slate*, 209.

§ 75. Admissibility of Confession in General

Though the trial court erred in allowing an officer to testify that defendant "was fixing to sign" a confession when his wife came in and stopped him, such error was not prejudicial in view of other evidence which tended to show that defendant willingly made the statement and indicated it was true. *S. v. Shook*, 465.

§ 75.9. Volunteered Statements

Evidence was sufficient to support the trial court's conclusion that defendant voluntarily claimed ownership of the contraband. *S. v. McGill*, 29.

CRIMINAL LAW—Continued

§ 75.10. Waiver of Constitutional Rights

Opinion testimony by an officer that defendant appeared to understand and know what he was doing in waiving his rights and making a statement was improperly admitted, but such evidence was not prejudicial in view of other competent evidence of defendant's understanding. *S. v. Shook*, 465.

§ 75.13. Confessions to Persons Not Police Officers

Defendant was entitled to a voir dire hearing to determine the voluntariness of his confession to a private individual. *S. v. Martin*, 115.

§ 75.14. Mental Capacity to Confess

Trial court did not err in denying defendant's motion to suppress a statement made by defendant shortly after the shooting in question, though the court failed to hold a hearing on the motion, where defendant's psychiatric history was before the court. *S. v. Shook*, 465.

§ 76.1. Voir Dire Hearing

Trial court's finding in the presence of the jury that a confession was made freely and voluntarily constituted a prejudicial expression of opinion on the evidence. *S. v. Hardin*, 558.

§ 86.7. Instructions Limiting Impeachment Evidence

Defendant was not prejudiced by the court's failure to give a limiting instruction on evidence of defendant's criminal record at the time the request was made where the court gave a proper limiting instruction in its charge to the jury. *S. v. DeBerry*, 538.

§ 87. What Witnesses May Be Called; List of Witnesses

Defendant's contention that it was error to admit the testimony of a rebuttal witness who was acquainted with a juror and whose name had not been given to the defense prior to trial was without merit. *S. v. Fate*, 68.

§ 88. Cross-Examination

Trial court did not err in limiting defendant's cross-examination of a witness. *S. v. McGill*, 29.

Defendant was not denied his right to cross-examine witnesses because he was not provided with signed prior statements of the witnesses. *S. v. McDougald*, 244.

§ 91. Time of Trial

Defendant waived his statutory right not to be tried in the week in which he was arraigned where he failed to move for a continuance pursuant to the statute. *S. v. Davis*, 672.

§ 91.1. Continuance Generally

Where the trial court granted defendant a continuance because witnesses had not been subpoenaed and defendant was unable to assist in his defense, court erred in allowing the case to proceed to trial upon defendant's motion for a speedy trial and for leave to withdraw his prior motion for continuance without evidence or findings that the impairments for which the continuance had been granted no longer existed. *S. v. Brooks*, 445.

CRIMINAL LAW—Continued

§ 91.7. Continuance On Ground of Absence of Witness

Trial court did not err in denial of defendants' motion for a continuance for an indefinite time because of the unavailability of a witness whose whereabouts was unknown. *S. v. Davis*, 672.

§ 92. Consolidation of Charges Against Multiple Defendants

Joinder of charges against a passenger and driver did not deprive the passenger of a fair trial because evidence found in the trunk of the car was admissible only against the driver where the court limited the jury's consideration of such evidence to the driver. *S. v. Ervin*, 261.

§ 92.1. Consolidation Proper Where Offenses Same

Trial court properly consolidated for trial charges against two defendants for the same crime of breaking or entering and larceny. *S. v. Gosnell*, 679.

§ 92.4. Consolidation of Charges Against Same Defendant

Trial court did not err in consolidating for trial charges of second degree rape and assault with a deadly weapon with intent to kill. *S. v. Huffman*, 584.

§ 95.2. Instruction Limiting Consideration of Evidence

Where the trial court's instruction limiting the jury's consideration of evidence to one defendant was not included in the record on appeal, it will be assumed that the limiting instruction specifically reversed the court's earlier overruling of a general objection to the evidence. *S. v. Ervin*, 261.

§ 99.2. Expression of Opinion by Remarks During Trial

In a homicide prosecution in which a juror asked the trial judge how he would know that a photograph was of deceased if he did not know deceased personally, the trial judge's response, "It's not for you to consider. Listen to the evidence," did not remove from the jury's consideration the identity of the person killed. *S. v. Tew*, 33.

§ 99.3. Expression of Opinion in Connection with Admission of Evidence

The trial judge's comment "Who cares?" after defense counsel had asked decedent's wife to repeat the number she stated she had called to reach the police immediately after decedent was stabbed did not constitute a prejudicial expression of opinion. *S. v. Tew*, 33.

§ 99.8. Expression of Opinion in Examination of Witnesses

Defendant was not prejudiced by four questions which the trial court asked State's witnesses. *S. v. Tew*, 33.

§ 101.2. Conduct Affecting Jurors, Exposure to Publicity

When the presence of reporters will not work to the prejudice of either party, the trial court may allow the presence of reporters during conferences in chambers. *S. v. McDougald*, 244.

§ 106.5. Sufficiency of Evidence, Accomplice Testimony

It was not error for the trial court to permit defendant's conviction based solely upon the uncorroborated testimony of an accomplice. *S. v. Brooks*, 48.

CRIMINAL LAW—Continued

§ 112.6. Instructions on Defense of Insanity

Evidence of defendant's insanity was insufficient to require an instruction in a prosecution for assault with a firearm on a law officer. *S. v. Mayberry*, 509.

§ 113.9. Correction of Misstatement in Instructions

Defendant was not prejudiced where the trial court failed to include "not guilty" in his statement of the possible verdicts where the judge immediately corrected himself. *S. v. Fate*, 68.

§ 114. Expression of Opinion in the Charge

Trial court's finding in the presence of the jury that a confession was made freely and voluntarily constituted a prejudicial expression of opinion on the evidence. *S. v. Hardin*, 558.

Trial court's instruction in a prosecution for assault with a deadly weapon that the prosecuting witness must have fallen into a lawn mower amounted to an improper expression of opinion on the evidence. *S. v. Whitted*, 603.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court did not misstate the evidence or express an opinion on the evidence by characterizing a pretrial statement of defendant as incriminating. *S. v. Oakes*, 113.

Trial court did not express an opinion during jury instructions. *S. v. Alston*, 219.

§ 122.1. Jury's Request for Additional Instructions

Trial judge made a sufficient inquiry into the jury's request for further instructions on the possible verdicts. *S. v. Hill*, 75.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Trial court's additional instruction urging the jury to reach a verdict did not reduce the State's burden of proof from proof beyond a reasonable doubt to proof "as you can agree without violating your conscientious convictions." *S. v. Dial*, 529.

§ 126. Unanimity of Verdict; Polling of Jury

Trial court did not err in failing to inquire into a juror's failure to answer questions during polling of the jury since defendant did not ask the judge to inquire further and the juror did answer twice that the guilty verdict was his verdict. *S. v. Fate*, 68.

§ 126.2. Inquiry to Clarify Verdict; Correction of Verdict

Trial court properly accepted a verdict of guilty of possession of marijuana with intent to sell after the jury foreman corrected the verdict he first returned. *S. v. Davis*, 672.

§ 128.2. Grounds for Mistrial

Defendant was not entitled to a mistrial because of his arrest for jaywalking in front of the courthouse at the end of the first day of trial by two officers who were prosecution witnesses. *S. v. Ervin*, 261.

§ 134.2. Time and Procedure for Imposition of Sentence

Trial court did not err in denying defendant's motion to delay sentencing to give him an opportunity to call various character witnesses. *S. v. McDougald*, 244.

CRIMINAL LAW—Continued

§ 134.4. Youthful Offenders

Trial court erred in sentencing the 19 year old defendant to prison without first finding that he would not benefit from treatment and supervision as a committed youthful offender. *S. v. Lewis*, 108.

Trial court did not abuse its discretion in sentencing defendant as a regular youthful offender where the court found that defendant would derive no benefit from treatment and supervision as a committed youthful offender. *S. v. McDougald*, 244.

§ 137.1. Conformity of Judgment Where There Are Several Counts

Defendant was not prejudiced where two crimes were charged and the trial court dismissed the wrong charge. *S. v. McGill*, 29.

§ 138. Severity of Sentence

Trial court did not abuse its discretion in sentencing defendant to a term of 30 to 40 years for armed robbery and recommending that he serve the sentence at hard labor without benefit of parole, commutation, work release or community leave. *S. v. DeBerry*, 538.

§ 138.4. Sentence Where There Are Several Charges

When different counts are consolidated for judgment, the total sentence may not exceed the greatest statutory penalty applicable to any one of the counts. *S. v. Gosnell*, 679.

§ 150.1. Waiver of Right to Appeal

Where defendant gave notice of appeal in open court on the date judgment was entered, withdrew the notice later that same day, and four days later gave written notice of appeal, trial court erred in ruling that defendant had no right to appeal. *S. v. Ervin*, 261.

§ 155.1. Docketing of Record in Court of Appeals

Appeal is dismissed for failure of appellant to serve and docket his record on appeal within the extended times permitted by an order of the Court of Appeals. *S. v. Johnson*, 111.

DAMAGES

§ 9. Mitigation of Damages

In an action to recover the alleged balance due for goods sold by plaintiff's assignor to defendant, trial court erred in entering summary judgment for plaintiff where there was a jury question as to whether plaintiff exercised reasonable diligence to minimize its loss. *Halsey Co. v. Knitting Mills*, 569.

§ 16.1. Sufficiency of Evidence of Causation

Evidence was insufficient to support a finding that phlebitis resulting from an automobile accident would be permanent so as to require the court to instruct the jury as to permanent injury and future pain and suffering. *Caison v. Cliff*, 613.

DEATH

§ 3.6. Sufficiency of Evidence in Wrongful Death Action

In a wrongful death action where the evidence tended to show that deceased was electrocuted when he came in contact with uninsulated wires while changing

DEATH—Continued

the air filter in his air conditioning unit, evidence was insufficient to show that decedent was contributorily negligent as a matter of law. *Rutherford v. Air Conditioning Co.*, 630.

§ 7.4. Competency of Evidence of Damages

Trial court in a wrongful death action did not err in permitting testimony of an expert economist concerning the expected income of intestate though the expert did not elaborate on his computations. *Rutherford v. Air Conditioning Co.*, 630.

DEEDS

§ 15. Special Limitations

The owner of a right of re-entry for breach of condition has no compensable interest in a condemnation award if the fee owner had no intention to abandon the permitted use of the property. *Board of Transportation v. Recreation Comm.*, 708.

§ 19.2. Personal Covenants

A covenant requiring owners of lots in a subdivision to be members of a country club and to pay country club dues did not run with the land and was not assignable. *Raintree Corp. v. Rowe*, 664.

§ 20.6. Who May Enforce Restrictive Covenants

A homeowners' association, not a subdivision developer, was the party entitled to maintain an action against the owners of a lot in the subdivision to collect assessments for maintenance of common areas. *Raintree Corp. v. Rowe*, 664.

§ 26. Effect of Judgment in Proceedings Under Torrens Act

Trial court properly determined that the metes and bounds description in one family's Land Registration Certificate was controlling, the disputed property was included in that metes and bounds description, and the further reference in the Certificate was inserted merely for the purpose of identifying generally the property that was more specifically described by metes and bounds. *Board of Transportation v. Pelletier*, 533.

DESCENT AND DISTRIBUTION

§ 2. Determination of Whether Property Is Acquired by Deed

A partition deed purporting to convey an estate by the entirety to a cotenant and her husband only severed the unity of possession and conveyed no interest in the land to the husband. *Harris v. Ashley*, 494.

DIVORCE AND ALIMONY

§ 2.2. Answer in Divorce Action

Defendant in a divorce action had 20 days after notice of the court's action on her Rule 12(b) motion for change of venue in which to file her answer. *Miller v. Miller*, 95.

§ 2.4. Jury Trial

Where defendant's time for filing an answer in a divorce action had not expired, her time for demanding a jury trial had not expired. *Miller v. Miller*, 95.

DIVORCE AND ALIMONY—Continued

§ 3. Venue

Defendant impliedly waived her right to a change of venue in a divorce action where she failed to appear for a scheduled hearing on her motion for change of venue. *Miller v. Miller*, 95.

§ 7. Divorce From Bed and Board

A wife may maintain an action for divorce from bed and board while the husband is staying in the same house with her. *Triplett v. Triplett*, 364.

§ 17.3. Amount of Alimony Upon Divorce From Bed and Board

Where the trial court reduced the amount of alimony awarded to the wife by 30% because of indignities on her part, it was not necessary for the court to make findings as to what specific indignities had been rendered by each of the parties or to show how it arrived at the 30% figure. *Cavendish v. Cavendish*, 577.

§ 18. Alimony Pendente Lite

Trial court did not err in permitting an alimony pendente lite order to remain in effect after a jury trial pending a hearing on the issue of whether an award of permanent alimony to the dependent spouse should have been disallowed or reduced because of indignities on her part. *Cavendish v. Cavendish*, 577.

§ 19.1. Jurisdiction to Modify Alimony Decree

An Alabama court which had in personam jurisdiction over plaintiff by virtue of her general appearance in a divorce proceeding instituted by defendant could terminate alimony payments awarded under an N. C. decree. *Vincent v. Vincent*, 580.

§ 19.4. Changed Circumstances for Modification of Alimony Decree

Where an earlier consent order found plaintiff to be a dependent spouse, the burden was upon defendant to prove a material change in circumstances to justify a finding that plaintiff was no longer a dependent spouse. *Roberts v. Roberts*, 295.

Evidence was insufficient to support the court's denial of plaintiff husband's motion for a reduction in alimony and child support payments required by a consent judgment on the ground that plaintiff's change in circumstances was voluntarily effected by him in disregard of his marital and parental support obligations. *Wachacha v. Wachacha*, 504.

§ 20.1. Effect of Absolute Divorce on Alimony

Trial court properly determined that an earlier consent order was for permanent alimony and therefore was not superseded by a subsequent decree of absolute divorce. *Roberts v. Roberts*, 295.

§ 21. Enforcement of Alimony Awards

A separation agreement not incorporated into a court order may not be enforced by specific performance. *Moore v. Moore*, 700.

§ 23. Jurisdiction of Child Custody and Support Action Generally

Trial court had authority to entertain a motion in the cause to reduce to judgment the support payments alleged to be in arrears where plaintiff sought to obtain judgment for only the amount of the arrearage which accrued before the child's 18th birthday. *Griffith v. Griffith*, 25.

DIVORCE AND ALIMONY—Continued

§ 23.2. Jurisdiction of Child Custody and Support in Connection With Divorce Action

Where a divorce action was properly filed by plaintiff husband in Forsyth County, the courts of Forsyth County attained exclusive jurisdiction of any action for the custody or support of the parties' child until entry of a final judgment in the divorce action. *Holbrook v. Holbrook*, 303; *Holbrook v. Holbrook*, 308.

§ 24. Child Support Actions

In an action to recover past due child support payments, defendant's contention that the child, who had reached the age of 18, was the real party in interest rather than her mother was without merit. *Griffith v. Griffith*, 25.

§ 24.1 Amount of Child Support

Trial court properly complied with G.S. 50-13.4(c) in determining the amount of child support. *Walker v. Walker*, 226.

Trial court did not err in ordering defendant father to pay a percentage of his annual bonus into an account for the support of his children, but the court erred in ordering that any surplus from the account be used for the children after they reached majority. *Parrish v. Cole*, 691.

§ 27. Attorney's Fees

In an action for child custody and support, findings of fact are not required to sustain an award for counsel fees. *Walker v. Walker*, 226.

EMINENT DOMAIN

§ 5.3. Compensation; Diminution of Damages

Trial judge in an eminent domain proceeding instituted by a municipality did not err in failing to instruct that any damages to which the respondents were entitled must be offset by any general benefits accruing to the respondents as a result of the condemnation of their land. *Town of Hillsborough v. Bartow*, 623.

§ 6.4. Other Evidence of Value

Trial court in a condemnation proceeding erred in refusing to strike testimony of a value witness who derived his estimate of defendant's damages by application of the "value of the part taken plus damages to the remainder" formula. *Board of Transportation v. Jones*, 337.

§ 13.5. Action by Owner; Instructions

Trial court in a condemnation proceeding erred in failing to instruct the jury that in assessing compensation they were to consider general benefits accruing to the parts of the tract not taken. *Board of Transportation v. Jones*, 337.

§ 16.1. Nature of Estate Held by Landowner

The owner of a right of re-entry for breach of condition has no compensable interest in a condemnation award if the fee owner had no intention to abandon the permitted use of the property. *Board of Transportation v. Recreation Comm.*, 708.

EVIDENCE

§ 15.2. Relevancy and Competency of Evidence; Particular Circumstances

In a trial on defendant's claim against decedent's estate, trial court erred in permitting a witness to testify concerning defendant's shooting of his wife. *Godwin v. Tew,* 686.

§ 19. Evidence of Similar Facts

In an action to recover for personal injuries received by minor plaintiff when she fell from an amusement ride at a fair, trial court erred in permitting an employee of a permanent amusement park to testify about a newer model of the ride located in the amusement park and in permitting the jury to view a film of the newer ride in operation. *Martin v. Amusements of America, Inc.,* 130.

§ 28.1. Affidavits

Defendant's right to cross-examine an affiant was not denied since affiant was present at the hearing and could have been examined by defendant. *Walker v. Walker,* 226.

§ 32.6. Parol Evidence; Validity of Instrument; Fraud; Mistake

A provision in a contract for the sale of a house that no representations other than those expressed in the contract were a part of the agreement did not preclude an action by the buyer based on the seller's alleged misrepresentation of the heated square footage of the house. *Marshall v. Keaveny,* 644.

§ 34.1. Admissions Against Interest

Trial court erred in excluding testimony as to what the testatrix told the witness concerning money owed by testatrix to defendant since the testimony was a declaration against interest. *Godwin v. Tew,* 686.

§ 41. Opinion Evidence; Invasion of Province of Jury

In an action for breach of contract where defendant contended that he was not a merchant within the meaning of the Uniform Commercial Code, trial court erred in permitting plaintiff to ask its witness questions with respect to defendant's knowledgeability since that was the question before the jury. *Currituck Grain Inc. v. Powell,* 7.

§ 48.2. Competency and Qualification of Experts; Discretion of Trial Court

In an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs from defendant, trial court properly permitted a county building inspector to testify as an expert concerning the proper construction of chimneys and flues. *Earls v. Link, Inc.,* 204.

§ 55. Expert Testimony as to Electricity

Trial court properly allowed an expert in electrical engineering to testify in a wrongful death action where deceased had been electrocuted since the witness's testimony was based on personal observation, training and experience. *Rutherford v. Air Conditioning Co.,* 630.

EXECUTORS AND ADMINISTRATORS

§ 23. Widow's Year's Support

"Net income" as used in G.S. 30-31 providing for a widow's year's allowance is to be computed after deducting all federal and state income taxes attributable to

EXECUTORS AND ADMINISTRATORS—Continued

the income received by the decedent during the three years preceding his death. *Pritchard v. Trust Co.*, 489.

§ 24.1. Action for Personal Services; Competency of Evidence

Trial court erred in excluding testimony by defendant on redirect examination concerning a contract with decedent to perform personal services. *Godwin v. Tew*, 686.

§ 30. Taxes

The personal representative of an estate is entitled to contribution from a life insurance beneficiary for her ratable share of the federal estate tax and N. C. inheritance tax imposed upon decedent's estate by reason of inclusion of the life insurance proceeds in decedent's estate. *Bank v. Dixon*, 430.

§ 36. Acceptance of Final Account and Discharge of Personal Representative

Though a final account had been filed by an executrix, she was nevertheless the proper person to receive the service of process in an action against deceased's estate since no discharge order had been entered. *Joyner v. Hospital*, 720.

FALSE PRETENSE

§ 2.2. Indictment Insufficient

An indictment which charged defendant with obtaining a suit from a store by false pretense was fatally defective where it failed to allege that defendant acted with intent to defraud. *S. v. Moore*, 239.

FRAUD

§ 5.1. Reliance on Misrepresentation; Inspection

The buyer of a house could not reasonably rely on representations by the seller as to the heated square footage of the house. *Marshall v. Keaveny*, 644.

§ 11. Competency and Relevancy of Evidence

A provision in a contract for the sale of a house that no representations other than those expressed in the contract were a part of the agreement did not preclude an action by the buyer based on the seller's alleged misrepresentations of the heated square footage of the house. *Marshall v. Keaveny*, 644.

§ 12. Sufficiency of Evidence

In an action for fraud in misrepresenting the acreage in a tract of land purchased by plaintiffs, trial court properly granted summary judgment in favor of the trustee and beneficiary of a deed of trust on the property. *Russo v. Mountain High, Inc.*, 159.

FRAUDULENT CONVEYANCES

§ 3. Action to Set Aside Conveyances as Fraudulent, Generally

In an action to set aside a conveyance allegedly fraudulent as to creditors, trial court's instruction pertaining to lack of consideration was favorable to defendant. *Tuttle v. Tuttle*, 651.

FRAUDULENT CONVEYANCES—Continued

§ 3.2. Action to Set Aside Conveyances; Burden of Proof

Trial court properly instructed the jury on the shifting burden of proof to show valuable consideration. *Tuttle v. Tuttle*, 651.

§ 3.4. Action to Set Aside Conveyances; Sufficiency of Evidence

Evidence was sufficient for the jury to find that in transferring the property in question the male defendant failed to retain sufficient assets to pay his then existing indebtedness. *Tuttle v. Tuttle*, 651.

In an action to set aside a conveyance which was allegedly fraudulent as to creditors, evidence was sufficient to present a jury question as to whether the conveyance was voluntary. *Ibid.*

In an action to set aside a conveyance by defendant husband which was allegedly fraudulent as to creditors, trial court properly denied defendant wife's motion for a directed verdict. *Ibid.*

GAMES AND EXHIBITIONS

§ 2.2. Liability of Proprietor to Patrons; Actions for Injuries

Trial court adequately instructed the jury on the duty of care required of a concessionaire of an amusement ride toward a minor patron on such ride. *Martin v. Amusements of America, Inc.*, 130.

HOMICIDE

§ 15.4. Opinion Evidence

A witness's testimony that he "witnessed murder of motorcycle rider and girl" invaded the province of the jury but was not prejudicial. *S. v. Correll*, 451.

§ 20.1. Photographs

In a homicide prosecution in which a juror asked the trial judge how he would know that a photograph was of deceased if he did not know deceased personally, the trial judge's response, "It's not for you to consider. Listen to the evidence," did not remove from the jury's consideration the identity of the person killed. *S. v. Tew*, 33.

§ 21.7. Second Degree Murder; Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for second degree murder of a motorcycle driver and passenger. *S. v. Correll*, 451.

§ 21.8. Second Degree Murder; Sufficiency of Evidence Where Defendant Pleads Self-Defense

Evidence was sufficient for the jury in a second degree murder prosecution and the evidence did not show self-defense as a matter of law. *S. v. Parker*, 316.

§ 21.9. Manslaughter; Sufficiency of Evidence

A wife was guilty of involuntary manslaughter in the death of her husband who was shot when he interfered in the wife's attempt to shoot herself. *S. v. Williams*, 138.

Evidence was sufficient for the jury in a prosecution for voluntary manslaughter of a husband by defendant wife. *S. v. Piland*, 367.

Even if the jury found that defendant acted in self-defense in firing his pistol at and killing a motorcycle driver, the evidence supported a verdict of involuntary

HOMICIDE—Continued

manslaughter in the shooting death of a female passenger on the motorcycle. *S. v. Correll*, 451.

§ 28.1. Duty of Court to Instruct on Self-Defense

Trial court in a prosecution for the homicide of a police officer erred in failing to instruct the jury on defendant's right to kill an intruder to prevent the forceful and unlawful entry of the intruder into his home. *S. v. McCombs*, 214.

§ 30.3. Submission of Lesser Degrees of Crime; Involuntary Manslaughter

Trial court in a homicide case erred in failing to instruct the jury on involuntary manslaughter where defendant testified he fired the fatal shot unintentionally when he "throwed up the gun and it went off." *S. v. Graham*, 86.

HUSBAND AND WIFE

§ 1. Right to Wife's Services

Plaintiff's wife's claim that her bookkeeping, supervision of employees, and running errands in defendant husband's land clearing business entitled her to an ownership interest in the business when funds derived from the business and placed in joint bank accounts were used to capitalize the business is without merit. *Leatherman v. Leatherman*, 696.

§ 13. Separation Agreement; Enforcement

The proper forum for an action for arrearages due under a separation agreement is the state in which the separation agreement was entered into when one of the parties to the agreement is still a resident of that state. *Pope v. Pope*, 328.

A separation agreement not incorporated into a court order may not be enforced by specific performance. *Moore v. Moore*, 700.

INDICTMENT AND WARRANT

§ 17.4. Variance as to Ownership

There was no fatal variance between an indictment which charged robbery of a motel and evidence which showed robbery of both the motel and an employee of the motel. *S. v. Fate*, 68.

INFANTS

§ 6.3. Facts Material to Award of Custody Generally

In a child custody contest between the mother and the paternal grandmother, evidence of the deceased father's character was irrelevant. *Sheppard v. Sheppard*, 712.

INJUNCTIONS

§ 13.2. Evidence of Irreparable Injury

In an action to enforce a restrictive convenant prohibiting defendant from engaging in accounts payable auditing in competition with plaintiff, plaintiff's affidavits and exhibits were sufficient to support trial court's finding of irreparable loss. *Schultz and Assoc. v. Ingram*, 422.

INJUNCTIONS—Continued

§ 16. Liabilities on Bonds

The setting of bond for damages resulting from a preliminary injunction is within the trial court's discretion and no appeal lies from this determination. *Schultz and Assoc. v. Ingram*, 422.

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals

Plaintiff's complaint was sufficient to state a claim for relief against a medical doctor for wrongful certification of plaintiff for admission to a mental hospital. *McLean v. Sale*, 520.

The respondent in an involuntary commitment proceeding was denied his right to a hearing before the district court within 10 days of confinement. *In re Jacobs*, 573.

§ 1.2. Findings Required by Involuntary Commitment Statutes

Respondent was not imminently dangerous to herself or others where the evidence showed only that she was completely unable to care for herself and needed nursing home care. *In re Doty*, 233.

Trial court properly refused to dismiss an involuntary commitment petition because a hearing was not held within 10 days of the day respondent was taken into custody as required by G.S. 122-58.7(a). *In re Underwood*, 344.

Involuntary commitment statutes do not provide that an order of commitment may issue only when the requisite factual findings are supported by competent medical evidence. *Ibid.*

Order committing respondent to a mental health care facility must be reversed where the court failed to record sufficient facts to support its findings. *In re Jacobs*, 573.

§ 2.1. Involuntary Commitment Proceeding; Notice

Failure to give respondent whose commitment to a state mental health facility was about to expire at least 15 days notice of a motion by the acting chief of medical services to rehear did not require dismissal of the proceeding. *In re Boyles*, 389.

INSURANCE

§ 149. Liability Insurance

An insurance policy providing liability coverage for a school superintendent did not provide coverage for attorney fees incurred by the insured in attempting to retain his position as superintendent after the school board had rescinded a prior decision to reemploy plaintiff. *Blake v. Insurance Co.*, 555.

INTEREST

§ 2. Time and Computation

In an action to recover a deficiency judgment, plaintiff was entitled to 12% interest on the judgment from the date the note became due and payable. *Bank v. Burnette*, 120.

JUDGES

§ 5. Disqualification

Trial judge erred in not disqualifying himself from ruling on plaintiffs' motion to set aside judgment against them on the ground of excusable neglect. *McClendon v. Clinard,* 353.

JUDGMENTS

§ 3. Conformity to Verdict and Pleadings

In an action to recover on a contingent fee contract, trial court erred in entering judgment for plaintiff severally against three defendants. *Covington v. Rhodes,* 61.

§ 13.2. Default Judgment; Notice

Notice given to defendants of a hearing on plaintiff's motion for judgment by default provided defendants with sufficient time in which to prepare so as to comply with due process. *Forman & Zuckerman v. Schupak,* 17.

A local rule of court providing that "requests for pretrial hearings on motions will be considered by the Calendar Committee if filed by 5:00 p.m. on Monday two weeks prior to the beginning of the session requested" did not prohibit the calendaring of a motion for default judgment where the request was a day late if the calendar committee or the court so chose. *Ibid.*

§ 35.1. Res Judicata

A prior action involving the sale of timber on land in controversy was not res judicata in this action to quiet title to the land. *Teague v. Alexander,* 332.

§ 55. Right to Interest

In an action to recover a deficiency judgment, plaintiff was entitled to 12% interest on the judgment from the date the note became due and payable. *Bank v. Burnette,* 120.

JURY

§ 6.3. Scope of Voir Dire Examination

The trial court did not err in refusing to allow the defendant to ask a prospective juror whether he could determine guilt or innocence in the case without the defense presenting evidence. *S. v. McDougald,* 244.

§ 7.6. Challenges for Cause Generally

The trial court did not err in failing to allow defendant's challenge for cause of a juror who stated that he would not require the State to carry its burden of proof, since the record on appeal indicated that the juror simply misunderstood the question. *S. v. McDougald,* 244.

KIDNAPPING

§ 1. Elements of Offense

Defendant could not lawfully be sentenced upon conviction of assault with intent to commit rape since the State included the charge as a part of the kidnapping bill of indictment in order to subject defendant to the greater punishment provided under G.S. 14-39(b). *S. v. Gunther,* 279.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Material Furnisher

A claimant who furnished materials for the improvement of real estate pursuant to a contract with the owner is not required to deliver such materials personally to the site of the improvement in order to be entitled to a materialman's lien. *Wallpaper Co. v. Peacock & Assoc.*, 144; *Wallpaper Co. v. Peacock & Assoc.*, 149.

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

A "Notice to Vacate" for nonpayment of rent by a realtor to a tenant did not simulate a court process in violation of G.S. 14-188.1. *S. v. Watts*, 561.

LARCENY

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Evidence was sufficient for the jury where it tended to show that defendant was in possession of goods which had been stolen approximately 45 minutes earlier. *S. v. Earley*, 361.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

In an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs on 16 June 1971 from defendant, plaintiffs could not reasonably have discovered the defect until they first used the fireplace in early 1974, and the cause of action did not accrue until 1974. *Earls v. Link, Inc.*, 204.

§ 4.2. Accrual of Cause of Action for Negligence

Though the actions of defendant in altering plumbing while engaged as a contractor performing a portion of the construction of a textile plant where plaintiff was employed brought defendant within the provisions of G.S. 1-50(5), that statute did not extend the time within which plaintiff could bring an action against defendant for injuries sustained by plaintiff when a urinal exploded. *Smith v. Sanitary Corp.*, 457.

§ 4.3. Accrual of Cause of Action for Breach of Contract

Trial court properly granted summary judgment for defendants on plaintiff's claim for wrongful death based on negligent installation of an air conditioning unit where the action was instituted on 15 August 1972 and the installation of the unit took place on 20 July 1965. *Rutherford v. Air Conditioning Co.*, 630.

MASTER AND SERVANT

§ 11.1. Covenant Not to Compete

In an action to enforce a restrictive covenant in an employment contract, defendant's contention that assignments of the contract were invalid because the contract was one for personal services is without merit. *Schultz and Assoc. v. Ingram*, 422.

A restrictive covenant prohibiting defendant from competing with plaintiff in "any area or areas from time to time constituting the Principal's or Associate's area

MASTER AND SERVANT—Continued

of activity in the conduct of their respective businesses" for a period of two years after termination of employment was reasonable and not unduly vague. *Ibid.*

§ 89.4. Distribution of Recovery of Damages at Common Law

The statute directing that attorney fees incurred by the party who effected recovery against a third party tort-feasor be apportioned between and paid by the employee and his compensation paying employer in proportion to the amount each receives from the recovery is constitutional. *Hogan v. Motor Lines*, 288.

§ 91. Workmen's Compensation; Filing of Claim Generally

There was insufficient evidence of estoppel to give the Industrial Commission jurisdiction over a workmen's compensation claim filed by plaintiff more than two years after reaching the age of 18. *Clodfelter v. Furniture Co.*, 45.

§ 94. Workmen's Compensation; Findings of Commission

Defendant's contention that the Industrial Commission erred by failing to find and conclude that the agreement to pay compensation to plaintiff was entered into through mutual mistake is wholly without merit. *Buchanan v. Mitchell County*, 596.

In a hearing upon defendants' request to be allowed to discontinue compensation payments to plaintiff, the Industrial Commission was not required to make any findings of fact with respect to the employee's intoxication at the time of the accident. *Ibid.*

MAYHEM

§ 2. Prosecution

Trial court erred in instructing the jury that defendant could be found guilty of felonious maiming of a child if it found that the child was injured as a result of defendant's gross carelessness or criminal negligence. *S. v. Haulk*, 357.

MORTGAGES AND DEEDS OF TRUST

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

Pursuant to G.S. 45-21.16(d) providing for foreclosure under a power of sale, the superior court judge is limited in a hearing de novo to the same matters considered by the clerk of court and is not authorized to invoke equity jurisdiction. *In re Watts*, 90.

MUNICIPAL CORPORATIONS

§ 4.5. Urban Redevelopment

An urban redevelopment commission was not required to reimburse a telephone company for the costs of removing and relocating telephone lines from an area being redeveloped. *Telegraph Co. v. Housing Authority*, 172.

§ 14.2. Extent of Duty to Maintain Streets in Safe Condition

Trial court properly granted summary judgment for defendant in an action to recover damages for injuries sustained by plaintiff in an automobile accident which occurred on a state road within the city limits. *Shapiro v. Motor Co.*, 658.

MUNICIPAL CORPORATIONS—Continued

§ 30.9. Spot Zoning

Issues of material fact were presented as to whether a city ordinance creating a historic district constituted spot zoning and whether the inclusion of plaintiff's property in the historic district was in accordance with a comprehensive zoning plan. *A-S-P Associates v. City of Raleigh*, 271.

§ 33. Closing of Public Street

City streets upon which a telephone company's facilities were located were closed for an urban redevelopment project by a lawful exercise of the police power. *Telegraph Co. v. Housing Authority*, 172.

NARCOTICS

§ 4.3. Sufficiency of Evidence of Constructive Possession

In a prosecution for possession of heroin where the evidence tended to show that an unidentified black man actually had the heroin in his possession and sold it to undercover agents, trial court did not err in denying defendant's motion to dismiss since evidence was sufficient for the jury to conclude that defendant exercised dominion and control over the man and the drugs he physically possessed. *S. v. Forney*, 703.

§ 6. Forfeitures

Trial court did not err in permitting petitioner to intervene in defendant's trial for unlawful possession of cocaine with intent to sell for the purpose of contesting the disposition of money found in the trunk of the car defendant was driving. *S. v. Ervin*, 261.

Trial court in a prosecution for unlawful possession of cocaine with intent to sell did not err in ordering forfeiture of money found in a briefcase in the trunk of the car defendant was driving. *Ibid.*

NEGLIGENCE

§ 13.1. Knowledge and Appreciation of Danger

In a wrongful death action where the evidence tended to show that deceased was electrocuted when he came in contact with uninsulated wires while changing the air filter in his air conditioning unit, evidence was insufficient to show that decedent was contributorily negligent as a matter of law. *Rutherford v. Air Conditioning Co.*, 630.

§ 19. Imputed Negligence

In an action to recover for injuries suffered by minor plaintiff in a fall from an amusement ride, there was no necessity for the trial court to instruct the jury that any negligence by minor plaintiff's mother who was on the ride with minor plaintiff could not be imputed to minor plaintiff. *Martin v. Amusements of America, Inc.*, 130.

§ 27. Competency and Relevancy of Evidence

In an action to recover for personal injuries received by minor plaintiff when she fell from an amusement ride, trial court properly excluded evidence of defendant's hiring practices and training procedures in prior years. *Martin v. Amusements of America, Inc.*, 130.

In an action to recover for personal injuries received by minor plaintiff when she fell from an amusement ride at a fair, trial court erred in permitting an

NEGLIGENCE—Continued

employee of a permanent amusement park to testify about a newer model of the ride located in the amusement park and in permitting the jury to view a film of the newer ride in operation. *Ibid.*

In a wrongful death action where plaintiff alleged negligent installation of a home air conditioning unit and negligent failure to warn plaintiff's intestate of the dangerous condition of the unit, trial court did not err in allowing testimony concerning the original installation contract though the court had previously granted defendants' motion for summary judgment in regard to plaintiff's allegations concerning negligent installation. *Rutherford v. Air Conditioning Co.*, 630.

§ 29.1. Sufficiency of Evidence; Particular Cases

Plaintiffs' evidence was sufficient for the jury on the issue of negligence by defendant exterminating company in failing accurately to report findings of an inspection of a house for termite damage. *Johnson v. Wall*, 406.

§ 30.1. Particular Cases Where Summary Judgment is Proper

Defendant was entitled to summary judgment in plaintiff's action to recover for injuries suffered when he fell and stumbled against a plate glass window in defendant hospital's emergency room foyer. *Stolz v. Hospital Authority, Inc.*, 103.

§ 35.2. Cases Where Contributory Negligence is not Shown as a Matter of Law

Plaintiffs were not contributorily negligent as a matter of law in failing to discover termite damage in a house they purchased. *Johnson v. Wall*, 406.

§ 37.3. Instructions on Standard of Care

Trial court adequately instructed the jury on the duty of care required of a concessionaire of an amusement ride toward a minor patron on such ride. *Martin v. Amusements of America, Inc.*, 130.

§ 40. Instruction on Proximate Cause

Trial court sufficiently instructed the jury that plaintiff need not prove that the negligence of defendant was the sole proximate cause of plaintiff's injury. *Martin v. Amusements of America, Inc.*, 130.

NOTICE

§ 2. Sufficiency and Requisites of Notice

Notice of a motion in the cause for arrearage in child support payments could properly be served on defendant's attorney of record, and defendant could not complain of inadequate notice. *Griffith v. Griffith*, 25.

PARENT AND CHILD

§ 3. Contributory Negligence of Parent in Causing Injury to Child

In an action to recover for injuries suffered by minor plaintiff in a fall from an amusement ride, there was no necessity for the trial court to instruct the jury that any negligence by minor plaintiff's mother who was on the ride with minor plaintiff could not be imputed to minor plaintiff. *Martin v. Amusements of America, Inc.*, 130.

§ 9.2. Abandonment; Sufficiency of Evidence

Evidence was sufficient to support the trial court's conclusion that respondent had not wilfully abandoned his child. *In re Stroud*, 373.

PARTITION

§ 72. Appeal

In a partition proceeding where the report of the commissioners was properly confirmed by the clerk, it will not be disturbed on appeal since respondents failed to make timely exceptions. *Hewett v. Hewett*, 37.

§ 12. Partition by Exchange of Deeds

A partition deed purporting to convey an estate by the entirety to a cotenant and her husband only severed the unity of possession and conveyed no interest in the land to the husband. *Harris v. Ashley*, 494.

PATENTS

§ 1. Jurisdiction to Enforce Rights Thereunder

Where plaintiff alleged that defendant violated a partnership dissolution agreement by continuing to manufacture a farm implement, trial court properly determined that the action involved patent infringement and the federal courts had exclusive jurisdiction. *Tart v. Walker*, 500.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Malpractice Generally

Plaintiff's complaint was sufficient to state a claim for relief against a medical doctor for wrongful certification of plaintiff for admission to a mental hospital. *McLean v. Sale*, 520.

§ 13. Limitations of Action for Malpractice

The continued course of treatment rule applied in a malpractice action based on alleged negligence of defendant physician in continuing to prescribe addictive narcotic drugs for plaintiff, and plaintiff's cause of action accrued at the earlier of (1) termination of defendant's treatment of plaintiff or (2) the time at which plaintiff knew or should have known that narcotic drugs were unnecessary to the treatment of his disease. *Ballenger v. Crowell*, 50.

§ 17. Departing from Approved Methods or Standard of Care; Sufficiency of Evidence

Summary judgment was improperly entered for defendant physician in a malpractice action based on alleged negligence of defendant in causing and increasing plaintiff's addiction to narcotic drugs. *Ballenger v. Crowell*, 50.

PLEADINGS

§ 9. Time for Filing Answer

Defendant in a divorce action had 20 days after notice of the court's action on her Rule 12(b) motion for change of venue in which to file her answer. *Miller v. Miller*, 95.

§ 38.3. Judgment on the Pleadings; Motion by Defendant

The rule that an action should not be dismissed on the basis that the facts alleged are insufficient to state a cause of action if the plaintiff can allege facts to state a cause of action in an amendment to the complaint does not apply where the complaint was dismissed because the suit was filed after the statute of limitations had run. *Harris v. Medical Center*, 716.

PROCESS

§ 9.1. Jurisdiction Over Nonresident Individual; Minimum Contacts

G.S. 1-75.4(5)(c) would give district court in personam jurisdiction over a nonresident defendant in an action for arrearages due under a separation agreement. *Pope v. Pope*, 328.

Money payments are a thing of value within the meaning of G.S. 1-75.4(5)(c). *Ibid.*

§ 10.4. Notice and Publication

G.S. 1-75.10, requiring proof of service of process by the affidavit of a publisher or printer, his foreman or principal clerk, is complied with when an agent executes an affidavit for the publisher which is a corporation. *Philpott v. Johnson*, 380.

§ 12. Service on Domestic Corporations

A summons was not fatally defective because it was directed to an officer or agent of the corporate defendant rather than to the corporation itself. *West v. Reddick, Inc.*, 370; *Wearring v. Belk Brothers*, 375.

§ 13. Service of Process on Agent of Foreign Corporation

Service of process upon defendant was valid where certified mail was addressed to defendant's process agent but was received by another person at defendant's address. *Smith v. Sanitary Corp.*, 457.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

The license of a hearing aid dealer could not be revoked for "gross incompetence" because of his failure to make promised refunds if hearing aids failed to improve the hearing of the purchasers thereof. *In re Faulkner*, 222.

PUBLIC OFFICERS

§ 8.1. Presumption of Regularity of Official Acts

The presumption of the validity and regularity of acts of public officers does not apply to the mailing of notice to a taxpayer of a foreclosure sale of his property. *Henderson County v. Osteen*, 199.

QUIETING TITLE

§ 2.2. Evidence

Opinions or conclusions stated by an expert in surveying were within the field of his expertise. *Teague v. Alexander*, 332.

A survey map was properly admitted for the purpose of illustrating testimony of a surveyor. *Ibid.*

RAPE

§ 5. Sufficiency of Evidence and Nonsuit

Defendant's contention that he was entitled to judgment of nonsuit because the rape victim never testified that the sexual acts were without her consent is without merit since the victim's testimony showed that the offense was committed by violence. *S. v. Huffman*, 584.

RAPE—Continued

§ 17. Assault With Intent to Commit Rape, Generally

Defendant could not lawfully be sentenced upon conviction of assault with intent to commit rape since the State included that charge as a part of the kidnapping bill of indictment in order to subject defendant to the greater punishment provided under G.S. 14-39(b). *S. v. Gunther*, 279.

RECEIVING STOLEN GOODS

§ 6. Instructions

Trial court's instructions with respect to the goods having been stolen by someone other than the accused were so conflicting as to be prejudicial. *S. v. Slate*, 209.

ROBBERY

§ 5.4. Instructions on Lesser Included Offenses

Trial court in a prosecution for robbery of a service station attendant erred in failing to submit misdemeanor larceny where there was some evidence that defendant and the station attendant acted in collusion in taking $57 from the station. *S. v. Perry*, 735.

RULES OF CIVIL PROCEDURE

§ 4. Process

A summons was not fatally defective because it was directed to an officer or agent of the corporate defendant rather than to the corporation itself. *West v. Reddick, Inc.*, 370; *Wearring v. Belk Brothers*, 375.

Service of process upon defendant was valid where certified mail was addressed to defendant's process agent but was received by another person at defendant's address. *Smith v. Sanitary Corp.*, 457.

§ 4.1. Service of Process by Publication

Though an affidavit showing service by publication was not filed until after a motion to quash had been filed and some six months after the last day of publication, the required affidavit was nevertheless filed "upon completion of such service." *Philpott v. Johnson*, 380.

§ 5. Service and Filing of Pleadings and Other Papers

Notice of a motion in the cause for arrearage in child support could properly be served on defendant's attorney of record, and defendant could not complain of inadequate notice. *Griffith v. Griffith*, 25.

§ 12. Defenses and Objections

Defendant in a divorce action had 20 days after notice of the court's action on her Rule 12(b) motion for change of venue in which to file her answer. *Miller v. Miller*, 95.

Defendant's motion for judgment on the pleadings based on an alleged release was properly denied. *Shellhorn v. Brad Ragan, Inc.*, 310.

RULES OF CIVIL PROCEDURE—Continued

§ 15. Amended Pleadings Generally

Trial court erred in allowing plaintiff's motion for summary judgment on the same day that he allowed plaintiff's motion to amend its complaint. *Halsey Co. v. Knitting Mills*, 569.

Granting of defendants' motion for judgment on the pleadings foreclosed plaintiffs' right to amend. *Harris v. Medical Center*, 716.

§ 24. Intervention

In an action to quiet title to a homeplace brought by plaintiff mother against her children and their spouses who refused to execute a quitclaim deed to her for the homeplace, applicant-intervenors, who were children and their spouses who executed the quitclaim deed to plaintiff, were not entitled to intervene as a matter of right, and trial court did not abuse its discretion in denying them permission to intervene. *Ellis v. Ellis*, 81.

Trial court did not err in refusing to permit a homeowners' association to intervene in an action instituted by a developer to collect assessments for maintenance of a common area in a subdivision. *Raintree Corp. v. Rowe*, 664.

§ 33. Interrogatories to Parties

Trial court erred in granting summary judgment for defendant before defendant answered plaintiff's interrogatories. *Joyner v. Hospital*, 720.

§ 34. Discovery

In an action for breach of an employment contract and interference with the contract, trial court properly granted plaintiff's discovery motions for the production of documents relating to alleged wrongful acts by defendants toward third parties, documents relating to the employment of other persons by the corporate defendant, and documents which came into existence during the eight years prior to the alleged breach. *Shellhorn v. Brad Ragan, Inc.*, 310.

Plaintiff's request for the production of any recording of any telephone or other conversations by past or present employees of the corporate defendant and for all documents related to any criminal or civil action involving defendants should have been denied by the court. *Ibid.*

§ 36. Admission of Facts

Trial court properly ordered that plaintiff's request for admissions be deemed admitted because of defendants' failure to respond within the 20-day period allowed under then existing G.S. 1A-1, Rule 36. *Rutherford v. Air Conditioning Co.*, 630.

§ 38. Jury Trial of Right

Where defendant's time for filing an answer in a divorce action had not expired, her time for demanding a jury trial had not expired. *Miller v. Miller*, 95.

§ 41.1. Voluntary Dismissal

Trial court did not err in allowing plaintiff's motion for voluntary dismissal after the court had allowed defendant's motion to dismiss for lack of personal jurisdiction. *West v. Reddick, Inc.*, 370.

Plaintiffs could not defeat defendant's motion for summary judgment by taking a voluntary dismissal after a hearing on the summary judgment motion where plaintiffs introduced evidence and after the court had signed summary judgment but before it was filed with the clerk. *Maurice v. Motel Corp.*, 588.

RULES OF CIVIL PROCEDURE—Continued

§ 50. Motion for Directed Verdict

Where plaintiff did not specifically object at trial, he lost the right to complain on appeal of defendant's failure to state specific grounds in her motion for directed verdict. *Byerly v. Byerly*, 551.

§ 52. Findings by Court

A notice of appeal does not bar a subsequent motion to amend the court's findings. *Parrish v. Cole*, 691.

§ 56. Summary Judgment

Trial court erred in granting summary judgment for defendant before defendant answered plaintiff's interrogatories. *Joyner v. Hospital*, 720.

§ 56.1. Notice of Summary Judgment

Plaintiff waived the 10-day notice required for a summary judgment hearing by participating in the hearing and failing to request a continuance or additional time. *Raintree Corp. v. Rowe*, 664.

§ 58. Entry of Judgment

Entry of judgment is made when the clerk makes a notation in his minutes. *Harrington v. Harrington*, 610.

§ 60. Relief from Judgment or Order

Trial court could properly issue a clarifying order pursuant to G.S. 1A-1, Rule 60(a) setting forth the reasons for a preliminary injunction. *Schultz and Assoc. v. Ingram*, 422.

A superior court judge has the authority under Rule 60(b) to set aside an order of dismissal without offending the rule that precludes one superior court judge from reviewing the decision of another. *Hoglen v. James*, 728.

§ 60.2. Grounds for Relief from Judgment or Order

Defendants' contentions that their failure to appear at the session of court when their case was calendared was excusable neglect is without merit. *Harrington v. Harrington*, 610.

Plaintiffs were not entitled to have an order dismissing their complaint set aside on the ground of newly discovered evidence where the evidence could have been obtained prior to a hearing on the motion to dismiss. *Harris v. Medical Center*, 716.

§ 65. Injunctions

The absence of a statement of the reasons for a preliminary injunction only rendered the order irregular, not void, and the irregularity should be corrected by the trial court, not the court on appeal. *Schultz and Assoc. v. Ingram*, 422.

SALES

§ 6.4. Implied Warranties in Sale of House by Builder-Vendor

A builder-vendor warrants that a fireplace and attached chimney will adequately remove to the exterior smoke from a fire constructed therein when such fire is within the normal and contemplated use of the fireplace. *Earls v. Link, Inc.*, 204.

SALES — Continued

§ 22.2. Defective Goods; Sufficiency of Evidence

Trial court properly entered summary judgment for defendant in an action to recover for damages to a bulldozer which occurred when a fire suppression system installed by defendant allegedly did not work. *City of Thomasville v. Lease-Martin Afex, Inc.*, 737.

SCHOOLS

§ 14. Criminal Liability of Parents for Failure to Send Children to School

Trial court properly excluded defendant's evidence that she did not willfully violate the compulsory school attendance law but acted in good faith in withdrawing her child from the public schools and placing her in a private school not having teachers and curricula approved by the State Board of Education. *S. v. Vietto*, 99.

SEARCHES AND SEIZURES

§ 8. Seizure Incident to Warrantless Arrest

A shirt was lawfully seized from defendant as an incident to his lawful arrest. *S. v. Gosnell*, 679.

§ 9. Search and Seizure Incident to Arrest for Traffic Violations

Seizure of marijuana from a passenger in a vehicle driven by a drunk driver during a search for a weapon was lawful. *S. v. Collins*, 617.

§ 15. Standing to Challenge Lawfulness of Search

Trial court erred in suppressing evidence seized from an outbuilding behind defendant's rented house which was not owned or rented by defendant. *S. v. Alford*, 236.

An automobile passenger had no standing to contest the search of an automobile driven by its owner. *S. v. Erwin*, 261.

§ 36. Scope of Search Incident to Arrest; Clothing

Marijuana taken from an automobile passenger's sock was seized in a proper search incident to a lawful arrest, and a packet of cocaine seized after the passenger had thrown it to the ground was lawfully seized as incident to a lawful arrest or as being in plain view without the necessity of a search. *S. v. Ervin*, 261.

TAXATION

§ 27. Estate Taxes

The personal representative of an estate is entitled to contribution from a life insurance beneficiary for her ratable share of the federal estate tax and N. C. inheritance tax imposed upon decedent's estate by reason of inclusion of the life insurance proceeds in decedent's estate. *Bank v. Dixon*, 430.

§ 31.1. Sales Tax; Particular Transactions

Where used equipment was accepted by a vendor as a trade-in on new equipment, and sale of the new equipment was exempt from local sales tax because it was delivered to purchasers outside the taxing county, the vendor's subsequent sale of the used equipment in the taxing county was subject to the local sales tax even though it was exempt from the State tax. *Equipment Co. v. Coble, Sec. of Revenue*, 483.

TAXATION—Continued

§ 41.2. Foreclosure of Tax Lien Under G.S. 105-414; Notice

The presumption of the validity and regularity of acts of public officers does not apply to the mailing of notice to a taxpayer of a foreclosure sale of his property. *Henderson County v. Osteen*, 199.

Recitals in a sheriff's deed to the purchaser at a tax foreclosure sale were only secondary evidence that the notice required by statute had been mailed to the taxpayer. *Ibid.*

TELECOMMUNICATIONS

§ 3. Rights of Way; Poles

The placing of a telephone pole by defendant telephone company in a town with the town's permission in the arc of a curve in the right-of-way of a state road approximately 12½ inches from the curb was not negligence. *Shapiro v. Motor Co.*, 658.

TRIAL

§ 1. Notice and Calendars

A local rule of court providing that "requests for pretrial hearings on motions will be considered by the Calendar Committee if filed by 5:00 p.m. on Monday two weeks prior to the beginning of the session requested" did not prohibit the calendaring of a motion for default judgment where the request was a day late if the calendar committee or the court so chose. *Forman & Zuckerman v. Schupak*, 17.

§ 3.2. Motions for Continuance; Particular Grounds

Trial court properly denied plaintiff's oral motion to continue so that other discovery might be completed since the motion, made on the very day of a summary judgment hearing, came over three years after the fire giving rise to the action, 12 months after the suit was started, and nearly two years after defendant had moved for summary judgment. *City of Thomasville v. Lease-Martin Afex, Inc.*, 737.

§ 11.2. Correction of Improper Jury Argument

Trial court erred in failing to instruct the jury to disregard the jury argument of plaintiff's counsel which amounted to testimony by the attorney as to the credibility of the witness. *Currituck Grain Inc. v. Powell*, 7.

§ 30. Effect of Voluntary Dismissal

Trial court could not properly enter a supplemental order affecting two prior orders where the court had allowed a voluntary dismissal, defendant had given notice of appeal, and the term had expired. *West v. Reddick, Inc.*, 370.

TRUSTS

§ 14.2. Constructive Trusts; Transactions Involving an Acquisition on or by Breach of Confidence

Trial court erred in imposing a constructive trust on the stock of a business which had been capitalized with funds derived from the business and placed in joint bank accounts of plaintiff wife and defendant husband. *Leatherman v. Leatherman*, 696.

TRUSTS—Continued

§ 19. Action to Establish Trust; Sufficiency of Evidence

Trial court properly granted defendant's motion for directed verdict in an action by plaintiff to have the court impress a trust for his benefit on certain real estate titled solely in the name of his wife. *Byerly v. Byerly*, 551.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The statute prohibiting unfair methods of competition or unfair or deceptive trade practices does not apply only to dealings between buyers and sellers but applies to disputes between competitors. *Manufacturing Co. v. Manufacturing Co.*, 393.

Statements in advertisements for tobacco harvesters did not go so far beyond tolerable limits of puffing as to constitute unfair competition or unfair or deceptive acts within the meaning of G.S. 75-1.1. *Ibid.*

Defendant's allegation that plaintiff incorporated into its automatic tobacco harvester a defoliator manufactured by defendant and demonstrated this defoliator as a product manufactured by plaintiff stated a claim for relief under the statute prohibiting unfair methods of competition. *Ibid.*

The unfair trade practices statute will not support a cause of action against a commodities broker for activity regulated by the Commodity Exchange Act. *Bache Halsey Stuart, Inc., v. Hunsucker*, 414.

UNIFORM COMMERCIAL CODE

§ 4. Definitions

Evidence that defendant was a farmer raising corn and soybeans was sufficient to put defendant within the statutory definition of merchant. *Currituck Grain Inc. v. Powell*, 7.

§ 28. Commercial Paper; Definitions

A promissory note sued upon by plaintiff was a negotiable instrument and plaintiff was required to establish she was holder of the note at the time of the suit. *Liles v. Myers*, 525.

§ 33. Commercial Paper; Liability of Parties; Signatures

In an action for the wrongful conversion of the proceeds of a check, trial court erred in granting summary judgment for plaintiff where the uncontradicted evidence tended to show that defendant, who endorsed the check by signing plaintiff's name, was entitled to the proceeds thereof. *Agaliotis v. Agaliotis*, 42.

§ 36. Collection of Checks

Plaintiff's branches, operating as separate banks, sent notice of dishonor of a check within the time requirements of the Uniform Commercial Code so as to preserve the ultimate right of charge-back by one of the branches. *Bank v. Harwell*, 190.

§ 38. Secured Transactions Generally

Article 9 of the Uniform Commercial Code governs the security aspects of purchase money security agreements, and the 10 year limitation of G.S. 1-47(2) is applicable to such agreements executed under seal. *Bank v. Holshouser*, 165.

UNIFORM COMMERCIAL CODE—Continued

§ 47. Default and Enforcement of Security Interest; Notice of Sale

Trial court erred in granting plaintiff's motion for judgment n.o.v. on the issue of whether plaintiff had given defendant sufficient notice of the public sale of collateral. *Bank v. Burnette*, 120.

The notice to the debtor of a public sale of collateral required by statute is mandatory and is a separate requirement from the requirement of commercial reasonableness. *Ibid.*

VENDOR AND PURCHASER

§ 6.1. Liability of Vendor of New Structure

A builder-vendor warrants that a fireplace and attached chimney will adequately remove to the exterior smoke from a fire constructed therein when such fire is within the normal and contemplated use of the fireplace. *Earls v. Link, Inc.*, 204.

In an action to recover the costs of repairing a defective chimney in a house bought by plaintiffs on 16 June 1971 from defendant, plaintiffs could not reasonably have discovered the defect until they first used the fireplace in early 1974, and the cause of action did not accrue until 1974. *Ibid.*

§ 10. Actions Involving Third Persons

Plaintiffs were not contributorily negligent as a matter of law in failing to discover termite damage in a house they purchased. *Johnson v. Wall*, 406.

An exterminating company is liable to purchasers who bought a house in reliance upon a false or inaccurate termite report provided by the exterminating company to the vendor. *Ibid.*

VENUE

§ 1. Definition and Nature; Waiver

Defendant impliedly waived her right to a change of venue in a divorce action where she failed to appear for a scheduled hearing on her motion for change of venue. *Miller v. Miller*, 95.

WILLS

§ 19. Evidence in Caveat Proceeding

An attesting witness to the will in question was not unavailable within the meaning of G.S. 31-18.1(c) to testify at a caveat proceeding though the witness was blind at the time of the proceeding. *In re Weston*, 564.

§ 23. Instructions in Caveat Proceedings

Trial court in a caveat proceeding did not err in instructing the jury that they should find that the document offered by propounder was deceased's last will and testament if they first found that deceased executed the document in question in accordance with the formalities required by law and that at the time he did so he had sufficient mental capacity to make a will. *In re Weston*, 564.

§ 61. Dissent of Spouse

The procedure set forth in G.S. 30-1 for determining whether a surviving spouse has the right to dissent to a will is not so vague and uncertain as to be unconstitutional. *In re Kirkman*, 515.

WORD AND PHRASE INDEX

ABANDONMENT

Evidence of unfitness not considered, *In re Maynor*, 724.

Father in prison is not, *In re Maynor*, 724.

Of child, insufficiency of evidence, *In re Stroud*, 373.

ACCOMPLICE

Sufficiency of uncorroborated testimony to convict, *S. v. Brooks*, 48.

ACCOUNT STATED

Letter stating attorney's fees, *Mahaffey v. Sodero*, 349.

ACTION TO QUIET TITLE

No intervention by parties who had executed quitclaim deed, *Ellis v. Ellis*, 81.

ADDITIONAL INSTRUCTIONS

Sufficiency of court's inquiry upon jury's request for, *S. v. Hill*, 75.

Urging jury to agree, no reduction of burden of proof, *S. v. Dial*, 529.

ADMISSION BY SILENCE

Statement made by defendant's brother in defendant's presence, *S. v. Fewell*, 592.

ADOPTION

Attempted use of attorney's files to circumvent protection statute, *Sheppard v. Sheppard*, 712.

AFFIDAVIT

Right to cross-examine affiant not denied, *Walker v. Walker*, 226.

AIR CONDITIONER

Failure to warn of dangerous condition, *Rutherford v. Air Conditioning Co.*, 630.

ALIMONY

See Divorce and Alimony this Index.

AMENDMENT

Summary judgment immediately thereafter improper, *Halsey Co. v. Knitting Mills*, 569.

AMUSEMENT RIDE

Fall of child from, *Martin v. Amusements of America, Inc.*, 130.

APPEAL

Notice not timely, *Harrington v. Harrington*, 610.

Pretrial orders on evidence, rule of damages, *Board of Transportation v. Gragg*, 740.

Withdrawal of, subsequent written notice of appeal, *S. v. Ervin*, 261.

ARRAIGNMENT

Waiver of right not to be tried in same week, *S. v. Davis*, 672.

ASSAULT WITH DEADLY WEAPON

Failure to define assault not error, *S. v. Daniels*, 382.

Failure to instruct on simple assault not error, *S. v. Daniels*, 382.

ASSAULT WITH INTENT TO COMMIT RAPE

Inclusion in kidnapping indictment, separate punishment improper, *S. v. Gunther*, 279.

ATTORNEYS

Adoption file properly excluded, *Sheppard v. Sheppard*, 712.

Apportionment of fees in workmen's compensation case, *Hogan v. Motor Lines*, 288.

Discharge, reasonable value of services recoverable, *Covington v. Rhodes*, 61.

Fees called for in note, *Bank v. Burnette*, 120.

No recovery by virtue of charging lien, *Covington v. Rhodes*, 61.

Representation by foreign attorneys, failure to follow statutes, *S. v. Scarboro*, 105.

Sufficiency of notice served on attorney of record, *Griffith v. Griffith*, 25.

Unreasonableness of contingent fee contract, recovery in quantum meruit, *Harmon v. Pugh*, 438.

AUTOMOBILES

Collision with telephone pole, *Shapiro v. Motor Co.*, 658.

Failure to give turn signal, *Brown v. Brown*, 607.

Speed—

knowledge of speed limit, *S. v. Brown*, 22.

opportunity for observation of car, *S. v. Brown*, 22.

BAIL

Revocation upon granting of continuance, *S. v. Brooks*, 445.

BANKS

Branches as separate banks, *Bank v. Harwell*, 190.

BETTERMENTS

Amount of recovery for, *Harris v. Ashley*, 494.

Deduction of rents and profits, *Harris v. Ashley*, 494.

BONUS

Portion of as child support, *Parrish v. Cole*, 691.

BOUNDARY DISPUTE

Admissibility of survey map, *Teague v. Alexander*, 332.

Conditional agreement, *Wadsworth v. Georgia-Pacific Corp.*, 1.

Consent to trial before superior court, *Wadsworth v. Georgia-Pacific Corp.*, 1.

Jury question, *Beal v. Dellinger*, 732.

Parol evidence describing land conveyed, *Maurice v. Motel Corp.*, 588.

BREAKING AND ENTERING

Inference of intent to commit larceny, *S. v. Hill*, 75.

Unlawful entry where only part of body in vehicle, *S. v. Sneed*, 230.

BREATHALYZER TEST

Failure to show who issued permit, *S. v. Mullis*, 40.

Who may ask driver to take, *Oldham v. Miller*, 178.

BULLDOZER

Effectiveness of fire suppression system, *City of Thomasville v. Lease-Martin Afex, Inc.*, 737.

BULLET

Expert opinion evidence as to type of weapon, *S. v. Grady*, 152.

Loss of no denial of material evidence, *S. v. Grady*, 152.

CALENDARING OF MOTION

Request filed a day later, *Forman & Zuckerman v. Schupak*, 17.

CAVEAT PROCEEDING

Blind attesting witness not unavailable, *In re Weston*, 565.

CHARACTER EVIDENCE

Irrelevant in civil action, *Godwin v. Tew*, 686.

CHECK

Payee's name signed by another, *Agaliotis v. Agaliotis*, 42.

Timeliness of notice of dishonor, *Bank v. Harwell*, 190.

CHILD ABUSE

Maiming of child, intent as essential element, *S. v. Haulk*, 357.

CHILD CUSTODY

Deceased father's character irrelevant, *Sheppard v. Sheppard*, 712.

Jurisdiction where divorce action filed, *Holbrook v. Holbrook*, 303; *Holbrook v. Holbrook*, 308.

CHILD SUPPORT

Arrearage for child over 18 properly ordered paid, *Griffith v. Griffith*, 25.

Counsel fees awarded without findings of fact, *Walker v. Walker*, 226.

Determining amount, *Walker v. Walker*, 226.

Motion to reduce, no bad faith effort by husband, *Wachacha v. Wachacha*, 504.

Portion of annual bonus for, *Parrish v. Cole*, 691.

Real party in interest to recover arrearage, *Griffith v. Griffith*, 25.

CHILDREN

See Infants this Index.

CHIMNEY

Accrual of cause of action from discovery of defect, *Earls v. Link, Inc.*, 204.

Expert opinion testimony about construction, *Earls v. Link, Inc.*, 204.

Warranty by builder-vendor of house, *Earls v. Link, Inc.*, 204.

COMMODITIES BROKER

Actions against for unfair trade practices, *Bache Halsey Stuart, Inc. v. Hunsucker*, 414.

Broker's liability for losses on options, *Donayre v. Jones*, 12.

COMPROMISE

Client's letter to attorney as offer to, *Mahaffey v. Sodero*, 349.

CONFESSIONS

Defendant "fixing to sign," *S. v. Shook*, 465.

Finding of voluntariness in jury's presence, expression of opinion, *S. v. Hardin*, 558.

Implication of codefendant, failure to give limiting instruction, *S. v. Slate*, 209.

No hearing on motion to suppress, *S. v. Shook*, 465.

No part of res gestae or original confession, *S. v. Williams*, 138.

Opinion testimony as to waiver of rights, *S. v. Shook*, 465.

To private individual, voir dire to determine voluntariness required, *S. v. Martin*, 115.

Volunteered statement about ownership of contraband, *S. v. McGill*, 29.

CONSIDERATION

Conveyance in fraud of creditors, shifting burden of proof, *Tuttle v. Tuttle*, 651.

CONSOLIDATED TRIAL

Charges not identical, evidence admissible against only one defendant, *S. v. Ervin*, 261.

Two charges against one defendant, *S. v. Huffman*, 584.

CONSTITUTIONAL RIGHTS, WAIVER OF

Opinion testimony improper, *S. v. Shook*, 465.

CONSTRUCTIVE POSSESSION

Heroin possessed by one other than defendant, *S. v. Forney*, 703.

CONSULTING ENGINEER

No action by contractor against for negligent inspection, *Drilling Co. v. Nello L. Teer Co.*, 472.

CONTINGENT FEE CONTRACT

Unreasonableness for attorney's fees, recovery in quantum meruit, *Harmon v. Pugh*, 438.

CONTINUANCE, MOTION FOR

Capacity to stand trial, sufficiency of hearing, *S. v. Williams*, 183.

Denial of motion based on unavailability of witnesses, *S. v. Davis*, 672.

Request for speedy trial after continuance granted, *S. v. Brooks*, 445.

Time for making motion, *City of Thomasville v. Lease-Martin Afex, Inc.*, 737.

CONTRACTOR

No recovery for consulting engineer's negligent inspection, *Drilling Co. v. Nello L. Teer Co.*, 472.

CORN

Breach of contract to deliver, *Currituck Grain Inc. v. Powell*, 7.

CORPORATIONS

Dissent from charter amendment, request for payment for shares, *Jackson v. Stanwood Corp.*, 479.

COUNSEL, RIGHT TO

Effective assistance not denied, *S. v. Brooks*, 48.

COUNTRY CLUB

Covenant of membership is not assignable, *Raintree Corp. v. Rowe*, 664.

COURT RULES

Calendaring of motion, *Forman & Zuckerman v. Schupak*, 17.

COVENANT NOT TO COMPETE

Accounts payable auditing prohibited, *Schultz and Assoc. v. Ingram*, 422.

Validity of assignments of contract containing, *Schultz and Assoc. v. Ingram*, 422.

DAMAGES

Question of minimizing damages raised, *Halsey Co. v. Knitting Mills*, 569.

DANGEROUS CONDITION

Failure to warn, *Rutherford v. Air Conditioning Co.*, 630.

DEEDS

Specific description controlling, *Board of Transportation v. Pelletier*, 533.

DEFAULT JUDGMENT

Notice of hearing, due process, *Forman & Zuckerman v. Schupak*, 17.

DEFENSE OF HOME

Shooting of police officer, instruction on right to defend from invasion by intruder, *S. v. McCombs*, 214.

DIRECTED VERDICT

Failure to state grounds for, *Byerly v. Byerly*, 551.

DISCOVERY

Defendant's request for all typed statements, *S. v. McDougald*, 244.

Motion for production of documents, *Shellhorn v. Brad Ragan, Inc.*, 310.

Sanctions for failure to comply with order, *S. v. McDougald*, 244.

DIVORCE AND ALIMONY

Alimony award not affected by absolute divorce, *Roberts v. Roberts*, 295.

Child custody, jurisdiction of divorce court, *Holbrook v. Holbrook*, 303; *Holbrook v. Holbrook*, 308.

Dependent spouse, burden of proof to show changed circumstances, *Roberts v. Roberts*, 295.

Divorce from bed and board, spouses still living in same house, *Triplett v. Triplett*, 364.

Motion to reduce alimony, no bad faith effort by husband, *Wachacha v. Wachacha*, 504.

Reduction of alimony for indignities of dependent spouse, *Cavendish v. Cavendish*, 577.

Time for requesting jury trial, *Miller v. Miller*, 95.

Validity of Alabama decree terminating alimony, *Vincent v. Vincent*, 580.

Waiver of right to change venue, *Miller v. Miller*, 95.

DRIVER'S LICENSE

Conviction of driving without license, trial for driving while license revoked, *S. v. Cannon*, 322.

DRUNK DRIVER

Warrantless search of defendant passenger, *S. v. Collins*, 617.

DUE PROCESS

Denial by conviction of misdemeanors in district court and conviction of felony in superior court, *S. v. Phillips*, 377.

EARNING CAPACITY

Expert testimony, failure to show computations, *Rutherford v. Air Conditioning Co.*, 630.

ELECTROCUTION

Uninsulated wires on air conditioner, *Rutherford v. Air Conditioning Co.*, 630.

EMINENT DOMAIN

Compensation for, owner of right of reentry, *Board of Transportation v. Recreation Comm.*, 708.

Consideration of special benefits only, *Town of Hillsborough v. Bartow*, 623.

Failure to instruct on general benefits, *Board of Transportation v. Jones*, 337.

Improper formula to determine value, *Board of Transportation v. Jones*, 337.

ENTRY OF JUDGMENT

Notation by clerk sufficient, *Harrington v. Harrington*, 610.

EXCUSABLE NEGLECT

Defendants' failure to appear for trial was not, *Harrington v. Harrington*, 610.

EXECUTRIX

No discharge orders, service of process on proper, *Joyner v. Hospital*, 720.

EXPERIMENTAL EVIDENCE

Cutting of shirt with knife, *S. v. Graham*, 86.

EXPERT OPINION EVIDENCE

Deceased's inability to use hand, *S. v. Grady*, 152.

Type of weapon used in homicide, *S. v. Grady*, 152.

EXPRESSION OF OPINION BY COURT

Assault victim falling into lawn mower, *S. v. Whitted*, 603.

Finding of voluntariness of confession in jury's presence, *S. v. Hardin*, 558.

Judge's comment "Who cares?", *S. v. Tew*, 33.

FALSE PRETENSE

Intent to defraud not alleged, indictment fatally defective, *S. v. Moore*, 239.

FALSE TESTIMONY

No prejudice on retrial, *S. v. Grady*, 152.

FARM IMPLEMENT

Patent infringement, federal court proper forum, *Tart v. Walker*, 500.

FARMER

Merchant under Uniform Commercial Code, *Currituck Grain Inc. v. Powell*, 7.

FIFTH AMENDMENT

No waiver by testifying in prior trial, *S. v. Pearsall*, 600.

FIRE SUPPRESSION SYSTEM

On bulldozer, failure to work, *City of Thomasville v. Lease-Martin Afex, Inc.*, 737.

FISHING EXPEDITION

Defendant's request for all typed statements, *S. v. McDougald*, 244.

FLIGHT

Evidence defendant fled first trial, *S. v. DeBerry*, 538.

Unsuccessful search for defendant, *S. v. Scarboro*, 105.

FORECLOSURE UNDER POWER OF SALE

Scope of hearing de novo before superior court judge, *In re Watts*, 90.

FORFEITURE

Money seized in narcotics case, *S. v. Ervin*, 261.

FRAUD

Misrepresentation of acreage, summary judgment for trustee and beneficiary, *Russo v. Mountain High, Inc.*, 159.

Misrepresentation of square footage of house, no reasonable reliance, *Marshall v. Keaveny*, 644.

FRAUDULENT CONVEYANCE

Retention of sufficient property to pay debts, *Tuttle v. Tuttle*, 651.

HEARING AID DEALER

Revocation of license for failure to make promised refunds, *In re Faulkner*, 222.

HEARSAY

Declaration against interest as exception, *Godwin v. Tew*, 686.

Intention to do particular act as exception, *S. v. Fewell*, 592.

HEROIN

Constructive possession, *S. v. Forney*, 703.

HIGHWAY

Improper formula to determine value in condemnation proceeding, *Board of Transportation v. Jones*, 337.

Of state, no liability of town for dangerous condition, *Shapiro v. Motor Co.*, 658.

HISTORIC DISTRICT

Whether ordinance spot zoning, *A-S-P Associates v. City of Raleigh*, 271.

HOMICIDE

Insufficient evidence of self-defense, *S. v. Parker*, 316.

Voluntary manslaughter of husband by wife, *S. v. Piland*, 367.

HOSPITAL

Fall of patient through plate glass window, *Stolz v. Hospital Authority, Inc.*, 103.

HUSBAND AND WIFE

Wife's knowledge of husband's fraudulent conveyance, *Tuttle v. Tuttle*, 651.

Wife's services in husband's business gratuitous, *Leatherman v. Leatherman*, 696.

IDENTIFICATION OF DEFENDANT

Photographic identification six weeks after crime not suggestive, *S. v. Fate*, 68.

Suggestive photographic procedure, no substantial likelihood of misidentification, *S. v. Williams*, 183.

INFANTS

Contributory negligence of minor, *Johnson v. Clay*, 542.

Fall from amusement ride, *Martin v. Amusements of America, Inc.*, 130.

Insufficient evidence of abandonment by father after separation, *In re Stroud*, 373; by imprisoned father, *In re Maynor*, 724.

Maiming of child, intent as essential element, *S. v. Haulk*, 357.

Striking child running into road, *Johnson v. Clay*, 542.

INSANE PERSONS

Failure to record supporting facts for commitment, *In re Jacobs*, 573.

Medical evidence not required for commitment, *In re Underwood*, 344.

Need for constant care not imminent danger, *In re Doty*, 233.

Right to hearing within 10 days after commitment, *In re Underwood*, 344; *In re Jacobs*, 573.

Statutory notice not given of motion to rehear, *In re Boyles*, 389.

INSANE PERSONS-Continued

Wrongful certification to mental hospital, *McLean v. Sale*, 520.

INSANITY

No instruction required, *S. v. Mayberry*, 509.

INSURANCE

Proceeds paid to son instead of father, *Agaliotis v. Agaliotis*, 42.

INTERROGATORIES

No answer, summary judgment improper, *Joyner v. Hospital*, 720.

INVOLUNTARY MANSLAUGHTER

Killing of motorcycle passenger, *S. v. Correll*, 451.

Necessity for instructions on, *S. v. Graham*, 86.

JAYWALKING

Arrest of defendant for by State's witnesses during trial, *S. v. Ervin*, 261.

JUDGES

Refusal of judge to disqualify himself, *McClendon v. Clinard*, 353.

JUDICIAL NOTICE

Failure to take of radio and TV publicity, *S. v. McDougald*, 244.

JURY

Exposure to publicity, no prejudice, *S. v. McDougald*, 244.

Failure to answer questions during polling, *S. v. Fate*, 68.

Time for requesting trial by, *Miller v. Miller*, 95.

JURY ARGUMENT

Statement about witness's credibility improper, *Currituck Grain Inc. v. Powell*, 7.

JURY INSTRUCTIONS

Conflicting instructions prejudicial, *S. v. Slate*, 209.

Court's use of word "incriminating," *S. v. Oakes*, 113.

Omission of possible "not guilty" verdict, *S. v. Fate*, 68.

Urging jury to agree, no reduction of burden of proof, *S. v. Dial*, 529.

KIDNAPPING

Assault included in indictment, separate punishment for assault improper, *S. v. Gunther*, 279.

LANDLORD

Notice to tenant to vacate was not simulation of court process, *S. v. Watts*, 561.

LARCENY

Failure to define in breaking and entering case, *S. v. Hammonds*, 385.

LAWN MOWER

Assault victim falling into, judge's expression of opinion, *S. v. Whitted*, 603.

LIABILITY INSURANCE

Attorney fees in attempt to retain job, *Blake v. Insurance Co.*, 555.

LIFE INSURANCE

Contribution to estate taxes by beneficiary, *Bank v. Dixon*, 430.

LINEUP

See Identification of Defendant this Index.

MAIMING OF CHILD

Intent as essential element, *S. v. Haulk*, 357.

MALPRACTICE

Birth certificate not newly discovered evidence, *Harris v. Medical Center*, 716.

Doctor's continued prescription of narcotic drugs, *Ballenger v. Crowell*, 50.

MARIJUANA

Discovery during warrantless search of defendant for weapon, *S. v. Collins*, 617.

MATERIALMAN'S LIEN

No need personally to deliver materials to site, *Wallpaper Co. v. Peacock & Assoc.*, 144; *Wallpaper Co. v. Peacock & Assoc.*, 149.

MENTAL CAPACITY

Ability of defendant to stand trial, insufficient evidence to support court's findings, *S. v. Reid*, 547.

Motion for continuance, sufficiency of hearing on capacity to stand trial, *S. v. Williams*, 183.

Motion for psychiatric fee denied, *S. v. Shook*, 465.

MERCHANT

Farmer of corn and soybeans, *Currituck Grain Inc. v. Powell*, 7.

METROLINA FAIR

Fall of child from amusement ride, *Martin v. Amusements of America, Inc.*, 130.

MOTION

Failure to state rule number, waiver of objection, *Hoglen v. James*, 728.

NARCOTICS

Doctor's continued prescription of narcotic drugs, *Ballenger v. Crowell*, 50.

NEGOTIABLE INSTRUMENT

Failure to show plaintiff was holder, *Liles v. Myers*, 525.

NEWSPAPER REPORTER

Presence at conference in chambers, *S. v. McDougald*, 244.

NOTICE

Service on attorney of record, *Griffith v. Griffith*, 25.

NOTICE TO VACATE

No simulation of court process, *S. v. Watts*, 561.

OAKWOOD HISTORIC DISTRICT

Whether ordinance spot zoning, *A-S-P Associates v. City of Raleigh*, 271.

OTHER OFFENSES

Admissibility to show intent, *S. v. Forney*, 703.

OUTBUILDING

No standing by defendant to contest search, *S. v. Alford*, 236.

PARK

Condemnation of land for, no compensation for owner of right of re-entry, *Board of Transportation v. Recreation Comm.*, 708.

PAROL EVIDENCE RULE

Fraudulent misrepresentation as to square footage of house, *Marshall v. Keaveny*, 644.

PARTITION

Failure to except to commissioners' order, *Hewett v. Hewett*, 37.

PATENT INFRINGEMENT

Federal court proper forum, *Tart v. Walker*, 500.

PERSONAL COVENANT

Membership in country club, *Raintree Corp. v. Rowe*, 664.

PERSONAL SERVICES

Contract with decedent, *Godwin v. Tew*, 686.

PHLEBITIS

Insufficiency of evidence of permanent injury, *Caison v. Cliff*, 613.

PHOTOGRAPHIC IDENTIFICATION

See Identification of Defendant this Index.

PHYSICIAN

Malpractice in continued prescription of narcotic drugs, *Ballenger v. Crowell*, 50.

Wrongful certification to mental hospital, *McLean v. Sale*, 520.

PLATE GLASS WINDOW

Fall through in hospital, *Stolz v. Hospital Authority, Inc.*, 103.

PLEADINGS

No amendment after judgment on the pleadings, *Harris v. Medical Center*, 716.

PLUMBING

Statute of limitations for negligence action, *Smith v. Sanitary Corp.*, 457.

POLICE OFFICER

Assault with firearm, instruction on nonfelonious assault not required, *S. v. Mayberry*, 509.

Proof of intent, *S. v. Mayberry*, 509.

Shooting of, right to defend home from invasion by intruder, *S. v. McCombs*, 214.

POSSESSION OF RECENTLY STOLEN PROPERTY

Lawn mower and garden tiller in car, *S. v. Earley*, 361.

PRELIMINARY INJUNCTION

Absence of statement of reasons, *Schultz and Assoc. v. Ingram*, 422.

Clarifying order proper, *Schultz and Assoc. v. Ingram*, 422.

PROCESS

Affidavit showing service filed six months after publication, *Philpott v. Johnson*, 380.

Service by publication, proof of service by affidavit of corporation's agent, *Philpott v. Johnson*, 380.

Service on agent of foreign corporation, *Smith v. Sanitary Corp.*, 457.

Service on executrix who had filed final account, *Joyner v. Hospital*, 720.

Summons directed to agent of corporation, *West v. Reddick, Inc.*, 370; *Wearring v. Belk Brothers*, 375.

PROCESSIONING PROCEEDING

Reply by petitioners unnecessary, *Beal v. Dellinger*, 732.

PROMISSORY NOTE

As negotiable instrument, necessity for showing one is holder, *Liles v. Myers*, 525.

PUNISHMENT

See Sentence this Index.

PURCHASE MONEY SECURITY AGREEMENT

Ten year statute of limitations applicable, *Bank v. Holshouser*, 165.

RAPE

Offense committed by violence, no consent, *S. v. Huffman*, 584.

RECEIVING STOLEN GOODS

Goods stolen by one other than defendant, instructions conflicting, *S. v. Slate*, 209.

RECORD ON APPEAL

Failure to docket within extended time, *S. v. Johnson*, 111.

REDEVELOPMENT COMMISSION

Costs of relocating telephone lines, *Telegraph Co. v. Housing Authority*, 172.

REQUEST FOR ADMISSIONS

Method and time for objecting, *Rutherford v. Air Conditioning Co.*, 630.

RESISTING ARREST

Sufficiency of evidence, *S. v. Hill*, 75.

RESTRICTIVE COVENANT

Membership in country club, *Raintree Corp. v. Rowe*, 664.

ROBBERY

Failure to submit misdemeanor larceny, *S. v. Perry*, 735.

Ownership of property taken, no variance, *S. v. Fate*, 68.

Recommendation that defendant not be allowed parole or work release, *S. v. DeBerry*, 538.

RULES OF CIVIL PROCEDURE

Amendment of findings after notice of appeal, *Parrish v. Cole*, 691.

Failure of motion to state rule number, waiver of objection, *Hoglen v. James*, 728.

Motion for production of documents, *Shellhorn v. Brad Ragan, Inc.*, 310.

Request for admissions, method and time for objecting to, *Rutherford v. Air Conditioning Co.*, 630.

Voluntary dismissal after defendant's motion to dismiss allowed, *West v. Reddick, Inc.*, 370.

SCHOOL ATTENDANCE LAW

Willfullness not element of violation of, *S. v. Vietto*, 99.

SCHOOL BUS ACCIDENT

Fee for discharged attorney, *Covington v. Rhodes*, 61.

SCHOOL SUPERINTENDENT

Liability insurance, attorney fees in attempt to retain job, *Blake v. Insurance Co.*, 555.

SEARCHES AND SEIZURES

No standing of tenant to contest search of outbuilding, *S. v. Alford*, 236; of passenger to contest search of automobile, *S. v. Ervin*, 261.

Search incident to warrantless arrest, *S. v. Gosnell*, 679.

Seizure of narcotics incident to arrest, *S. v. Ervin*, 261.

Warrantless search of automobile passenger for weapon, *S. v. Collins*, 617.

SELF-DEFENSE

Instruction not required where shooting allegedly accidental, *S. v. Dial*, 529.

Necessity for instruction in assault case, *S. v. Blackmon*, 620.

SELF-DEFENSE—Continued

Shooting of police officer, right to defend home from invasion by intruder, *S. v. McCombs*, 214.

SELF-INCRIMINATION

No waiver of privilege by testifying in prior trial, *S. v. Pearsall*, 600.

SENTENCE

Delay to obtain character witnesses denied, *S. v. McDougald*, 244.

Recommendation that defendant serve armed robbery sentence without parole or work release, *S. v. DeBerry*, 538.

Separate punishment for offense included in kidnapping offense improper, *S. v. Gunther*, 279.

Youthful offender, failure to make "no benefit" finding, *S. v. Lewis*, 108; *S. v. McDougald*, 244.

SEPARATION AGREEMENT

Jurisdiction over nonresident defendant in action for arrearages, *Pope v. Pope*, 328.

No right to specific performance, *Moore v. Moore*, 700.

SERVICE STATION

Robbery of, failure to submit misdemeanor larceny, *S. v. Perry*, 735.

SEWER SYSTEM

Condemnation by municipality, *Town of Hillsborough v. Bartow*, 623.

SHOEPRINTS

Prints not matched to defendants' shoes, *S. v. Gosnell*, 679.

SIMULATION OF COURT PROCESS

Notice to tenant to vacate was not, *S. v. Watts*, 561.

SOYBEANS

Breach of contract to deliver, *Currituck Grain Inc. v. Powell*, 7.

SPECIFIC PERFORMANCE

Separation agreement not enforceable by, *Moore v. Moore*, 700.

SPEED

Knowledge of speed limit, *S. v. Brown*, 22.

Opportunity for observation of car, *S. v. Brown*, 22.

SPEEDY TRIAL

Delay not negligent, wilful or prejudicial, *S. v. Fate*, 68.

Motion for after continuance granted, findings required for trial to proceed, *S. v. Brooks*, 445.

STATUTE OF LIMITATIONS

Continued course of medical treatment, *Ballenger v. Crowell*, 50.

SUICIDE

Homicide during attempt, *S. v. Williams*, 138.

SUMMARY JUDGMENT

Appeal from fragmentary, *Hill v. Smith*, 625.

Before interrogatories answered improper, *Joyner v. Hospital*, 720.

Failure to object to form of supporting material, *Bank v. Harwell*, 190.

Granting immediately after amendment improper, *Halsey Co. v. Knitting Mills*, 569.

SUMMONS

Directed to agent of corporation, *West v. Reddick, Inc.*, 370; *Wearring v. Belk Brothers*, 375.

SURVEY MAP

Admissibility of, *Teague v. Alexander*, 332.

TAXATION

Contribution to estate taxes by life insurance beneficiary, *Bank v. Dixon*, 430.

Notice of tax foreclosure sale, *Henderson County v. Osteen*, 199.

Sales tax on sale of used equipment accepted as trade-in, *Equipment Co. v. Coble, Sec. of Revenue*, 483.

TELEPHONE LINES

Costs of relocating for urban redevelopment, *Telegraph Co. v. Housing Authority*, 172.

TELEPHONE POLE

Placement not negligence, *Shapiro v. Motor Co.*, 658.

TERMITE INSPECTION REPORT

Liability of exterminating company to house purchaser, *Johnson v. Wall*, 406.

TESTER

Opinion as to definition, *S. v. Forney*, 703.

TOBACCO HARVESTER

Passing off competitor's goods as own product is unfair competition, *Manufacturing Co. v. Manufacturing Co.*, 393.

Puffing in advertisement not unfair competition, *Manufacturing Co. v. Manufacturing Co.*, 393.

TORRENS DEED

Specific description controlling, *Board of Transportation v. Pelletier*, 533.

TRIAL DE NOVO

Conviction of misdmeanor in district court, trial for felony in superior court, *S. v. Phillips*, 377.

TRUSTS

Consideration furnished by husband not used for purchase, no resulting trust, *Byerly v. Byerly*, 551.

No constructive trust for wife on stock of husband's business, *Leatherman v. Leatherman*, 696.

Property in wife's name, no constructive trust, *Byerly v. Byerly*, 551.

UNFAIR TRADE PRACTICE

Actions of commodities broker, *Bache Halsey Stuart, Inc. v. Hunsucker*, 414.

Passing off competitor's goods as own product is, *Manufacturing Co. v. Manufacturing Co.*, 393.

Puffing in advertisement is not, *Manufacturing Co. v. Manufacturing Co.*, 393.

UNIFORM COMMERCIAL CODE

Public sale of collateral, notice to debtor, *Bank v. Burnette*, 120.

URINAL

Injuries from explosion of, *Smith v. Sanitary Corp.*, 457.

VENUE

Change for pretrial publicity denied, *S. v. Huffman*, 584.

Waiver of right to change in divorce action, *Miller v. Miller*, 95.

VERDICT

Acceptance by court after correction, *S. v. Davis*, 672.

VOLUNTARY DISMISSAL

Improper procedure when affirmative relief sought in counterclaim, *Maurice v. Motel Corp.*, 588.

WARRANTY

By builder-vendor as to construction of chimney, *Earls v. Link, Inc.*, 204.

WIDOW'S YEAR'S SUPPORT

Computation of "net income," *Pritchard v. Trust Co.*, 489.

WILLS

Blind attesting witness not unavailable in caveat proceeding, *In re Weston*, 564.

Constitutionality of dissent statute, *In re Kirkman*, 515.

Specific allegations not required in notice of dissent, *In re Kirkman*, 515.

WORKMEN'S COMPENSATION

Apportionment of attorney fees for recovery against tortfeasor, *Hogan v. Motor Lines*, 288.

Approved agreement for compensation binding, *Buchanan v. Mitchell County*, 596.

Claim not filed in time after reaching majority, no estoppel, *Clodfelter v. Furniture Co.*, 45.

Request to discontinue compensation denied, *Buchanan v. Mitchell County*, 596.

WRONGFUL DEATH

Expert testimony about deceased's earning capacity, *Rutherford v. Air Conditioning Co.*, 630.

YOUTHFUL OFFENDER

Failure to make "no benefit" finding, *S. v. Lewis*, 108.

ZONING

Creation of Oakwood Historic District, *A-S-P Associates v. City of Raleigh*, 271.

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