NORTH CAROLINA COURT OF APPEALS REPORTS

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RALEIGH
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OF
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NAOMI E. MORRIS

Judges

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BOARD OF TRANSPORTATION v. R. MAYNARD ROYSTER AND WIFE, GRACE T. ROYSTER; COUNTY OF WAKE

No. 7810SC273

(Filed 20 February 1979)

1. **Eminent Domain § 7.4— condemnation proceeding—more than one tract—amendment to include additional land**

Under Art. 9 of G.S. Ch. 136 a single condemnation proceeding may include more than one tract of land, and the proceeding may be amended to include additional land if such land is described in the complaint and declaration of taking and in the land records of the county through a memorandum of action as required by G.S. 136-104, and if the deposit is increased where the sum estimated for just compensation is increased.

2. **Eminent Domain § 7.4— condemnation proceeding—noncontiguous tracts**

The Board of Transportation may include in a condemnation proceeding against an opposing party owner multiple tracts of land which are not contiguous.

3. **Eminent Domain § 7.4— condemnation proceeding—right to amend complaint**

The Board of Transportation had a right to amend its complaint without leave of court in a condemnation proceeding to add a second tract to the proceeding and to correct a mistake which resulted in a deposit for fair compensation for lands not included in the original complaint and declaration of taking where defendants had not served a responsive pleading on the Board, G.S. 1A-1, Rule 15(a), and where the amendment was made in compliance with the condemnation statutes.

4. **Eminent Domain § 7.1; Attorneys at Law § 7.3— condemnation proceeding—attorney fees**

In a condemnation proceeding instituted by the Board of Transportation, the trial court erred in awarding attorney fees of $240.00 to defendants after

the court denied their motion to strike a second amended complaint filed by the Board, since the proceeding does not fall within any of the categories for which attorney fees may be awarded in condemnation cases under G.S. 136-119.

APPEAL by defendants from *Brewer, Judge*. Order entered 8 February 1978, in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1979.

Defendants were the owners of two tracts of land on Cary-Macedonia Road, lying approximately 1/2 mile from South Hills Shopping Center. Defendants' residence was situated on one tract (Tract "A") and their other tract (Tract "B") was separated from Tract "A" by the Cary-Macedonia Road.

On 15 February 1977, plaintiff filed summons, complaint, declaration of taking and notice of deposit for the purpose of appropriating a portion of defendants' lands for highway purposes. This action was numbered 77CVS661. The description of the lands affected in the pleadings described Tract "B". On 17 February 1977, defendants withdrew the $65,250.00 deposited in court by plaintiff as estimated just compensation.

On 6 June 1977, plaintiff filed a second action against defendants, denominated as Civil Action 77CVS2498, for the purpose of appropriating a certain tract of land owned by defendants in Wake County with a deposit of $625.00. The Complaint in Civil Action 77CVS2498 contained an Exhibit "B" which contained exactly the same description as that found in Civil Action 77CVS661. Defendants did not apply for an Order disbursing the $625.00 deposited as "just compensation" by plaintiff.

On 19 September 1977, plaintiff attempted, by motion in the cause, to obtain judicial assistance in requiring defendants to quit Tract "A". Upon holding a hearing on this motion, the Superior Court determined that plaintiff had condemned Tract "B", not Tract "A", and therefore denied plaintiff's request for relief.

Thereafter plaintiff filed an amended complaint, supplemental memorandum of action and notice. The amendment described Tract "A", but gave the wrong deed reference. This amendment purported to substitute, for the description of Tract "B", the description of Tract "A". Another motion in the cause was filed,

again seeking possession of Tract "A". Defendants moved to strike the amendment to the complaint.

On 3 November 1977 Judge Herring granted defendants' motion to strike. Thereafter, on 28 November 1977, plaintiff filed an amended complaint, declaration of taking and notice of deposit. Rather than attempting to substitute the description of Tract "A" for the description of Tract "B", the amended complaint correctly described, and condemned, both parcels. The amended complaint was accompanied by an additional deposit of $3,075.00 as estimated just compensation, alleged that the sum of $65,250.00, previously deposited, was not plaintiff's estimate of just compensation for Tract "B", but was in fact plaintiff's estimate of just compensation for Tract "A", and alleged that the amount of money now deposited in the cause (77CVS661) was plaintiff's estimate of just compensation for the taking of Tracts "A" and "B".

Defendants thereafter filed a motion to strike the second amended complaint, which was denied by Judge Herring. Plaintiff then filed a motion in the cause seeking possession of Tract "A". The relief requested in this motion was granted by Judge Brewer on 8 February 1978. On that same day Judge Brewer ordered plaintiff to pay defendants' counsel $240.00 attorney's fees.

Plaintiff appeals from Judge Brewer's order allowing counsel fees. Defendants appeal from the denial of their motion to strike the amended complaint of 28 November 1977, and Judge Brewer's order of 8 February 1978 granting plaintiff immediate possession of Tract "A". No answer has been filed.

Attorney General Edmisten by Associate Attorney R. W. Newsom III for the State.

Teague, Johnson, Patterson, Dilthey & Clay by Robert W. Kaylor for defendant appellants.

CLARK, Judge.

The defendants assign as error the trial court's denial of their motion to strike the Board of Transportation's second amended complaint and declaration of taking of Tract "B" by adding Tract "A", contending that by adding the separate tract, not contiguous to the Tract "B", a different and separate condemna-

tion proceeding was instituted without strict adherence to the requirements of G.S. 136-103.

It is clear from the record on appeal that defendants owned two tracts of land separated by the Cary-Macedonia Road; that in the proceeding before us the Board of Transportation in its complaint described Tract "B" by mistake instead of Tract "A" and deposited $65,250.00, the estimated just compensation for Tract "A"; and that the purpose of amending the complaint was to correct the mistake by adding Tract "A" and depositing $3,075.00, the estimated just compensation for Tract "B", which originally was described in this proceeding.

G.S. 136-103 requires a description of "the entire tract or tracts" in both the declaration of taking and the complaint, and provides for amendment to both and an "increase [in] the amount of its deposit . . . ." If there is an amendment affecting the property, G.S. 136-104 requires a supplemental memorandum of action. The purpose of this requirement is that any amendment affecting the property taken will be entered in the land records of the county. *State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971).

[1] It is clear that under Article 9, Chapter 136, General Statutes of North Carolina, a single condemnation proceeding may include more than one tract of land, and that the proceeding may be amended to include additional land provided that the additional land is described in the complaint and declaration of taking and in the land records of the county through a memorandum of action as required by G.S. 136-104, and further, that the deposit is increased if the sum estimated for just compensation is increased. The condemnation statutes do not require that multiple tracts be contiguous in a condemnation proceeding.

[2] A condemnation proceeding under Article 9, Chapter 136, is a civil action and is subject, as are other civil actions, to the Rules of Civil Procedure, G.S. 1A-1, Rule 1. Rule 18 removes all restrictions on the number or kinds of claims that may be joined by a party and moves the question of claims joinder into the area of trial or preparation for trial stage of the lawsuit. Shuford, N.C. Civil Practice and Procedure, § 18-3. Clearly, the Board of Transportation may include in a condemnation proceeding against an opposing party owner multiple tracts of land which are not contiguous.

[3] In the case *sub judice*, since the Board of Transportation could have included both Tracts "A" and "B" in a single condemnation, the Board had the right to amend this proceeding by adding Tract "A", though Tract "A" was separated from Tract "B" by the Cary-Macedonia Road, provided that the amendment is made in compliance with the condemnation statutes, (Art. 9, Ch. 136, General Statutes of North Carolina), and the Rules of Civil Procedure, G.S. 1A-1. The Board amended its complaint under G.S. 1A-1, Rule 15(a), which provides for amendment without leave of court before a responsive pleading is served. The defendants had not served a responsive pleading upon the Board of Transportation. In denying the motion of the defendants to strike the second amended complaint and declaration, the trial court properly ruled that the Board of Transportation had complied with the amendment provisions of Rule 15(a) and the condemnation statutes.

The order of the trial court denying defendants' motion to strike does not prejudice the right of the defendants to raise relevant issues of fact or law in their responsive pleading or their right to move for severance under Rule 42(b) "in the furtherance of convenience or to avoid prejudice. . . ." Severance is not a matter of right but lies within the court's discretion. *Aetna Insurance Co. v. Carroll's Transfer, Inc.*, 14 N.C. App. 481, 188 S.E. 2d 612 (1972).

It is noted that the amendment not only adds a second tract to the proceeding but also seeks to correct a mistake which resulted in a deposit for fair compensation for lands not included in the original complaint and declaration of taking. When the condemnor has made an appraisal of lands taken but the lands described in the condemnation proceedings do not conform to the lands appraised, the condemnor may amend the proceeding to properly describe the lands upon which the appraisal was made. *McClarren v. Jefferson School Township*, 169 Ind. 140, 82 N.E. 73 (1907); *Darrow v. Chicago L.S.&S.B. Ry.*, 169 Ind. 99, 81 N.E. 1081 (1907); *Blissfield Community Schools District v. Strech*, 346 Mich. 186, 77 N.W. 2d 785 (1956).

We find no error in the order denying defendants' motion to strike plaintiff's second amendment of the complaint.

[4] Plaintiff has appealed from the order of the trial court awarding defendants attorney fees in the sum of $240.00. G.S. 136-119 authorizes the landowner to recover attorney fees in cases of inverse condemnation, in cases in which the Board of Transportation has no right to condemn, and in cases abandoned by the Board. The case *sub judice* does not fall within any of the statutory categories, and therefore the trial court erred in awarding counsel fees to defendants.

Affirmed as to the order denying defendants' motion to strike the second amended complaint and the order granting plaintiff immediate possession of Tract "A".

Reversed as to the order awarding counsel fees to defendants.

Affirmed in part; Reversed in part and remanded.

Judges VAUGHN and HEDRICK concur.

LAURA P. McCOY v. GLADYS D. PEACH

No. 7825DC252

(Filed 20 February 1979)

Betterments § 1; Quasi Contracts and Restitution § 1.2— improvements placed across property line—no right of action by encroacher

In an action by plaintiff praying that the court require defendant, an adjoining landowner, to sell to plaintiff at a reasonable price a strip of defendant's land on which plaintiff had inadvertently made improvements, the trial court properly granted defendant's motion to dismiss, since plaintiff was not in a position to initiate litigation but should have waited and pleaded unjust enrichment or betterments in response to an action by defendant landowner for a mandatory injunction to compel removal of the encroachment.

APPEAL by plaintiff from *Edens, Judge.* Order entered 9 January 1978 in District Court, BURKE County. Heard in the Court of Appeals 10 January 1979.

Plaintiff and defendant are adjoining landowners in Burke County. In 1973 the plaintiff commenced construction of improvements on her land. Plaintiff, inadvertently, allowed the im-

provements to extend across the common boundary with the defendant. The extent of the encroachment amounted to approximately 25 feet and included the driveway and part of the garage portion of the house. Plaintiff alleges that defendant observed plaintiff constructing the house and driveway; that defendant stated to plaintiff that she thought the house was too close to the line and believed the driveway was partially on her land; and that defendant further stated that "this was all right because she would not be using that small parcel of land if in fact the driveway was on her land." Defendant owns lots 81 through 86 of the W. Russell Garrison Property, Plat Book 2, page 75, Burke County Registry. Plaintiff owns lots 77 through 80 of the Garrison property. Defendant's property is unimproved.

Plaintiff filed this action 4 August 1977, praying that the court require defendant "to sell and convey plaintiff a strip of land on which such improvements are located at a reasonable price." On 27 September 1977, defendant filed a motion to dismiss the complaint. She has not answered the complaint. On 14 November 1978, plaintiff filed a motion for leave to amend the complaint and tendered the amended complaint which added allegations that should defendant elect to require plaintiff to remove that portion of her house from defendant's land, defendant should be required to pay the cost of removal and the cost of rebuilding plaintiff's house and that such costs would greatly exceed the value of the land on which the encroaching building is located. On 10 January 1978, defendant's motion to dismiss was considered, and the district court entered an order dismissing the action. Plaintiff appeals from that order.

John H. McMurray for plaintiff appellant.

Matthews and Vaught, by Curt J. Vaught, for defendant appellee.

MORRIS, Chief Judge.

It is fundamental that in ruling on a motion to dismiss, the motion should be denied unless the complaint, construed liberally in favor of the plaintiff, fails to state a cause of action. Plaintiff relies on the doctrine of betterments to support her cause of action. The complaint alleges inter alia:

"(8) Plaintiff in good faith without inexcusable negligence constructed her dwelling house and improvements, including driveway, partially on the land of defendant, who was unaware of this mistake in location and therefore failed to make objection.

(9) Defendant should not be permitted to claim the improvements erected on her land by plaintiff. If she did retain such improvements it would constitute unjust enrichment and greatly damage plaintiff who would be required to tear down and remove that portion of her improvements on defendant's land at great expense.

(10) Plaintiff is willing to purchase a strip of land from defendant of sufficient width to include such improvements and pay a reasonable price for such land.

(11) Defendant can convey this strip of land to plaintiff without doing undue damage to the remaining portion of her land."

Plaintiff's action is not based on G.S. 1-340, our statutory provision for betterments, or under the common law right to claim for betterments. Indeed, plaintiff is not entitled to such an action. The claim for betterments arises only upon defendant's petition filed when he has been sued in ejectment by the true owner, and the right to claim for betterments "applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land." *Beacon Homes v. Holt*, 266 N.C. 467, 471, 146 S.E. 2d 434, 437 (1966); *Comrs. of Roxboro v. Bumpass*, 237 N.C. 143, 74 S.E. 2d 436 (1953); *Wood v. Tinsley*, 138 N.C. 507, 51 S.E. 59 (1905).

Plaintiff relies upon the equitable principles of unjust enrichment and estoppel which have been recognized as providing the basis for a cause of action for improvements. *See Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E. 2d 316 (1944); *Beacon Homes v. Holt, supra.* The right of such an action is based upon the principle that, as the Court in *Beacon Homes, supra*, stated, "It is as contrary to equity and good conscience for one to retain a house which he has received as the result of a bona fide and reasonable mistake of fact as it is for him to retain money so received." 266 N.C. at 474, 146 S.E. 2d at 439.

The receipt of a benefit at the expense of another does not necessarily result in unjust enrichment. "A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust." A.L.I., Restatement of the Law, Restitution § 1, comment a. A determination of whether retention of any benefits is "unjust" requires a consideration of traditional concepts of equity. One is not unjustly enriched where the benefit has been conferred by a "volunteer" or an intermeddler and where the benefit is not easily returnable and the recipient has not been afforded the opportunity of rejection. This analysis is known as the "Choice Principle." *See Siskron v. Temel-Peck Enterprises*, 26 N.C. App. 387, 216 S.E. 2d 441 (1975). *See also Beacon Homes v. Holt, supra*, where plaintiff constructed a house on defendant's lot, believing it to be the lot owned by the party for whom he agreed to build the house. Defendant refused to allow plaintiff to remove the house and refused to pay for it. The Court said defendant had the choice of allowing plaintiff to remove the house or retaining it herself. Having chosen to retain it, defendant was required, by equitable principle, to pay for it since she had the choice of returning the benefit. *See generally* Dobbs, Remedies § 4.9 (1973). Nevertheless, this principle does not apply with absolute rigidity but yields at times to special situations cognizable in equity which override a defendant's right of free choice. *Siskron v. Temel-Peck Enterprises, supra.* In such instances, if the benefit received is less than the amount of the loss suffered by the transferor, the amount of recovery is limited to the amount by which the transferee has been benefited.

> "Thus, if a person's chattels are incorporated into the land of another without the other's knowledge, the owner of the land is liable, if at all, only to the extent to which its value has been increased, although the value of the chattels was greater." A.L.I., Restatement of Law, Restitution § 1, comment e. *See also Id.* § 42.

In fact, in certain instances it is perhaps more harsh to require the one receiving benefits to pay for them than to deny restitution.

Plaintiff's counsel ably argued to this Court an imaginative and novel theory upon which to find unjust enrichment of the defendant. Counsel's reasoning follows. He asserts that defendant

had reason to believe that plaintiff's construction encroached upon her property and, although she mentioned that fact, she represented to plaintiff that it would be all right because she would not be using that small parcel of land. Plaintiff contends that she was induced by this representation to continue construction despite the encroachment. Counsel argues that defendant thereafter took unfair advantage of her position essentially to coerce the plaintiff into either paying an exorbitant price for the land upon which the plaintiff had encroached or removing the structure in order that defendant might obtain a marketable title for the property.

The case of *Lumber Co. v. Edwards*, 217 N.C. 251, 7 S.E. 2d 497 (1940), presents a situation similar in several respects to the present case. Justice Seawell's observation with respect to the source of that litigation is uniquely applicable to the present case.

> "It is apparent that the defendant Edwards intends to take whatever advantage he may of the windfall that has come to him by reason of the innocent mistake of the original adjoining landowner who, unwittingly, constructed his house partly upon a vacant lot now the property of defendant. Whatever advantage the defendant may have under the austerities of more formal law, plaintiff contends, with some reason, that this attitude is calculated to produce substantial injustice, and argues that it is remediable in equity." 217 N.C. at 254, 7 S.E. 2d at 499.

Plaintiff in *Lumber Co.* prayed for recovery of the value of his premises which had been possessed by defendant since he discovered the encroachment of plaintiff's house, or permission to remove the house from defendant's premises. The Court recognized equities on the part of both of the original owners of the property but concluded that plaintiff, who had also sought "further relief as the plaintiff may be entitled to have either in law or in equity," was entitled only to ejectment of the defendant from plaintiff's admitted portion of the house. The Court concluded, "What the plaintiff may do hereafter to 'mend its licks', if anything, is not, at present a concern of this Court." 217 N.C. at 255, 7 S.E. 2d at 500. The posture of that action, like the present action, was unique. Rather than pleading in response to an action brought by the owner of the land for a mandatory injunction to

compel removal of the encroachment, *see* Annot., 28 A.L.R. 2d 679 (1953), this plaintiff has attempted to foreclose such an action by initiating the litigation. Plaintiff is unable to cite any precedent for her action and this Court is not alone in its inability to find such precedent. *See Valentine v. Hynes*, 199 F. 392, 395 (9th Cir. 1912). Indeed, plaintiff seeks essentially the private right of eminent domain. This is an inherent right available only to the federal government, the states, and those bodies to whom the states properly delegate the authority to exercise such powers. *Cf. Redevelopment Com'n of Greensboro v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391 (1962); *Ports Authority v. Southern Felt Corp.*, 1 N.C. App. 231, 161 S.E. 2d 47 (1968); *see generally* 29A C.J.S., Eminent Domain § 18 *et seq.*

It is not necessary for us to determine whether defendant might prevail in a subsequent action seeking a mandatory injunction for removal of the encroachment. However, such an action might present a more appropriate forum for considering the many factors involved in resolving the conflict between the parties to this action. *See generally* Annot., 28 A.L.R. 2d at 692-721.

The trial court's order dismissing plaintiff's complaint is

Affirmed.

Judges MARTIN (Harry C.) and CARLTON concur.

ELLA J. HEDGEPETH v. ROSE'S STORES, INC.

No. 786SC305

(Filed 20 February 1979)

Negligence § 57.4— fall on stairway in store—worn metal strips on stairs—hand rails blocked by plants—failure to show cause of fall

In an action to recover for injuries suffered by plaintiff when she slipped and fell while descending a stairway leading from a landing to the basement of defendant's store, plaintiff's evidence that each of the steps had a metal strip on it which was worn and slick was insufficient to overcome a motion for directed verdict where there was no evidence of the particular defective condition that caused her fall. Furthermore, evidence that potted plants placed on the right side of the steps next to the handrail blocked plaintiff's access to the

handrail was insufficient evidence of negligence, when considered alone or in conjunction with the allegedly slick condition of the metal strips on the steps, to allow plaintiff's case to go to the jury since (1) another set of steps on the other side of the landing where the handrail was not blocked was available to plaintiff, (2) a store owner is not generally required to provide handrails on stairways absent some building code, safety ordinance or other special circumstances causing steps to be dangerous without one, and (3) plaintiff's contention that she could have averted her fall had the handrail not been blocked was purely conjectural.

Judge CLARK dissenting.

APPEAL by plaintiff from *Graham, Judge.* Judgment entered 29 May 1977 in Superior Court, HALIFAX County. Heard in the Court of Appeals on 16 January 1979.

This is a civil action to recover damages for personal injuries allegedly resulting from defendant's negligence. In her complaint, plaintiff alleged that on 1 November 1975, she, accompanied by her sister, was shopping in the defendant's store in Roanoke Rapids, North Carolina and that she was proceeding down some stairs to the toy department when she slipped and fell. In describing her fall, plaintiff alleged:

> 6. . . . As she proceeded down the last several steps, the defendant had placed a number of large potted plants adjacent to the handrail preventing the plaintiff from grasping the handrail on the last several steps. That as the plaintiff attempted to move down the last several steps, her heel skidded on the slick metal tread of the steps and she was unable to reach the handrail because of the plants or shrubs between her and the handrail, and she fell forward to the basement floor . . . .
>
> 7. That the defendant was negligent in that:
>
> (a) The treads of the steps in the defendant's place of business where the plaintiff fell were worn and slick and had been for some time and the defendant was aware or should have been aware that such worn and slick treads existed and were dangerous to their customers and particularly to this plaintiff.
>
> (b) That although the defendant provided handrails for the safety of its customers descending the stairs, defendant

negligently placed plants or shrubs between the handrails and the travel portion of the stairs which made it difficult, if not impossible, to use the handrails in descending the stairs.

8. That the negligence of the defendant as aforesaid was the proximate cause of the injury and damage to the plaintiff as hereinafter stated.

At trial, plaintiff offered evidence that tended to show the following:

The stairs leading to the toy department consisted of about ten steps that led to a landing and then two more sets of steps on each side of the landing, one leading to the left and one to the right, each containing about five or six steps to the basement floor. The platform and the steps were well lighted. On the set of steps to the right of the landing were some potted plants next to a handrail. There was one plant on each step, and the plants were located on the right side of these steps. There were no plants on the left hand side of these steps, nor were there any plants on the other set of steps leading from the left side of the landing. Plaintiff chose to descend the steps leading from the right side of the landing and walked near the potted plants. With respect to her falling, plaintiff testified, "I could not reach the rail and when I got to maybe the second or third step I slipped . . . and I tried to get the rail and tore the plants down trying to get the rail and I was close enough to get it if it won't [sic] covered up . . . The steps had a metal strip on the edge. The condition of the metal strip was worn." On cross-examination, plaintiff, in response to a question as to whether there was any "kind of substance on the floor," stated, "No . . . It was slick. It was very slick." Plaintiff's sister, on cross-examination, testified she did not see any foreign objects or slippery substances on the floor, "but the metal on the step was slick."

At the close of plaintiff's evidence, the trial court allowed defendant's motion for a directed verdict. Plaintiff appealed.

Josey & McCoy, by H. P. McCoy, Jr., and C. Kitchin Josey for plaintiff appellant.

Young, Moore, Henderson & Alvis, by William M. Trott, for defendant appellee.

HEDRICK, Judge.

The sole question presented by this appeal is whether plaintiff's evidence, considered in the light most favorable to her, was sufficient to support a finding of negligence on the part of the defendant which proximately caused plaintiff's injuries. We agree with the trial court that it was not.

Numerous cases have noted the general rule that the owner or proprietor of a business, though not an insurer of the safety of his customers, does owe a duty to keep in a reasonably safe condition those portions of the premises which he may expect customers to use during regular business hours and to give warning of hidden perils or unsafe conditions insofar as they are known or can be ascertained by reasonable inspection. *E.g., Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 153 S.E. 2d 804 (1967); *Stafford v. Food World, Inc.*, 31 N.C. App. 213, 228 S.E. 2d 756 (1976).

Plaintiff contends that her evidence is sufficient to show that the defendant failed to keep the stairway in a reasonably safe condition. Plaintiff first argues that the defendant, in the exercise of ordinary care, should have discovered the condition of the "worn" metal strip on the stairway. Plaintiff next argues that the defendant was negligent in failing to keep the stairway clear and unobstructed by placing potted plants on the steps, thereby preventing persons from using the handrail. Plaintiff theorizes that had she "been able to use the handrail to complete her descent to the basement level of the store, she could have prevented herself from falling on the step."

The only evidence introduced by the plaintiff as to the condition of the step on which she fell was that it was "worn" and that it was "very slick." Plaintiff, however, does not know on which step she fell, or even which foot slipped and caused her to fall. There is no evidence in this record that the condition of the step upon which plaintiff slipped was any different from that of the entire flight of steps. Plaintiff's evidence tending to show that the steps had a metal strip on them, and that the metal strip was "worn" and that the steps were "very slick" apparently refers to all the steps. This is not sufficient evidence to support a finding by the jury that the steps had become so worn that their use would be hazardous to the store's patrons. The unsupported allegations by the plaintiff that the set of steps on which she fell

were "worn" or "slick", without evidence of the particular defective condition that caused the fall, is insufficient to overcome a motion for a directed verdict. *See Davis v. Albert Steiger, Inc.*, 360 Mass. 861, 277 N.E. 2d 312 (1971); *Radies v. Reading Liederkranz German Singing and Sport Society*, 197 Pa. Super. 509, 178 A. 2d 789 (1962); *Novek v. Horn & Hardart Baking Co.*, 364 Pa. 349, 72 A. 2d 115 (1950); Annot., 64 A.L.R. 2d 471, 474 (1959).

In *Di Noto v. Gilchrist Co.*, 332 Mass. 391, 125 N.E. 2d 239 (1955), there was evidence that the step on which plaintiff had slipped was constructed containing a large percentage of abrasive non-slip material but that the edge of the step had become worn down at least one inch. The court held that this evidence of the specific defect was sufficient to take the case to the jury. The court noted, however, that "description of the step as wet or slippery *and nothing more* would not be sufficient to show that it was not reasonably safe for the use of defendant's customers." (Emphasis added.) Similarly, in *Chapman v. Clothier*, 274 Pa. 394, 118 A. 356 (1922), the court held that the mere fact that marble steps had become worn and smooth was not sufficient to show negligence on the part of the proprietor.

In North Carolina, it has been held that the mere fact that a floor has been waxed and is slippery, does not make the owner liable for the fall of a patron on a slick spot on the floor, absent a showing of how the spot had been created or how long it had been there. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967). *See also Barnes v. Hotel OHenry Corp.*, 229 N.C. 730, 51 S.E. 2d 180 (1949).

We think that the plaintiff has failed to meet her burden of showing that the cause of her fall was due to the negligently maintained condition of the stairway. Plaintiff's evidence in this regard consists only of conclusory allegations, which are not sufficient to meet the burden imposed on her.

We next consider plaintiff's argument that the store owner's actions in permitting plants to be placed on the steps which blocked access to the handrail, either alone, or in combination with the allegedly "slick" condition of the metal strips on the steps, was sufficient evidence of negligence allowing her case to go to the jury.

Initially, we note that the route which plaintiff chose in descending the stairs was not the only means available to her. She could have used the set of steps to the left of the landing where access to the handrail was not blocked. Secondly, we note that a storeowner is not generally required to provide handrails on stairways, absent some building code, safety ordinance, or other special circumstances causing steps to be dangerous without one. *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461 (1959); 62 Am. Jur. 2d, Premises Liability § 229 (1972). Finally, plaintiff's contention that, had the handrail not been blocked, she could have averted her fall, is purely conjectural and impossible of proof. Plaintiff has the burden to show the cause of her fall. The evidence introduced by plaintiff leaves the cause of her fall a matter of conjecture. "There is no presumption or inference of negligence from the mere fact that an invitee fell to his injury while on the premises, and the doctrine of res ipsa loquitur does not apply to a fall or injury of a patron or invitee on the premises, but the plaintiff has the burden of showing negligence and proximate cause." 9 Strong's N.C. Index, Negligence § 53.4, at 482-83 (3d Ed. 1977). Plaintiff has failed to meet this burden.

This judgment directing a verdict for defendant is affirmed.

Affirmed.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The plaintiff's evidence tended to show, first, that the metal strip on the front edge of each step was worn and slick, and, second, pots of flowers were placed on each step beside the handrail which made it difficult, if not impossible, to use the handrail in descending the stairway. These conditions were known, or reasonably should have been known, to the defendant. Plaintiff slipped on a step, tried but was unable to grasp the handrail for support, and fell. In my opinion there was sufficient evidence of negligence and proximate cause to overcome the motion for directed verdict.

The majority cites *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461 (1959), in support of the proposition that a storeowner is not generally required to provide handrails on stairways. We note this case involved not a stairway but a 6-inch perpendicular stepdown to the sidewalk at the front of the store. Clearly, *Garner* is distinguishable. And we find that the other cases relied on by the majority are factually distinguishable.

I vote to reverse and remand for a new trial.

STATE OF NORTH CAROLINA v. GEORGE JOSEPH WATKINS

No. 7828SC900

(Filed 20 February 1979)

1. **Criminal Law §§ 66.3, 66.14— confrontation at courthouse—one-on-one confrontation at police station—in-court identification not tainted**

The trial court in an armed robbery prosecution did not err in admitting identification testimony by the victim since the pre-arrest viewing of defendant by the victim in a waiting room of the courthouse was not suggestive, as the victim without prompting singled defendant out from 25 or 30 other people as the robber, and since a post-arrest one-on-one confrontation between defendant and the victim at the police station, though suggestive, did not taint the victim's in-court identification of defendant which was based on her observation of him at the well lighted crime scene for 10 minutes.

2. **Criminal Law § 34.5— armed robbery charged—prior occasions of exposing private parts—admissibility to show identity**

In a prosecution for armed robbery where the evidence tended to show that the robber entered a store with his private parts exposed and forced the robbery victim to fondle his private parts, the trial court properly allowed two witnesses to testify concerning defendant's exposure of his private parts on two prior occasions since such evidence was admissible to show the identity of defendant.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 26 April 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 January 1979.

Defendant was found guilty as charged in the indictment of armed robbery, taking $30.00 from the person and possession of Sue Boyd, an employee of Hop-In Food Store, and appeals from the judgment imposing imprisonment.

The evidence for the State tends to show that on 24 November 1977, about 1:00 a.m., Sue Boyd observed defendant enter the store and get a cup of coffee, then leave and drive away in a red and white truck. About 5:00 a.m. defendant again entered the store, approaching Ms. Boyd with his privates exposed, pulled a gun from his pants, and told her to put the money in the cash register in a bag. Defendant walked up to the counter and forced her at gunpoint to fondle his privates. Defendant was there 5 to 10 minutes and left when a customer drove in the parking lot. Ms. Boyd telephoned the Asheville police.

Carol Freeman testified that on 4 November 1977 about 2:00 a.m. while working at Dunkin Donuts, located on Tunnel Road near the Hop-In Food Store, she saw defendant standing outside the window naked; he was masturbating. She watched him for three or four minutes, then walked to the phone at the back of the store. Defendant ran.

Robert N. Davis, a deputy sheriff, testified that on 12 November 1977 about 1:00 a.m., he was parked on a hill observing the Hop-In Store. He saw a man approach the store dressed in a coat but no trousers. Davis drove toward the store, reaching the parking lot when the man got to the door. The man ran to the woods. Davis and other officers gave chase and apprehended defendant in the woods.

Defendant did not testify but offered evidence which tended to show that during the night in question he, his brother, and his girl friend were at his brother's home which was about 6.1 miles from the Hop-In Food Store.

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

Long, McClure, Hunt & Trull by Robert B. Long, Jr. and Jeff B. Hunt for defendant appellant.

CLARK, Judge.

[1] Defendant assigns as error the admission of the identification testimony of Sue Boyd, contending that his constitutional rights were violated by (1) the pre-arrest viewing of defendant by Ms.

Boyd with policeman Kelley in the waiting room on the seventh floor of the courthouse, and by (2) the post-arrest one-on-one confrontation by Ms. Boyd in an office at police headquarters.

Both before and after adversary judicial criminal proceedings have begun an accused has a Fifth Amendment protection against an identification procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to denial of due process of law. *Stovall v. Denno*, 388 U.S. 293 at 302, 18 L.Ed. 2d 1199 at 1206, 87 S.Ct. 1967 (1967).

The pre-arrest identification of the defendant by Sue Boyd took place on 30 November 1977 in a waiting room on the seventh floor of the courthouse. The elevator opened in this area. During *voir dire* evidence was presented which tended to show that Ms. Boyd was advised by Officer Kelley that a person had been arrested for exposing his privates in a public place, that this person could be the one who had robbed her, that the man was scheduled for trial on that day, and that he would take her to a waiting room on the seventh floor of the courthouse. There were 25 to 30 people in the waiting room. People were moving about near the elevator. Ms. Boyd saw a man whose back was turned to her; when he turned so she could see his face she immediately pointed out defendant as the robber.

The post-arrest identification was a one-on-one confrontation after defendant was arrested under a warrant and taken by Officer Kelley to an office in the police station. Such confrontation is necessarily suggestive. *United States ex rel. Kirby v. Sturges*, 510 F. 2d 397 (7th Cir. 1975), *cert. denied* 421 U.S. 1016, 44 L.Ed. 2d 685, 95 S.Ct. 2424 (1975). The defendant does not contend that the procedure violated defendant's Sixth Amendment right to counsel. *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S.Ct. 1926 (1967).

A suggestive and unnecessary identification procedure does not violate due process if the identification possesses sufficient aspects of reliability under the "totality of the circumstances" test of *Stovall, supra.* An unnecessarily suggestive procedure is not *per se* conducive to mistaken identification. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140, 97 S.Ct. 2243 (1977). The *Manson* case approved the factors bearing on reliability which

were set out in *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972), as follows:

> (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.

After *voir dire* the court made findings of fact which included the following: Ms. Boyd saw defendant in the store which was well-lighted when he came in first for a cup of coffee; that when he returned and committed the robbery she saw him at a distance of a few feet for ten minutes; soon after he left she described him accurately to the police; she identified him immediately and positively when she saw him in the waiting room at the courthouse six days after the robbery.

The trial court concluded that Ms. Boyd's in-court identification was based on her observation of defendant at the store when the robbery was committed. The conclusion of the court that her in-court identification was not tinged by any improper identification is fully supported by the evidence, even though the one-on-one confrontation at the police station, a short time after the identification at the waiting room of the courthouse, was necessarily suggestive. It did not violate due process because her identification possessed sufficient aspects of reliability under the totality of the circumstances. We find no error in admitting in evidence the in-court identification of the defendant by Ms. Boyd.

[2] Defendant next contends that the court erred in admitting the testimony of State's witness Carol Freeman relative to indecent exposure by defendant on 4 November 1977 at Dunkin Donuts, and the testimony of Deputy Sheriff Davis relative to indecent exposure by defendant on 12 November 1977. The person who committed the charged robbery entered the store with his

privates exposed, and he forced Ms. Boyd at gunpoint to fondle his privates. Obviously the perpetrator was a sexual deviate who was sexually gratified by exposing his private parts in public. The identity of the defendant was questioned. It was relevant on this question to offer evidence that defendant had exposed his private parts on two prior occasions, the first time 20 days and the second time 12 days before the day in question. The trial court properly instructed the jury that this evidence was admitted only for the purpose of identity.

Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime. 1 Stansbury's N. C. Evidence, § 91 (Brandis rev. 1973). Although the North Carolina Court has not expressly recognized a separate category for sex offenses, the decisions are markedly liberal in holding evidence of similar sex offenses admissible, especially when the sex impulse manifested is of an unusual or unnatural character. "It may be that a special rule for cases of this sort will ultimately develop." 1 Stansbury's N. C. Evidence, *supra*, § 92 at 299. We find no merit in this assignment of error.

We have carefully examined and considered defendant's other assignments of error and arguments, and we find that discussion is not warranted. The defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. KENNETH SADLER

No. 7826SC987

(Filed 20 February 1979)

1. **Constitutional Law § 43; Criminal Law § 66.5— no right to counsel at show-up**

Defendant was not entitled to counsel at a show-up where he had not been formally charged with a crime at the time of the show-up.

2. **Criminal Law § 66.10— impermissibly suggestive police station show-up—findings by court**

The appellate court is bound by the trial court's findings that a police station show-up procedure was impermissibly suggestive and that a witness's in-court identification was based entirely on the show-up where they were supported by competent evidence.

3. **Searches and Seizures §§ 8, 12— stopping suspect for questioning—seizure of evidence—validity of arrest**

Officers had reasonable grounds to stop defendant and his companion for questioning where the officers received a radio broadcast reporting an armed robbery in the area they were patrolling and giving a description of the two suspected robbers and the clothing they were wearing, the officers saw defendant and his companion a short distance from the robbery scene, and defendant and his companion generally fit the description of the suspects given over the police radio. Furthermore, there was no evidence to support the court's ruling that there was no probable cause for the officers to arrest defendant and its order suppressing a credit card and other articles belonging to the robbery victim which the officers discovered in defendant's possession where the court found that testimony as to how the officers obtained possession of the credit card and other articles was not believable, and the record was left bare of evidence to explain how the officers obtained such possession.

APPEAL by the State from *Snepp, Judge*. Order entered 5 September 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 January 1979.

Defendant was indicted for armed robbery and assault with intent to kill. He moved to suppress the introduction of identification testimony by the victim and a witness, and the introduction of a credit card, bus pass and bus tickets that were taken during the robbery and found in defendant's possession.

At the hearing Vera Yandle, an elderly woman, testified that on the afternoon of 7 June 1978 two men came to her house and assaulted her with a knife and robbed her of cash, a Belk's credit card, social security card, bus card and tickets. She could not identify the men because she was losing her sight.

Debra Cureton testified that she was walking down the sidewalk and saw two men come from the back of a house. The two men joined her and one talked to her, and she described him as wearing white pants, black shirt, hat and sunglasses with initials. She later saw the two men run from the back of the same house, and she stated that she could identify defendant as the man she talked to, but could not identify the second man except that she observed that he was wearing blue jeans. Ms. Cureton waited for the police at Vera Yandle's house and gave them her description of the two men. About 45 minutes later Ms. Cureton viewed defendant at the police station and she identified him after he put on his hat and sunglasses.

Officer Caudill testified that he was on patrol on the afternoon of 7 June 1978 and received a radio broadcast of a robbery. Two suspects, black males, one with a light colored hat, white pants, black shirt and sunglasses, and one wearing blue jeans, were described by the broadcast. He observed two black males and stopped one, and later the second, defendant, who at first failed to stop. When asked for identification defendant said he had none, but then, according to the officer, defendant pulled out a credit card and some bus tickets which he told the officer that he had just found. The credit card was issued to Vera Yandle. Defendant was wearing light tan pants, brown shirt, a hat and sunglasses with initials.

Officer Dixon testified that he had gone to the Yandle house, obtained the description from Debra Cureton and relayed it to the police dispatcher.

The trial court concluded that: (1) the victim could not identify her assailant because of her failing eyesight; (2) the in-court identification of defendant by the witness Cureton was based entirely upon an impermissibly suggestive show-up procedure at which defendant was denied his right to counsel; (3) that defendant and his companion were stopped illegally on the street; and (4) that there was no probable cause for their arrest. Defendant's motion to suppress was granted and the State appeals.

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

Theo H. Nixon for defendant appellee.

ARNOLD, Judge.

[1] First the State argues that defendant was not entitled to counsel at the show-up. The State errs in arguing that G.S. 7A-451(b)(2) controls. That statute sets out the entitlement of indigent persons to the services of counsel; the issue here is not whether defendant was entitled to have counsel *appointed* at State expense, but whether he was entitled to have counsel *present* at the show-up. The State is correct, however, that defendant was not entitled to counsel at this identification. Defendant was arrested and taken to the police station. There he was shown to the witness, who identified him. He was subsequently taken before a magistrate and formally charged. On an identical sequence of occurrences this Court has held that a defendant is not entitled to counsel at the show-up, since "[t]he constitutional right to counsel at an identification procedure does not attach until 'the initiation of adversary *judicial* criminal proceedings . . . by way of formal charge, preliminary hearing, indictment or arraignment.'" *State v. Sanders*, 33 N.C. App. 284, 287, 235 S.E. 2d 94, 96, *cert. denied* 293 N.C. 257 (1977).

[2] Nevertheless, the order suppressing the identification evidence must be affirmed. His Honor found that the victim could not identify her assailant, that the show-up procedure was impermissibly suggestive, and that Ms. Cureton's in-court identification was based entirely on the show-up. Inasmuch as the findings of fact were based on competent evidence this Court is bound by the trial court's findings. 4 Strong's N.C. Index 3d, Criminal Law, § 66.20 at 276.

[3] The record reveals that the police officers who made the stop received a radio broadcast reporting an armed robbery in the area they were patrolling. A description was given of two suspects who were young black males with a knife, one of whom was wearing a light-colored hat, white pants, black shirt and sunglasses. A short distance from the scene the officers attempted to stop defendant and his companion, two black males who generally fit the description given over the police radio.

According to the officer's uncontroverted testimony at the hearing, defendant's companion had under his shirt what appeared to the officers to be a knife. (It turned out to be a stick.) Defendant's companion was stopped for questioning, and the of-

ficers attempted to stop defendant, who kept going, but later was stopped. Defendant had on light tan pants, a brown shirt and sunglasses.

The court's finding that "there is no evidence that the man fit [the] description" simply is not supported by the evidence in this record, and thus is not binding on this Court. *Yarborough v. State*, 6 N.C. App. 663, 171 S.E. 2d 65 (1969). Moreover, this deficient finding by the trial court appears to be the basis for its conclusion that the stop was illegal. The remaining findings likewise do not support the conclusion that the stop was illegal. Indeed, from this record we find no evidence from which such a finding could be made.

In view of the description relayed over the police radio and the proximity of distance and time to the crime, there existed reasonable grounds for the officers to lawfully confront defendant and his companion for questioning. Based on the holding of our Supreme Court in *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973), we have no difficulty in finding the stop in this case to be legal. The trial court's conclusion that the stop was illegal is therefore reversed.

Finally, that portion of the order which suppresses evidence of the credit card, bus pass and bus tickets found on defendant's person is vacated. We also vacate the court's conclusion that there was no probable cause to arrest defendant.

Uncontroverted testimony by the officer who arrested defendant indicated that defendant at first stated that he had no identification on him, but then pulled out a credit card and upon request showed the card to the officers. It was the Belk's charge card issued to Mrs. Yandle. The trial court's finding that the "Court does not believe this testimony" leaves the record bare of evidence which explains how the officers came into possession of the Belk's card and other articles, and there is no evidence to support the ruling that there was no probable cause for defendant's arrest.

That part of the Superior Court's order concluding that the stopping of defendant by the police was illegal is reversed; that part of the order suppressing the identification evidence is affirmed; and that part of the order suppressing evidence of the

Belk's card and other articles found on defendant, and finding no probable cause for arrest, is vacated. The case is remanded for trial.

Remanded.

Judges PARKER and WEBB concur.

ARLENE R. HARRIS, PLAINTIFF v. HAROLD R. HARRIS, DEFENDANT UNITED STATES OF AMERICA, GARNISHEE

No. 7812DC295

(Filed 20 February 1979)

Garnishment § 1— anticipated military retirement pay—no garnishment

Since generally under N.C. law an order of garnishment is unavailable to reach earnings for future pay periods or unaccrued wages, the anticipated retirement pay for a future period of a regular officer, retired from a branch of the military service, is not subject to garnishment.

APPEAL by plaintiff from *Guy, Judge*. Order dated 12 October 1977 in District Court, CUMBERLAND County. Heard in the Court of Appeals 15 January 1979.

The plaintiff and the defendant were married in 1951. On 27 September 1974, they entered into a separation agreement. Plaintiff filed a complaint on 12 May 1977, alleging that the defendant had defaulted in payments pursuant to the separation agreement. According to the agreement, plaintiff was to receive as alimony 50% of the defendant's Army retirement pay during the rest of his life. Plaintiff was also to receive $200 per month as child support for the two children who remained minors. Plaintiff joined the United States of America as garnishee under the provisions of 42 USC § 659. The plaintiff sought a continuing garnishment order directed at prospective amounts payable by the United States to the defendant for military retirement pay. The United States of America filed a motion for dismissal, which was allowed on 12 October 1977. Plaintiff appealed from the order dismissing the garnishee.

William J. Townsend, for plaintiff appellant.

United States Attorney George M. Anderson, by Bruce H. Johnson, Assistant United States Attorney, for defendant appellee.

CARLTON, Judge.

The only question presented on this appeal is the validity of the order of 12 October 1977 dismissing the United States of America as garnishee.

Plaintiff relies on the provisions of 42 USC § 659 to support her contention that the dismissal was improper. We do not agree.

42 USC § 659 provides for a waiver of sovereign immunity, in that the United States of America consents to be joined as a garnishee in garnishment proceedings authorized under state law. *Overman v. United States*, 563 F. 2d 1287 (8th Cir. 1977); *Williams v. Williams*, 427 F. Supp. 557 (D. Md. 1976). The statute reads as follows:

> *Consent by United States to garnishment and similar proceedings for enforcement of child support and alimony obligations.*
>
> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement against such individual of his legal obligations to provide child support or make alimony payments.
>
> 42 USC § 659 (1976).

Plaintiff concedes in her brief that the case of *Elmwood v. Elmwood*, 34 N.C. App. 652, 241 S.E. 2d 693 (1977), first decided in this Court, would control the disposition of this appeal. At the time this appeal was filed, *Elmwood* was on appeal to the Supreme Court, and plaintiff candidly admits that the purpose of

her appeal was to allow her to go forward in the event the Supreme Court should reverse this Court's decision. The Supreme Court filed its opinion in *Elmwood* on 6 June 1978. 295 N.C. 168, 244 S.E. 2d 668 (1978).

In *Elmwood*, the Supreme Court established the following propositions:

(1) 42 USC § 659 does not create a right in a party, or the children of parties, to garnish military retirement pay. It merely removes the barrier of sovereign immunity so as to place the United States in the same position as a private employer for the purpose of garnishment for child support and alimony, of money due as "remuneration for employment." Whether the monthly payments which the defendant is entitled to receive from the United States are "remuneration for employment" is governed by federal law. If they are, their susceptibility to garnishment is governed by the law of this State.

(2) Payments received by a retired military officer from the United States on account of *disability* are not "remuneration for employment" and, therefore, the United States is not subject to state garnishment proceedings on account of such payments under 42 USC § 659.

(3) Payments received by a retired *regular* officer of the military service for *retirement* are "remuneration for employment." Payments for retirement received by a retired *reserve* officer are not "remuneration for employment." Retired reserve officers are not subject to recall to active duty and are not subject to the Uniform Code of Military Justice. Therefore, the payment is considered pension for past services.

(4) Since the retirement pay of a *regular* retired officer is deemed to be *currently earned*, the defendant has no vested right therein until it is so earned. It is, therefore, subject to garnishment in proceedings instituted in the courts of this State to the extent, and only to the extent, that compensation for service currently rendered to a private employer is so subject.

(5) Since retirement pay of a *regular* retired officer is deemed to be compensation for services currently rendered, present entitlement to future payments is obviously contingent upon rendition of services in the future. Thus, entitlement to future re-

tirement payments may be defeated by a number of possible developments; e.g., death, resignation, dismissal pursuant to court-martial, or change in the federal law.

(6) Since generally under North Carolina law, an order of garnishment is unavailable to reach earnings for future pay periods or unaccrued wages, the anticipated retirement pay for a future period, of a *regular* officer, retired from a branch of the military service, is not subject to garnishment.

(7) Accumulated, unpaid retirement pay for past periods of service is subject to garnishment, except as limited by statutes relating to such proceedings.

(8) Under certain circumstances, military retirement pay may be subject to garnishment for child support.

Under the sixth rule enumerated above, plaintiff, in the case at bar, is unable to join the United States as garnishee.

In *Elmwood*, the Supreme Court quoted its decision in *Ward v. Manufacturing Co.*, 267 N.C. 131, 148 S.E. 2d 27 (1966) as follows: "[T]he principle defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt."

In the case at bar, the defendant obviously could not maintain suit against the United States for retirement pay which he anticipates he will become entitled to receive in the future. His right to future retirement payments is a mere expectancy, contingent on several factors such as death, resignation, dismissal pursuant to court-martial, etc.

We therefore hold that the United States of America may not be properly joined as a garnishee and the trial court's allowance of the motion to dismiss is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

BETTY JEAN SEBASTIAN, EMPLOYEE v. MONA WATKINS HAIR STYLING, EMPLOYER; NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER

No. 7810IC235

(Filed 20 February 1979)

Master and Servant § 68— hair stylist—sensitivity to chemicals—no compensable disability

Plaintiff hair stylist did not have a compensable disability where her incapacity to earn wages was the result of her personal sensitivity to chemicals used in her work rather than an occupational disease.

APPEAL by plaintiff from Order of North Carolina Industrial Commission entered 22 November 1977. Heard in the Court of Appeals on 9 January 1979.

Plaintiff filed a claim for workmen's compensation benefits for an occupational disease. A hearing was held before Commissioner William H. Stephenson and on 4 August 1977 an opinion and award was entered in which Commissioner Stephenson made findings of fact which are summarized and quoted below:

Plaintiff is a forty-two year old woman who has been a hair stylist for more than twenty years and has been employed by Mona Watkins Hair Styling for three years as a hair stylist. In December of 1975, plaintiff began to experience a "breaking-out on her hands," and saw Dr. A. M. Alderman, "who diagnosed her condition as 'contact dermatitis due to strong and various chemicals used in (her) occupation as a beautician.'" Plaintiff was also treated by Dr. W. Stacy Miller, a medical expert specializing in dermatology who "diagnosed her condition as 'hand eczema secondary to chemicals used in hairdressing.'" During the latter part of 1976, plaintiff was exposed to chemicals in her work and sustained a skin disease as a result. On 31 December 1976, plaintiff's skin disease became so acute that she was forced to quit her job as a hair stylist. Thereafter, plaintiff's skin condition "completely cleared up and within thirty days, or on or about January 31, 1977 she was able to return to any type of employment which did not subject her to the handling of chemicals." Since 31 January 1977, plaintiff has applied for several other jobs but she "knows no trade or occupation other than hair styling" and has been unable to find other work. Since 31 January 1977, "plaintiff has been able to work and earn wages and has not been disabled."

Based on the foregoing, Commissioner Stephenson concluded:

1. In the way and manner set out in the Findings of Fact, plaintiff sustained a compensable occupational disease. G.S. 97-53(13).

2. Plaintiff was temporarily totally disabled by reason of her occupational disease from January 1, 1977 through January 30, 1977 and she is entitled to compensation during said period as by law provided. G.S. 97-29.

3. Plaintiff has no compensable disability after January 30, 1977. G.S. 97-2(9); G.S. 97-31.

On 22 November 1977, the North Carolina Industrial Commission entered an Order adopting as its own the findings of fact and award of Commissioner Stephenson. Plaintiff appealed.

Blanchard, Tucker, Twiggs & Denson, by R. Paxton Badham, Jr., for plaintiff appellant.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., for defendant appellees.

HEDRICK, Judge.

The Industrial Commission found that plaintiff's skin condition was compensable as an occupational disease under G.S. § 97-53(13) and awarded her medical expenses plus temporary total disability benefits for a period of thirty days. Defendants did not challenge this conclusion or award and thus no question is presented with respect to it. The Commission, in its Order, stated that "plaintiff has failed to show that her disability after January 31, 1977, was caused by her occupational disease." Plaintiff has excepted to the conclusion based thereon that "[p]laintiff has no compensable disability after January 30, 1977." Plaintiff argues that the "term 'disability' signifies an impairment of wage earning capacity rather than a physical impairment" and that she "has not been able to work [as a hair stylist] or to earn the equivalent wage;" consequently, she continues to have a compensable disability. We disagree.

Plaintiff asserts that the issue is "how to compute damages accruing to a skilled employee who, as a result of an occupational disease, is not able to work at her skill, but is otherwise healthy

and able to work at a non-skilled job." This formulation erroneously assumes the crucial question to be determined: whether plaintiff's incapacity to earn wages is the "result of an occupational disease."

Pursuant to G.S. § 97-53, only certain specifically enumerated "diseases and conditions . . . shall be deemed to be occupational diseases," among which is "(13) Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment . . ." By virtue of G.S. § 97-52, "[d]isablement . . . of an employee *resulting from an occupational disease* described in G.S. § 97-53 shall be treated as the happening of an injury by accident" and is compensable under the Workmen's Compensation Act. (Emphasis added.) G.S. § 97-54 provides that in "cases of occupational disease 'disablement' shall be equivalent to 'disability' as defined in G.S. 97-2(9)." The definition of "disability" in G.S. § 97-2(9) is "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Emphasis added.)

From the above it is clear that in order to be compensable, plaintiff's "disability" must result from an occupational disease. In the present case, there is no evidence whatsoever that subsequent to 31 January 1977 plaintiff's incapacity to earn wages was the result of an occupational disease; rather, it was the result of her personal sensitivity to chemicals used in her work. We do not believe that the purpose of the Workmen's Compensation Act is to provide benefits for inability to perform a particular type of work due to an individual's susceptibility to disease from that work. The underlying purpose of the Act "is to provide compensation for workmen who suffer disability by accident arising out of and in the course of their employment [or from] those diseases or abnormal conditions . . . the causative origin of which is occupational in nature." *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 127-28, 66 S.E. 2d 693, 694 (1951).

Plaintiff relies heavily on *Mabe v. N.C. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972). In that case, the claimant had worked as a stonecutter with thirty to thirty-five years of experience and was forced to quit because he contracted silicosis from his exposure to silica during his employment. Although he

had only a forty percent medical disability, the Commission found him "fully incapacitated because of silicosis to earn wages through work at hard labor, which is the only work he is qualified to do by reason of his age and education." 15 N.C. App. at 255, 189 S.E. 2d at 806. In that case, it was clear that plaintiff's incapacity to earn wages was the result of his having silicosis, which in turn was a result of his work. Furthermore, there is a radical difference between silicosis and the skin condition of plaintiff in the present case. In *Singleton v. D. T. Vance Mica Co.*, 235 N.C. 315, 324, 69 S.E. 2d 707, 713 (1952), the Court stated:

> Silicosis is an inflammatory disease of the lungs due to the inhalation of particles of silicon dioxide. It is incurable and is one of the most disabling occupational diseases because it makes the lungs susceptable to other infection, particularly tuberculosis. According to the textbook writers, it has been definitely determined that the removal of a man, who has silicosis, from silica exposure, does not stop the progress of the disease at once, but that fibrotic changes continue to develop for another one or two years.

In contrast, plaintiff's skin condition had completely cleared up within one month of her terminating her employment as a hair stylist. While it may be true that plaintiff's skin disease could recur if she returned to her previous job, there is no evidence of any continuing disability as a result of a disease contracted in the course of employment as is the case with silicosis. Therefore, she is not entitled to disability compensation payments for her susceptibility to the skin disease.

For the reasons stated above, the Order appealed from is affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

NORTH CAROLINA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION v. M. T. HAMMOND, AND FEDERAL RESERVE BANK OF RICHMOND

No. 7822SC175

(Filed 20 February 1979)

Uniform Commercial Code § 36— forged endorsement on check—breach of warranty of good title by collecting bank

In an action by plaintiff seeking to recover reimbursement on a check presented by defendant Federal Reserve and paid by plaintiff, plaintiff was entitled to summary judgment where the check was paid by plaintiff after receipt from Federal Reserve with all prior endorsements guaranteed; upon discovery that payee's endorsement was forged, plaintiff timely demanded reimbursement from Federal Reserve since it was the collecting bank; Federal Reserve breached its warranty under G.S. 25-4-207(2) by failing to convey "good title" to the check in question; and Federal Reserve's contention that it did not breach its warranty of good title because defendant payee's signature was authorized was without merit since a third person's oral testimony that defendant payee gave him permission to endorse the check did not equal to or become a power of attorney. G.S. 47-115.1.

APPEAL by defendant, Federal Reserve Bank of Richmond, from *Collier, Judge*. Judgment entered 30 December 1977 in Superior Court, IREDELL County. Heard in the Court of Appeals 28 November 1978 in Winston-Salem.

On 3 November 1976, plaintiff filed a complaint against defendant M. T. Hammond, seeking $30,000.00 due because of a default under the terms of a promissory note. On 1 July 1977, plaintiff filed an amended complaint pursuant to court order, wherein as an alternate cause of relief, plaintiff sought reimbursement on a check presented by the Federal Reserve and paid by plaintiff since the signature on that check was forged, and therefore, the Federal Reserve did not have good title in accordance with G.S. 25-4-207.

On 16 December 1977, plaintiff bank moved for summary judgment against the defendant Federal Reserve Bank on the basis that the Federal Reserve Bank did not have good title due to the forged signature on the loan proceeds check. This motion was supported by an affidavit of James R. Durham, handwriting expert, who stated that the signature of defendant Hammond on the loan proceeds check was a forgery. Hammond also stated in an affidavit that his signature on the loan proceeds check was a

forgery. Defendant Federal Reserve claimed in its answer that the provisions of the North Carolina Uniform Commercial Code § 25-4-207 were not applicable in this case, since the loan proceeds check was signed by someone else, but with the authorization of M. T. Hammond. Federal Reserve filed an affidavit of Raymond M. Robbins, Jr. in reply to plaintiff's motion for summary judgment stating that Hammond authorized him to endorse the loan proceeds check and deposit the proceeds for ultimate payment to certain brokerage firms.

Judge Collier, after granting a motion to make Raymond Robbins an additional party defendant, granted summary judgment against defendant Federal Reserve since it did not have good title to the loan proceeds check as a collecting bank under § 25-4-207 of the North Carolina Uniform Commercial Code. From this judgment, defendant Federal Reserve appealed.

Chamblee & Gourley, by Robert H. Gourley, for plaintiff appellee.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for defendant appellant, Federal Reserve Bank of Richmond.

ERWIN, Judge.

This appeal presents one question for our determination. Did the trial court err in granting summary judgment against defendant Federal Reserve? We answer "No." Defendant contends that there was a genuine issue of material fact as to whether or not defendant M. T. Hammond's signature was affixed on the loan proceeds check with his authorization. Federal Reserve asserted further that this issue of material fact should be determined by a jury in this civil action.

Rule 56(c) provides that upon motion for summary judgment, such judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Federal Reserve, in response to plaintiff's motion for summary judgment, filed: (1) affidavits of Raymond M. Robbins, Jr. and (2) a portion of deposition of Robbins which tended to show that Hammond authorized him to endorse the loan

proceeds check and deposit the proceeds with his bank. Plaintiff contends that summary judgment was proper by reason of the following: (1) The check in question was paid by the plaintiff after receipt from Federal Reserve with all prior endorsements guaranteed. (2) Upon discovery that payee's endorsement was forged, plaintiff timely demanded reimbursement from Federal Reserve, since it was the collecting bank. (3) Federal Reserve breached its warranty under G.S. 25-4-207(2) by failing to convey "good title" to the check in question.

G.S. 25-4-207(2) provides:

> "(2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his transferee and to any subsequent collecting bank who takes the item in good faith that
>
> (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
>
> (b) all signatures are genuine or authorized. . ."

Under the statute, Federal Reserve warranted that it had a "good title" to the check, and all prior signatures were genuine or authorized. *Twellman v. Lindell Trust Co.*, 534 S.W. 2d 83 (Mo. App. 1976). "Good title," as used in G.S. 25-4-207, is not specifically defined. In real estate conveyances, "good title" has often been deemed synonymous with a marketable title. *Lea v. Bridgeman*, 228 N.C. 565, 46 S.E. 2d 555 (1948); *accord, Green v. Ditsch*, 143 Mo. 1, 44 S.W. 799 (1898). In *Green, Id.* at 12, 44 S.W. at 802, the Missouri Supreme Court sought to define a "marketable title":

> " '[H]e should have a title which would enable him, not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.' Waterman on Spec. Perf. sec. 412; *Mastin v. Grimes*, 88 Mo 478; *Mitchener v. Holmes, supra.*"

A title to be good should be free from litigation, palpable defects, and grave doubts. *Reynolds v. Borel*, 86 Cal. 538, 25 P. 67 (1890).

Federal Reserve did not convey "good title" to North Carolina National Bank, its transferee. The payee's endorsement

was forged. *Society Nat. Bank of Cleveland v. Capital Nat. Bank*, 30 Ohio App. 2d 1, 59 Ohio Op. 2d 1, 281 N.E. 2d 563 (1972).

Federal Reserve contends it did not breach its warranty of good title, because defendant Hammond's signature was authorized. This contention is without merit. Raymond Robbins' oral testimony that Hammond gave him permission to endorse the check does not equal to or become a power of attorney. G.S. 47-115.1; *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978). The purpose of requiring a written power of attorney is to put persons on notice of the terms and conditions of the power granted in the written document.

We find no genuine issue of any material fact. Plaintiff is entitled to summary judgment as a matter of law against Federal Reserve. We express no opinion as to any rights, if any, Federal Reserve may have against Hammond.

The judgment entered by the trial court is

Affirmed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY GOLDEN

No. 7815DC353

(Filed 20 February 1979)

1. **Criminal Law § 146.7— criminal case in district court—no appeal to Court of Appeals**

   No appeal lies to the Court of Appeals from an order entered in a criminal action in the district court finding that defendant had violated conditions of his suspended sentence.

2. **Bastards § 8.1— willful refusal to support illegitimate child—verdict of guilty—finding of paternity**

   A general verdict of "guilty" or "guilty as charged" to a valid charge of willfully neglecting and refusing to support an illegitimate child in violation of G.S. 49-2 is adequate as a finding of paternity.

APPEAL by defendant from *Harris, Judge*. Undated order entered in District Court, ALAMANCE County. Heard in Court of Appeals 30 January 1979.

On 31 August 1977 defendant was tried and found guilty in the District Court in Alamance County in Case No. 77CR7457 in which defendant was charged in a criminal summons with the offense of willfully neglecting and refusing to support his illegitimate child born on 7 March 1977, a misdemeanor under G.S. 49-2. Judgment was entered by District Judge Walter M. Lampley sentencing defendant to jail for six months, the sentence being suspended for three years on condition that defendant pay $35.00 per week to the Clerk of Superior Court for the use and benefit of the child. The judgment further provided that all money paid into the office of the Clerk be transmitted to the Department of Human Resources and that "this case be assigned a 'CVC' file number but that it retain its character as a criminal action." Defendant did not appeal from the judgment.

On 18 January 1978 a Deputy Clerk of Superior Court issued an order for defendant's arrest in a case entitled "*The State of North Carolina v. Michael Anthony Golden*" bearing file number 77CVC104. As grounds for the arrest, the order recited: "The defendant named above having failure to comply—non-support." The order directed the arresting officer to bring the defendant "before the Civil Court of Alamance County at Graham, N.C. on the 24th day of February, 1978, at 9:30 o'clock a.m., or upon the first day of court following his arrest."

On 2 February 1978 defendant filed a motion in Case No. 77CVC104 to strike the Judgment entered on 31 August 1977 "in the above entitled matter" on the ground that "the Judgment entered in the above-entitled matter failed to find the defendant to be the natural father of the minor child."

An undated order was entered in Case No. 77CVC104 by District Judge W. S. Harris, Jr., the Judge Presiding at the 24 February 1978 Session of the District Court for Alamance County. This order recites that "the plaintiff was present in court by and through its attorney, Donnell S. Kelly, Staff Attorney for the Alamance County Department of Social Services" and that "the defendant was personally present in court represented by his counsel." It then refers to the criminal summons in which defendant had been charged with willfully neglecting and refusing to support his illegitimate child, the trial on 31 August 1977 at which a general verdict of guilty had been rendered, and the judg-

ment entered thereon sentencing defendant to jail for six months, suspended on condition defendant pay the sum of $35.00 weekly for the support and maintenance of his child. The order then contains the following findings:

4. That subsequently and pursuant to a motion duly made by the defendant the support payments which he was ordered to pay as set out above were reduced by The Honorable W. S. Harris, Jr., by court order to $50.00 each two weeks until arrearages of $80.00 had been liquidated and then said payments to revert to $40.00 each two weeks.

5. That the defendant is before this court this day for his failure to comply with the order of Judge W. S. Harris, Jr. set out above that he pay the sum designated by Judge Harris, he, the defendant, having been previously cited to show cause why he should not be held and adjudged for contempt for his failure to pay.

6. That a motion was filed by the defendant's attorney, The Honorable Wiley P. Wooten, on or about the 2nd day of February, 1978 asking that the defendant's conviction, the terms of which are set out above, be vacated on the ground that the presiding judge at the time of defendant's trial failed to find defendant to be the natural father of the minor child set out in the criminal summons.

7. That the court is of the opinion that a general verdict of guilty by a presiding district court judge upon a proper charge of bastardy under G.S. Section 49-2 is adequate and that no specific finding that the defendant is the natural father of the child in question is required.

8. That the defendant has been gainfully employed at Copland Fabrics in Alamance County, North Carolina at least since the month of December, 1977 where, according to the evidence, he has been earning $3.15 per hour but has in fact made no payment pursuant to the court orders above referred to since the month of December, 1977.

9. And the Court further finds as the fact that the defendant has had and continues to have a present ability to pay pursuant to the orders set up above but has in fact un-

lawfully and willfully failed and neglected to pay as ordered and is in willful contempt of prior orders of this court.

On these findings, the court denied defendant's motion filed 2 February 1978 to strike the judgment which had been entered against him on 31 August 1977 and adjudged "[t]hat defendant be confined in the common jail of Alamance County until such time as he has paid the sum of $150.00 to be applied upon accumulated arrearages." From this order the defendant gave notice of appeal to the North Carolina Court of Appeals.

Donnell S. Kelly for plaintiff appellee.

Vernon, Vernon & Wooten by Wiley P. Wooten for defendant appellant.

PARKER, Judge.

[1] This is a criminal action in which defendant was given a suspended sentence after he was found guilty in the District Court of a misdemeanor charge contained in a criminal summons. Defendant did not appeal from the judgment which imposed that sentence. After the judgment was entered, for some reason not apparent on this record, the case was given a different file number. The assignment of a new file number could not and did not change the action from criminal to civil. Defendant now attempts to appeal to this Court from an order subsequently entered in the same criminal proceeding.

The jurisdiction of the Court of Appeals to review upon appeal decisions of the several courts of the General Court of Justice is controlled by Article 5 of G.S. Ch. 7A. No appeal lies to this Court from an order or judgment entered in a criminal action in the District Court. Appeals in such cases are to the Superior Court. G.S. 7A-290. Therefore, the purported appeal in the present case must be dismissed.

Although the attempted appeal must be dismissed, we do observe that when a probationer is charged with violating a condition of his probation, the procedure provided in G.S. 15A-1345 (formerly in GS 15-200.1) should be followed rather than a proceeding to hold him in contempt.

[2] We also observe that a general verdict of "guilty" or "guilty as charged" to a valid charge of violation of G.S. 49-2 is adequate as a finding of paternity. *See, State v. Ellison*, 230 N.C. 59, 52 S.E. 2d 9 (1949).

For the reason above stated, defendant's purported appeal is

Dismissed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. THELTON BENJAMIN MATTHEWS

No. 786SC883

(Filed 20 February 1979)

Arrest and Bail §§ 3.8, 4— stopping by city policemen—legality of arrest—arrest by trooper not at scene of crime

In a prosecution of defendant for driving while his license was suspended and driving under the influence, defendant's contentions that his arrest was illegal because city policemen arrested him outside their territorial jurisdiction, that a highway patrol trooper who was not at the scene of the alleged crime had no probable cause to make an arrest, and that there was no probable cause determination by a judicial officer after his arrest were without merit, since it was not necessary to determine whether defendant's arrest was illegal because an arrest, though illegal, may be constitutionally valid; on the basis of the facts told the trooper by the city policemen, which constituted reasonably reliable information to provide probable cause, and on the basis of the trooper's observation of defendant, there was ample evidence to provide him with probable cause to believe that the misdemeanor of driving under the influence had been committed; and on the day of defendant's arrest he was taken before a magistrate who signed an order of commitment and a release order.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 13 April 1978 in Superior Court, HERTFORD County. Heard in the Court of Appeals 16 January 1979.

Defendant was cited for driving while his operator's license was suspended (G.S. 20-28) and for driving under the influence of intoxicating liquor (G.S. 20-138). In district court he was found guilty of both offenses, and he appealed to superior court. There the State presented evidence that on 16 April 1977 three Ahoskie policemen in a marked patrol car were forced off the road by a

car turning toward them out of a side road. The policemen stopped the car two miles outside of town, and as they pulled in behind it they saw the driver and the passenger exchange places. Defendant, in the passenger seat, was observed to be unsteady on his feet and to have an odor of alcohol about his person. Kevin Parker was in the driver's seat. The policemen, two of whom were in uniform, asked defendant and Parker to come with them to the Ahoskie Police Department. There they were arrested by Trooper Banks of the Highway Patrol, who was not present at the scene where the automobile was stopped. The officers did not make charges on the highway because they had no jurisdiction to make arrests there. At the police station defendant was given balance and breathalyzer tests and found to have a blood alcohol content of .17%.

Kevin Parker testified for defendant that it was he who was driving the car when they were stopped. Chief Willoughby of the Ahoskie Police told them " 'You will have to go with us down there to the Ahoskie Police Department.' " There was a tall cup of Pepsi in the car which started to spill when they stopped, and defendant reached down to grab it.

The defendant was found guilty of both offenses and sentenced to 6 months on each charge, with both sentences suspended for three years upon certain conditions. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for the state.

Rosbon D. B. Whedbee for defendant appellant.

ARNOLD, Judge.

Defendant contends that the charges against him should have been dismissed because his arrest was illegal and unconstitutional. He argues that the Ahoskie policemen arrested him outside their territorial jurisdiction, that Trooper Banks had no probable cause to make an arrest, and that there was no probable cause determination by a judicial officer after his arrest.

G.S. 15A-402(c) sets the territorial jurisdiction for arrests by city policemen at one mile outside the city limit. The evidence here is uncontradicted that defendant was stopped by the Ahos-

kie policemen more than two miles outside the city limit. The question is whether the arrest took place at that point, or later at the police station. If the former is the case, the arrest was illegal, since where arrests are regulated by statute, an arrest which does not comply with the statute is illegal. *Cf. State v. Williams*, 31 N.C. App. 237, 229 S.E. 2d 63 (1976). But we find it unnecessary to determine whether the arrest was illegal, since an arrest, though illegal, may be constitutionally valid, *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh. den.* 285 N.C. 597 (1973), and "[t]he fact that an original arrest may have been unlawful . . . does not preclude trial of the accused for the offense." 5 Am. Jur. 2d, Arrest § 116 at 796.

It is also argued by defendant that the arrest was illegal because there was no issuance of a magistrate's order showing a finding of probable cause as required by G.S. 15A-511(c)(3). Such compliance, however, is not mandatory, and a failure to comply will not affect the validity of a trial. *State v. Burgess*, 33 N.C. App. 76, 234 S.E. 2d 40 (1977). Defendant has shown no prejudice by the non-compliance and we believe he could show none, since on the day of his arrest he was in fact taken before a magistrate, who signed an order of commitment and a release order. Defendant secured his release shortly thereafter by giving an appearance bond.

Defendant further contends that Trooper Banks had no probable cause to arrest him at the police station, because the requirements of G.S. 15A-401(b)(2)b were not met. This subsection requires an officer making an arrest without a warrant for a misdemeanor committed out of his presence to have probable cause to believe (1) that the person has committed a misdemeanor *and* (2) that the person will not be apprehended unless immediately arrested, or that he may injure himself or others unless immediately arrested.

We find no merit in defendant's contention that Banks had no probable cause to believe that defendant had committed a misdemeanor, the first requirement of G.S. 15A-401(b)(2)b. Sergeant Hoggard testified that "[w]hen we got to the police station, I explained the facts to Mr. Banks." Chief Willoughby radioed the police station after he had stopped the car and "asked what Trooper Banks wanted to do and he said for us to ask them if

they would come to town." Trooper Banks testified that Hoggard and Willoughby told him where they had stopped defendant, and that he was under the influence in their opinion. "As a result of what they told me, I placed [defendant] under arrest . . . ." Banks observed that defendant was unsteady on his feet and had a strong odor of liquor on his breath. Defendant was unable to perform the balancing tests Banks gave him.

Considering Banks' own observations of defendant, and information given him by the other officers, there was ample evidence to provide Trooper Banks with probable cause to believe that a misdemeanor had been committed. Obviously information given by one officer to another officer is reasonably reliable information to provide probable cause. *In re Gardner*, 39 N.C. App. 567, 251 S.E. 2d 723 (1979). "Probable cause and 'reasonable ground to believe' are substantially equivalent terms." *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971). "[W]hether probable cause exists depends upon whether at that moment the facts and circumstances within [the officer's] knowledge and of which [he has] reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense." 1 Strong's N.C. Index 3d, Arrest and Bail § 3.1 at 415. The same evidence that provides probable cause for a belief that a misdemeanor had been committed is sufficient to provide probable cause to believe that defendant might injure himself or others if allowed to leave the police station at that time. *Cf. State v. Eubanks, supra.*

Defendant's other assignments of error have been reviewed and do not avail.

No error.

Judges PARKER and WEBB concur.

CLEVE GOODNITE AND WIFE, ELSIE LEE GOODNITE; CHARLIE D. VANN, GENE K. UNDERWOOD AND WIFE, JOY ANN W. UNDERWOOD; AUGUSTA JOY WARREN; MARGARET ZILPHIA KORNEGAY AND RUTH HARVEY NESTER v. NORWARD LEAMON GURLEY AND WIFE, BETTIE PRICE GURLEY

No. 784SC421

(Filed 20 February 1979)

Deeds § 20.1— subdivision lots—restrictions as to business activities—restrictions not included in deeds—conveyances free of encumbrances

Where the original owners of land in a subdivision recorded a "contract . . . with all future purchasers of lots in the . . . subdivision to place Protectibe [sic] Covenants in all future deeds of covenance [sic]," one of the covenants being that the lots would be used exclusively for residential purposes, but the original owners did not insert the restrictions into the deeds they gave their purchasers, the lots were in fact conveyed free and clear of all encumbrances.

APPEAL by plaintiffs and cross-appeal by defendants from *Browning, Judge*. Judgment entered 13 December 1977, amended judgment entered 6 April 1978 in Superior Court, SAMPSON County. Heard in the Court of Appeals 8 February 1979.

Both plaintiffs and defendants are the owners of lots in the Wilson Subdivision of Clinton, North Carolina. Plaintiffs allege that defendants' operation of a day care center on their property violates a restrictive covenant, and they seek to have operation of the business enjoined. Defendants by their answer deny that a restrictive covenant applies to their land, and argue in the alternative that if it does, plaintiffs have waived their right to object.

The action was heard on exhibits and the facts stipulated by the parties: (1) The Wilsons were the original owners of the subdivision land. In 1948 the Wilsons recorded a document which allegedly placed restrictive covenants on the land. (2) In 1953 the central portion of the subdivision, consisting of 23 of the original 57 lots, was conveyed to the School Administration, which erected an elementary school there. In the same year four lots were conveyed for church purposes, and church and Sunday School buildings were constructed upon them. Alleged releases from restrictive covenants were given for both of these conveyances. (3) Highway 701, which is adjacent to both plaintiffs' and defendants' property, was a two-lane highway in 1948; it is now a five-

lane boulevard. (4) As of the institution of this action a chain link fence business was being operated from a dwelling house in the subdivision, but the business had terminated before this action came to trial. The trial court also visited the area and noted that the pond in the subdivision was being filled with rubbish, which created an unsightly area.

The court made findings of fact and concluded that while a restrictive covenant did apply to the land, it would be inequitable to enforce the restriction due to a fundamental change in the character of the subdivision. Plaintiffs' action was dismissed, and they appeal. Defendants cross-appeal.

Chambliss, Paderick, Warrick & Johnson, by Joseph B. Chambliss, for plaintiff appellants.

Dees, Dees, Smith, Powell & Jarrett, by John W. Dees, for defendant appellees.

ARNOLD, Judge.

By their cross-appeal defendants assign error to the trial court's ruling that a restrictive covenant exists and applies to their land. In 1948 the Wilsons recorded a "contract . . . with all future purchasers of lots in the R. L. Wilson subdivision to place Protectibe [sic] Covenants in all future deeds of convenance [sic]." Among the covenants enumerated in the "contract" was the covenant that the lots "shall be used exclusively for residential purposes, and not for business, manufacturing or commercial purposes." The trial court found as fact:

> That R. L. Wilson and wife, Zannie Wilson, made numerous conveyances of lots in the R. L. Wilson Subdivision and other areas embraced in the three tracts of land described in the purported covenant to future purchasers. . . . Each and every one of said conveyances included a warranty that the conveyed premises were 'free and clear from all encumbrances' and no reference was made in said conveyances to the instrument which purports to be a covenant to future purchasers. . . . None of the instruments in the chain of title of the defendants to their lot and their tract of land make reference to said purported covenant to future purchasers.

In its original judgment the court did not determine whether the recorded document placed restrictions on the land, saying "even if said purported covenants with future purchasers were determined to be valid restrictions on the use of the lands in the R. L. Wilson Subdivision, they are unenforceable." In its amended judgment four months later the trial court, "deem[ing] it necessary to amend its judgment in this action in order that all issues presented to the Court might be determined," held:

> That the paper writing dated September 17, 1948, executed by R. L. Wilson and wife, Zannie Wilson, recorded in Book 556, at Page 412, Sampson County Registry, is determined to be a contract and agreement with all future purchasers of lots in the R. L. Wilson Subdivision and its effect is to place protective covenants in all future deeds of conveyance from the three tracts of land described in said instrument.

Defendants argue that the failure of the Wilsons to insert the restrictions into the deeds they gave their purchasers resulted in the conveyance of the lots free and clear of all encumbrances. We find that defendants' argument is correct. The language of the 1948 recorded document says simply that the Wilsons "agree to place" certain specified protective covenants in all future deeds. This they did not do; instead, the deeds from the Wilsons to the predecessors in title of the parties specified that the land was conveyed "free and clear from all encumbrances." As our Supreme Court has noted, "[r]estrictive covenants are not favored. . . . The courts are not inclined to put restrictions in deeds where the parties left them out." *Hege v. Sellers*, 241 N.C. 240, 249, 84 S.E. 2d 892, 898-99 (1954). We hold that the document recorded by the Wilsons in 1948 placed no restrictive covenants upon the subdivision land.

Plaintiffs' appeal contests the finding and conclusion by the trial court that a fundamental change had occurred in the character of the subdivision. We would agree with plaintiffs' position that the uses of the property essentially have been in keeping with the residential character of the neighborhood, but since we find that no restrictive covenants have been placed upon this subdivision it is unnecessary for us to address this question.

Reversed and remanded.

Judges PARKER and WEBB concur.

BILLY DEAN MILLER v. CANNON MOTORS, INC.

No. 7823DC340

(Filed 20 February 1979)

Bailment § 3.3— bailee's failure to return vehicle—prima facie showing of negligence

In an action to recover damages for the loss of a vehicle taken to defendant's place of business for repairs, a jury question was presented on the issue of defendant's negligence where plaintiff made out a *prima facie* case of defendant's negligence by presenting evidence that he took the vehicle to defendant's garage for repairs and that defendant accepted the vehicle and failed to return it when plaintiff called for it; plaintiff also presented testimony by defendant's president concerning the care exercised by defendant with regard to plaintiff's vehicle; and defendant did not introduce any evidence to explain its failure to return the vehicle.

Judge MITCHELL concurs in the result.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 24 January 1978 in District Court, WILKES County. Heard in the Court of Appeals 18 January 1979.

Brewer and Bryan, by Joe O. Brewer and Paul W. Freeman, for plaintiff appellee.

W. G. Mitchell, for defendant appellant.

MARTIN (Robert M.), Judge.

Plaintiff brought this civil action to recover damages for the loss of a 1971 Volkswagen bus, which had been taken to defendant's place of business for repairs and which was not returned to plaintiff when he called for it. At trial, no evidence was introduced to show what had become of the bus, although there is evidence that indicates that the parties to this action assumed that the bus had been stolen. Defendant put on no evidence at trial, contending that plaintiff's own evidence showed defendant's lack of negligence. Defendant's motion for directed verdict was

denied by the trial court, and the case was submitted to the jury on the issue of defendant's negligence. The jury awarded plaintiff $2,340.00, the value of the bus. The trial court denied defendant's motion for judgment *n.o.v.* and entered judgment on the verdict. From this judgment and the orders of the trial court denying the motions for directed verdict and judgment *non obstante veredicto*, defendant appeals, assigning error.

The defendant first contends that the trial court erred in failing to direct the verdict in his favor, there being insufficient evidence of defendant's negligence upon which to submit the issue to the jury. We disagree. Having established by uncontroverted evidence that he had taken the Volkswagen bus in question to defendant's garage for service, and that the defendant accepted the bus and then failed to return it when plaintiff sought to retrieve it, plaintiff had made out a *prima facie* case of defendant's negligence which was sufficient to be submitted to the jury. *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560 (1935). The relationship between the parties was that of bailment for the mutual benefit of bailor and bailee, *Terrell v. Chevrolet Company*, 11 N.C. App. 310, 181 S.E. 2d 124 (1971), so that the defendant bailor would be liable to the bailee for ordinary negligence, *Clott v. Greyhound Lines*, 278 N.C. 378, 384, 180 S.E. 2d 102, 107 (1971).

> . . . [W]hen a bailor . . . offers evidence tending to show (1) that the property was delivered to the bailee, (2) that bailee accepted it and thereafter had possession and control of the property, and (3) that bailee failed to return the property, or returned it in a damaged condition, a *prima facie* case of actionable negligence is made out and the case must be submitted to the jury. [Citations omitted.] When a *prima facie* case is made out, it warrants but does not compel a verdict for plaintiff. The jury is simply authorized to find either way, and either party may lose if he offers no further proof. *Manufacturing Co. v. R.R.*, 222 N.C. 330, 23 S.E. 2d 32 (1942); Stansbury, North Carolina Evidence, 2d Ed., § 203.

Clott v. Greyhound Lines, supra, at 388-389, 180 S.E. 2d 110. Where plaintiff has made out a *prima facie* case, the burden of persuasion does not shift from plaintiff to defendant, but the defendant then has the choice of introducing evidence to exonerate himself or relying upon any deficiencies he has found in plaintiff's

case. *See*, Stansbury, N.C. Evidence (Brandis Rev.) §§ 203, 226. Defendant contends that plaintiff's *prima facie* case was rebutted by plaintiff's calling the president of the defendant corporation to testify and receiving his testimony concerning the care exercised by defendant with regard to plaintiff's vehicle. We disagree. The witness was called as an adverse witness, and testified only as to the care employed by him. Had he made such testimony on direct examination in defense of the defendant corporation, it would have been insufficient to rebut plaintiff's *prima facie* case and warrant taking the issue of negligence away from the jury. This particular testimony in the case before us came from a witness who was ruled by the trial court without objection to be an adverse witness, and, ordinarily, if the testimony of an adverse witness is unfavorable to the party calling him and is not contradicted by other evidence, the party so calling the adverse witness is bound by his testimony, *Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578 (1960); Stansbury, *op. cit.*, § 40. In the absence of the *prima facie* inference of negligence arising upon plaintiff's evidence, verdict might properly have been directed against plaintiff; however, in this case, because plaintiff's evidence made out a *prima facie* case of defendant's negligence, the question was left for the jury whether the care employed by the defendant (about which defendant's president testified) while it had plaintiff's vehicle in its possession was reasonable. Plaintiff's evidence would support, but not compel, a finding that defendant was negligent, just as the testimony by defendant's president would support, but not compel, a finding that defendant was not negligent. Defendant did not choose to introduce any evidence that would explain its failure to return the bus. While it is true that both defendant's owner and the plaintiff gave testimony that would indicate that they thought the bus had been stolen, the duty lay with defendant to rebut the *prima facie* inference of negligence arising upon plaintiff's evidence, by showing what had happened to the bus. As plaintiff's evidence presented a *prima facie* case of defendant's negligence, directed verdict would not have been properly entered in favor of either party at the close of plaintiff's evidence, *Investment Properties v. Allen*, 281 N.C. 174, 180 S.E. 2d 441 (1972), and, as no evidence of exoneration was brought forward by the defendant, the trial court properly submitted the issue of defendant's negligence to the jury. *See, e.g.*, Annot., 43 ALR 2d 403, 416. This assignment of error is overruled.

A motion for judgment *non obstante veredicto* is technically only a renewal of the motion for directed verdict made at the close of all the evidence. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977). Therefore, the grounds for the motion for judgment *n.o.v.* must be viewed as the same as those for the directed verdict and the same standards apply in determining the sufficiency of the evidence to withstand the motion. *Kaperonis v. Underwriters*, 25 N.C. App. 119, 212 S.E. 2d 532 (1975). Accordingly, for the reasons discussed *supra* with reference to defendant's motion for directed verdict, it is apparent that judgment *n.o.v.* would not have been appropriately granted in this case. Defendant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Affirmed.

Judge ERWIN concurs.

Judge MITCHELL concurs in the result.

JACKIE ANNAS, GUARDIAN FOR WANDA LYNELLE ANNAS, AND WANDA ANNAS HIGHTOWER v. McREE DAVIS AND WIFE, JANIE L. DAVIS AND THOMAS H. MORRISSEY, SHERIFF FOR BUNCOMBE COUNTY, AND BUNCOMBE COUNTY BOARD OF TAX SUPERVISION

No. 7828DC287

(Filed 20 February 1979)

1. **Execution § 15.1; Taxation § 40— tax sale—notice to taxpayer not given**

A sheriff's sale of plaintiff's property on a tax judgment was invalid where there was evidence that the deputy sheriff posted a notice of sale at the courthouse door, but there was no evidence when the notice was posted, and the deputy sheriff failed to mail a notice of sale to the listed taxpayer at her last known address.

2. **Execution § 15.1; Taxation § 40— sheriff's deed void—reimbursement of taxes paid—no reimbursement of costs of sale**

Where the trial court found that a sheriff's deed to defendants, based upon execution sale on a judgment for taxes, was void, the trial court erred in denying defendants reimbursement for the taxes they paid on the property in question for the three previous years, but the court properly denied defendants reimbursement for the costs of sale.

Annas v. Davis

APPEAL by defendants McRee Davis and wife, Janie L. Davis, from *Sluder, Judge*. Judgment entered 31 October 1977 in District Court, BUNCOMBE County. Heard in the Court of Appeals 15 January 1979.

Plaintiffs instituted this action to remove cloud from their title to certain lands in Buncombe County. Jury trial was not requested, and the case was tried by the district court judge. Plaintiffs alleged the sheriff's deed to defendants Davis, based upon execution sale on a judgment for taxes, was void and constituted cloud on plaintiffs' title. The court found facts, made conclusions of law, and entered judgment declaring the sheriff's deed void and cancelling it of record. The action was dismissed as to the Sheriff of Buncombe County and the Buncombe County Board of Tax Supervision.

Henry C. Fisher (now deceased) and Long, McClure, Parker, Hunt & Trull, by Jeff P. Hunt, for plaintiff appellees.

McLean, Leake, Talman, Stevenson & Parker, by Joel B. Stevenson, for defendant appellants.

MARTIN (Harry C.), Judge.

[1] Defendants contend the trial court erred in cancelling the sheriff's deed to them. The trial court found plaintiff Jackie Annas acquired title to the land in question 17 June 1938 by deed recorded in the office of the Register of Deeds for Buncombe County in book 508, at page 453; plaintiff Jackie Annas has lived on the property since 1940; she listed it for taxes and paid some taxes prior to 1944; she did not pay any tax on the property after 1944; on 12 June 1972, the tax collector filed tax judgment certificate with the clerk of superior court against plaintiffs' property; on 20 May 1974, the clerk of superior court issued execution on the tax judgment; the sheriff posted a notice of sale at the courthouse door and published notice of sale in newspaper for four weeks; the sheriff did not mail notice of sale to anyone before conducting the sale; on 12 June 1974, the sheriff conducted an execution sale of the subject property and defendant Janie L. Davis was the highest bidder in the amount of $1,115; the sale was confirmed, deed executed by Sheriff of Buncombe County to defendants Davis, and recorded in book 1103, page 147, in the office of the Register of Deeds of Buncombe County; plaintiff Jackie

Annas at no time had actual notice of the execution sale. These findings by the court are supported by the evidence.

Upon those findings the court concluded that the sheriff had failed to comply with N.C.G.S. 1-339.52(a)(1) in not posting the notice of sale at the courthouse door for a period of thirty days immediately preceding the sale and failed to comply with N.C. G.S. 105-375(i)(2) in not mailing a notice of sale to the listed taxpayer at her last known address.

These conclusions of law are supported by the findings of fact and evidence. The deputy sheriff who carried out the execution sale testified he did not mail any notice of sale by registered mail or otherwise. There is evidence that the deputy sheriff posted a notice of sale at the courthouse door, but no evidence when the notice was posted. There is no evidence that the notice of sale was posted at the courthouse door for thirty days immediately preceding the sale.

This assignment of error is controlled by *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E. 2d 166 (1977). In *Henderson*, the Court held the giving of the notice of sale under execution, by mailing a copy of the notice to the listing taxpayer at his last known address at least one week prior to the day fixed for the sale, as required by N.C.G.S. 105-375(i)(2), is constitutionally indispensable to a valid sale under that statute. The Court further held the contrary portion of N.C.G.S. 105-394 is unconstitutional as violating Article I, Section 19, of the Constitution of North Carolina. The sheriff failed to give the constitutionally required notice. Therefore, the sale is void.

Defendants Davis argue plaintiffs are estopped to rely upon this defect in the proceeding. Estoppel is an affirmative defense and must be pleaded. N.C. Gen. Stat. 1A-1, Rule 8(c). Defendants failed to so do.

This assignment of error is overruled.

[2] Defendants next contend the court erred in not allowing them to recover of plaintiffs the balance of the purchase price paid at the execution sale and the taxes they paid on the property for the years 1974, 1975, and 1976.

The trial court held defendants were entitled to recover only the taxes they paid prior to the sale in the amount of $1,144.98. Defendants also paid costs of the sale of $96.66 and taxes for the years 1974, 1975, and 1976 in the sum of $162.75.

Counsel for plaintiffs in oral argument concede that defendants Davis are entitled in good conscience to reimbursement of the $162.75 taxes paid. The $96.66 costs of sale was incurred by defendants as result of an invalid sale of plaintiffs' property. Plaintiffs did not benefit from that payment. To the contrary, they were required to bring this action to avoid the sale. This assignment of error is overruled, except as to the $162.75 conceded by plaintiffs' counsel.

The judgment of the trial court is modified by reason of concession of plaintiffs' counsel that defendants Davis are entitled to recover the taxes for 1974, 1975, and 1976 in the amount of $162.75. Except as so modified, the judgment is affirmed.

Modified and affirmed.

Chief Judge MORRIS and Judge CARLTON concur.

MARY LOU WHEELER v. RAYMOND W. WHEELER

No. 7826DC276

(Filed 20 February 1979)

1. Contracts § 18— alteration of contract—consideration

In order for an alteration of a contract to be enforceable, there must be either an express or implied agreement between the parties that the terms of the contract should be altered, and generally such an agreement must be supported by consideration.

2. Contracts § 18; Estoppel § 4— alteration of contract—estoppel in pais

The principle of estoppel *in pais* is an equitable device which permits an express or implied agreement altering the terms of a contract to be enforced even though not supported by consideration.

3. Contracts § 18; Divorce and Alimony § 25.12; Husband and Wife § 12.1— separation agreement—waiver of visitation rights—estoppel in pais—instructions

In an action for breach of a separation agreement, the trial court erred in instructing the jury that it should find a waiver by defendant of his visitation

rights under the agreement if it found that he intentionally surrendered those rights, since the court should have instructed the jury that, in order to find that defendant had waived his visitation rights under the agreement, it must find either that defendant's acts, representations or silence induced plaintiff to believe that defendant had surrendered his visitation rights and that plaintiff relied on that belief to her detriment or that defendant's express or implied agreement to surrender his visitation rights was supported by consideration.

APPEAL by defendant from *Brown, Judge*. Judgment entered 8 December 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 January 1979.

The plaintiff instituted this action on 8 October 1975 by filing a complaint for breach of contract against the defendant. The contract which the plaintiff alleged had been breached by the defendant was a written separation agreement entered into by the two parties on 13 June 1956. The separation agreement provided that the plaintiff should receive primary custody of the parties' three children, alimony in the amount of $400 per month and child support of $50 per month per child. In return, the defendant was to have certain specified visitation rights.

The plaintiff alleged that the defendant had breached the agreement by failing to make the required alimony payments. The defendant answered alleging that the breach was justified because the plaintiff had previously violated the agreement by refusing to allow him to exercise the visitation rights provided him therein. In rebuttal, the plaintiff asserted that the defendant had waived those visitation rights.

At trial, the jury found that the plaintiff had breached the separation agreement. Presumably this finding was based upon the jury's determination that she had denied the defendant his visitation rights. The jury additionally found, however, that the defendant had waived his rights to visitation guaranteed by the agreement. Upon the resolution of those two issues and the stipulation of the parties as to damages, the trial court entered judgment for the plaintiff in the amount of $11,200. The defendant appealed.

Charles T. Myers for plaintiff appellee.

Ernest S. DeLaney, Jr. for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the trial court's instructions to the jury concerning the issue of his waiver. The trial court instructed the jury that they were to find that there had been a waiver by the defendant if they found that he had intentionally surrendered his visitation rights accorded to him under the separation agreement. The defendant contends that such mere surrender of rights by him would be insufficient to constitute a waiver of the plaintiff's breach of the contract by denying him his rights to visitation.

"Waiver" is sometimes defined as the intentional and voluntary relinquishment of a known right. *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345 (1951). This definition is adequate in describing certain types of waivers such as a waiver of the right to have the assistance of counsel at a criminal proceeding or the waiver of the right to trial by jury. However, there must be more than a mere intentional and voluntary relinquishment of a known right in order for there to be a waiver of a right based in contract.

[1] In order for an alteration to a contract to be enforceable, there must be either an express or implied agreement between the parties that the terms of the contract should be altered. *See Klein v. Insurance Co.*, 289 N.C. 63, 220 S.E. 2d 595 (1975). Generally, an agreement to alter the terms of the contract is treated as any other contract and must be supported by consideration. *See Hospital v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901 (1965).

[2] On the other hand, express or implied agreements not supported by consideration are enforceable in some instances on equitable grounds. The principle of estoppel *in pais* is one such equitable device which permits an express or implied agreement altering the terms of the contract to be enforced even though not supported by consideration. Estoppel *in pais* serves as a bar to a party's assertion that the agreement to alter the terms of a contract lacks consideration:

> [W]hen any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on

such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Boddie v. Bond, 154 N.C. 359, 365, 70 S.E. 824, 826 (1911). *Accord*: *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967); *In re Covington's Will*, 252 N.C. 546, 114 S.E. 2d 257 (1960); *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955); *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953); *Long v. Trantham*, 226 N.C. 510, 39 S.E. 2d 384 (1946); *Thomas v. Conyers*, 198 N.C. 229, 151 S.E. 270 (1930); *Bank v. Winder*, 198 N.C. 18, 150 S.E. 489 (1929). *But see Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971).

[3] In the present case, however, the trial court merely instructed the jury that they were to find a waiver by the defendant of his visitation rights if they found that he intentionally surrendered those rights. Therefore, we find that the trial court's charge failed to give adequate guidance to the jury with regard to the foregoing principles governing the application of the doctrine of estoppel *in pais*. The trial court should have instructed the jury that, in order for the jury to find that the defendant had waived his visitation rights under the separation agreement, the jury must first find either that the defendant's acts, representations or silence induced the plaintiff to believe that the defendant had surrendered his visitation rights and that the plaintiff relied on that belief to her detriment or that the defendant's express or implied agreement to surrender his visitation rights was supported by consideration. As the charge of the trial court did not adequately explain and apply the foregoing principles, it constituted error prejudicial to the defendant which requires that the defendant be granted a

New trial.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. ALBERT VERNON GRANT, JR.

No. 784SC850

(Filed 20 February 1979)

1. **Criminal Law § 117.4— accomplice testimony—request for instruction required**

In the absence of a request, the trial court was not required to charge the jury to scrutinize closely the testimony of defendant's accomplice; moreover, there was no merit in defendant's contention that, because the court charged as to how the jury should consider the testimony of the accomplice's accomplice which corroborated the testimony of the accomplice, the court was then required to charge the jury to scrutinize closely the testimony of defendant's accomplice.

2. **Criminal Law § 113.1— jury instructions—recapitulation of evidence**

Where defendant testified that he realized his young accomplice "would do about like I asked him to," the trial court properly recapitulated the evidence by stating as a contention of defendant that "defendant . . . realized [his accomplice] is a young man who is susceptible to being influenced by older people."

3. **Criminal Law § 142.4— probation—submission to warrantless searches—improper condition**

The condition of defendant's probation that he submit to a search by any law enforcement officer without a warrant was invalid. G.S. 15A-1343.

APPEAL by defendant from *Small, Judge*. Judgment entered 11 May 1978 in Superior Court, DUPLIN County. Heard in the Court of Appeals 11 January 1979.

The defendant appeals from a conviction of accessory before the fact to felonious larceny. The State's evidence showed that Charles Teachey and John Kennion took a livestock trailer which belonged to Mercer Sumner. Teachey, who was 17 years old and had worked for the defendant, testified that the defendant offered him $100.00 to get the trailer. Kennion testified by way of corroboration that Teachey had told him defendant had offered Teachey $100.00 to get the trailer.

The defendant acknowledged asking Teachey to obtain the trailer for him. He contended, however, that it was done in a joking manner, that he did not intend that Teachey do it, and he did not believe Teachey would do it under the circumstances.

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

William E. Brewer, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant argues first that the court erred in not charging the jury to scrutinize closely the testimony of Teachey who was an accomplice of the defendant. No request was made for such a charge. This being a subordinate feature of the case, the court was not required to charge on it absent such a request. 4 Strong, N.C. Index 3d, Criminal Law, § 117.4, p. 621. The defendant contends, however, that the court having charged as to how the jury should consider the testimony of Kennion which corroborated the testimony of Teachey, it was then required to charge the jury to scrutinize closely the testimony of the accomplice. Defendant relies on *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968) for this proposition. In that case, the issue was whether the trial court properly admitted the police officer's testimony to corroborate accomplices of the defendant. In holding that the evidence was properly admitted, the Supreme Court noted that the superior court had properly charged the jury as to how to consider the accomplice's testimony. We do not find that it supports the argument advanced by defendant. This assignment of error is overruled.

[2] The defendant also contends the court committed error in the charge when it stated a contention of the defendant as follows: "The defendant . . . realizes Charles Teachey is a young man who is susceptible to being influenced by older people . . . ." The defendant contends the use of the word "realizes" was tantamount to charging the defendant had admitted those facts. The defendant had testified that he realized Charles Teachey "would do about like I asked him to." We hold this was a fair recapitulation of the defendant's testimony.

[3] The defendant's last assignment of error deals with the sentence imposed. The defendant was sentenced to 30 months, with 6 months to be served actively and 24 months to be suspended. The defendant was placed on probation after serving the 6 months. One condition of probation is that "upon request of any law enforcement officer, he shall consent to a search for stolen

property of his person, the premise where he resides, or any vehicle in his possession, without first requiring such officer to obtain a search warrant, ..."

G.S. 15A-1343 provides:

> (b) Appropriate Conditions.—When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:
>
> * * *
>
> (15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

G.S. 15A-1343 was adopted as Chapter 711 of the 1977 Session Laws which says at section 39:

> "This act 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, ..."

As we read this statute, its effective date is 1 July 1978 and it applies to all judgments entered before that date. For that reason, the requirement that he submit to a search by any law enforcement officer without a warrant is invalid. We do not remand the case for resentencing, but hold that this provision of the suspended sentence shall not be enforced.

We note that by this provision of the criminal procedure act, prohibiting in a probation judgment the requirement that defendants allow searches by law enforcement officers without warrants, the General Assembly has struck down a tool that has often been used by the courts. It will place a restriction on law enforcement officers. It is also important, we think, that in those cases in which the judge is wavering between an active or a suspended sentence, it might tip the scales in favor of an active

sentence because the judge cannot impose the type sentence he feels is appropriate. The General Assembly may want to reconsider this provision.

Modified and affirmed.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF: THE ESTATE OF JAMES L. BROWN

No. 7820SC335

(Filed 20 February 1979)

Executors and Administrators § 23— widow's year's allowance—life insurance and joint bank account proceeds

Proceeds of a life insurance policy and a joint bank account paid to a widow were not chargeable against the widow's year's allowance under G.S. 30-15, notwithstanding the deceased left a will under the terms of which the widow did not receive any property from the estate.

APPEAL by respondent executor from *McConnell, Judge.* Judgment entered 14 November 1977 in Superior Court, MOORE County. Heard in the Court of Appeals 19 January 1979.

This is an appeal from an order determining that the proceeds of a life insurance policy and the surviving spouse's portion of a joint bank account with right of survivorship are not a part of the surviving spouse's year's allowance.

At the death of James L. Brown, his widow, Lauretta L. Brown, received $2,694.98 as beneficiary of an insurance policy on the life of James L. Brown and $825.00 as her share of a joint bank account with right of survivorship which she had owned with her late husband. By his will, James L. Brown gave to Lauretta L. Brown one-sixth of his net estate with the direction that any property passing to her by right of survivorship and any proceeds of life insurance policies be included in his estate for the purpose of calculating her share. The proceeds of the life insurance policy and the funds received by Lauretta L. Brown exceeded one-sixth of the decedent's net estate. Lauretta L. Brown did not dissent from the will, but made application for a year's

allowance which was allowed by a magistrate from funds of the estate which did not include the proceeds from the insurance policy or the joint bank account. On appeal to the superior court, Judge McConnell held, as had the magistrate, that the proceeds of the life insurance policy and the funds from the joint bank account were not properly charged against Lauretta L. Brown's year's allowance and ordered the executor to pay $2,000.00 to Lauretta L. Brown from assets of the estate. The executor appealed to this Court.

Seawell, Pollock, Fullenwider, Robbins and May, by P. Wayne Robbins, for respondent appellant.

Johnson, Poole and Webster, by W. Terrell Webster, Jr., for petitioner appellee.

WEBB, Judge.

G.S. 30-15 provides:

> "Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of two thousand dollars ($2,000) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse."

The parties have cited no case and we can find none controlling the decision in this case. We believe the plain words of the statute control. The statute provides that the surviving spouse shall be entitled to property worth $2,000.00 from the "personal property of the deceased spouse." The appellant contends the insurance proceeds and funds paid to appellee from the joint bank account shall be included in this allowance. We cannot so hold. The proceeds from the insurance policy were paid to appellee in accordance with her rights under the insurance contract. This was not the "personal property of the deceased spouse." The proceeds from the joint bank account were paid to her under the terms of the contract setting up the account. This was also her property and not the "personal property of the deceased spouse."

In this case the fact that the deceased has left a will, under the terms of which his widow did not receive property from his estate, has created some confusion. The statute provides that when there is testacy the surviving spouse's allowance shall "be charged against the share of the surviving spouse." The appellant contends that the surviving spouse cannot take a greater amount than she received under the will. We do not believe the General Assembly intended that if the testator left a will under the terms of which the surviving spouse received nothing from his personal property, that the spouse was deprived of an allowance. Nor do we believe the General Assembly intended that if the deceased left a will under the terms of which the surviving spouse received only what she would have received by law as her own property, that the surviving spouse is deprived of an allowance from the deceased's personal property. We hold in this case that James L. Brown, having left a will under the terms of which his surviving spouse did not receive any legacy from his personal property, she can take her allowance out of his personal property, which would not include the proceeds from the insurance policy or her share of the joint bank account.

Affirmed.

Judges PARKER and ARNOLD concur.

MAX R. JOYNER v. V. W. THOMAS AND WIFE, LULA C. THOMAS AND H. E. LOWRY AND WIFE, MARION T. LOWRY

No. 783DC351

(Filed 20 February 1979)

Rules of Civil Procedure § 41— trial without jury—involuntary dismissal— findings required

Where the court was sitting without a jury, defendants should have moved for an involuntary dismissal under G.S. 1A-1, Rule 41(b) rather than a directed verdict at the close of plaintiff's evidence; however, such a motion may be treated on appeal as having been made under Rule 41, and the trial court is required to make findings of fact and state his conclusions of law separately.

APPEAL by plaintiff from *Wheeler, Judge.* Judgment entered 17 November 1977 in District Court, PITT County. Heard in the Court of Appeals 30 January 1979.

An option on a tract of land given by defendants to plaintiff and one Collice C. Moore stated that the purchase price of $192,500 was to be paid in $86,500 cash, and the assumption of a note and deed of trust outstanding in the amount of $106,000, "the balance due . . . at the date of sale . . . warranted not to exceed [$106,000]."

Plaintiff alleges that the actual amount due on the note it assumed when the option was exercised was $107,750 and sues to recover the $1,750 difference. A directed verdict was granted for defendants and plaintiff appeals.

James, Hite, Cavendish & Blount, by James M. Roberts and E. Cordell Avery, for plaintiff appellant.

No counsel for defendant appellees.

ARNOLD, Judge.

The court, sitting without a jury, granted defendants' motion for directed verdict at the close of plaintiff's evidence. As plaintiff points out, the correct motion would have been for an involuntary dismissal under G.S. 1A-1, Rule 41(b), since the action was being tried without a jury. Compare G.S. 1A-1, Rule 50, Comment. However, such a motion, though improperly designated, may be treated on appeal as having been made under Rule 41. *Higgins v. Builders & Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973), *cert. den.* 284 N.C. 616, 201 S.E. 2d 689 (1974). Treating this motion as made under Rule 41, we find that it was necessary for the trial court to comply with that Rule and make findings as provided in G.S. 1A-1, Rule 52(a)(1): "the court shall find the facts specially and state separately its conclusions of law thereon."

A motion for involuntary dismissal under Rule 41(b) has replaced the motion for nonsuit in civil actions tried without a jury. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). However, the questions presented by the two motions are not the same. The motion for nonsuit asked the court to determine whether the plaintiff's evidence, taken as true, would support a judgment for plaintiff. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1

(1973). The motion to dismiss, on the other hand "permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff may have made out a prima facie case which would have repelled the motion for nonsuit." *Whitaker v. Earnhardt, supra* at 264, 221 S.E. 2d at 319. Because of this distinction, the language of the rule may be somewhat misleading in stating that defendant may move for dismissal "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Our Rule 41(b) is identical to the federal rule. F.R.C.P. Rule 41(b). The present federal rule evolved from an original form which made no distinction between motions to dismiss in jury and nonjury cases, through an intermediate form which added the provision that when the motion was granted in a nonjury case the court might then determine the facts, to the present form which restricts the motion to dismiss to nonjury cases. 9 Wright & Miller, Federal Practice & Procedure § 2371. By allowing the court to determine the facts after granting the motion, the drafters of the rule established a distinction between a motion to dismiss and a directed verdict, *id.*, and "[g]rant of the defendant's motion [at the close of plaintiff's evidence] is a decision on the merits in favor of defendant." *Id.* at 224. This concept, though criticized, see Steffen, The Prima Facie Case in Non-Jury Trials, 27 U. Chi. L.Rev. 94 (1959), has been adopted by most state courts, including ours.

It has been said repeatedly that it is the better practice for the trial court to take the alternative presented by the Rule and "decline to render any judgment until the close of all the evidence." *See, e.g. Whitaker v. Earnhardt, supra; Helms v. Rea, supra.* Where the trial court does not do so, but instead chooses to grant defendant's motion at the close of plaintiff's evidence, he must then find the facts and state his conclusions of law separately as required by the Rule. Since the court here failed to make these necessary findings we must vacate and remand for a new trial. *Carteret Co. General Hospital Corp. v. Manning,* 18 N.C. App. 298, 196 S.E. 2d 538 (1973).

Since a new trial is awarded it is unnecessary for us to address the errors assigned to the court's rulings on evidentiary questions.

New trial.

Judges PARKER and WEBB concur.

CLIFFORD LEE CAMERON v. DR. PAUL O. HOWARD

No. 7811SC316

(Filed 20 February 1979)

Physicians, Surgeons and Allied Professions § 17— malpractice in treating wound—insufficient evidence

Plaintiff's evidence was insufficient for the jury in an action for malpractice in the treatment of a wound to plaintiff's hand where it tended to show that plaintiff suffered an injury to the back of his hand from a piece of wood; defendant doctor sewed up the larceration; small splinters later began coming out of the skin, and plaintiff told defendant about this; a lump and pain developed, but defendant only rubbed plaintiff's hand and gave him a piece of foam rubber to exercise the hand; another doctor thereafter operated on the hand and removed several wooden fragments which had caused the hand to swell; and the wound healed and the swelling disappeared after the operation.

APPEAL by plaintiff from *Smith (David I.), Judge.* Order entered 28 November 1977 in Superior Court, LEE County. Heard in the Court of Appeals 17 January 1979.

Plaintiff filed a complaint charging defendant doctor with malpractice in treatment of a wound to plaintiff's hand. Defendant answered, denying negligence. At trial at the close of plaintiff's evidence, the trial court allowed defendant's motion for a directed verdict. Plaintiff appeals.

J. W. Hoyle, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by John H. Anderson, for defendant appellee.

ERWIN, Judge.

Plaintiff's evidence tended to show that he was shaping a piece of wooden molding with a machine on 22 March 1969 when the wood broke and a piece of it struck the back of his hand; that he pulled the wood from his hand, and the end of it broke off; that he was taken to the hospital and treated by defendant, who

sewed up the larceration; that defendant removed the stitches and gave him medication and rebandaged the hand about a week later; that small splinters began coming out of the skin, and he told defendant; that he saw defendant several times over the next few weeks, "because it wasn't doing right"; that a lump and pain developed; that defendant only rubbed his hand and gave him a piece of foam rubber to exercise his hand; that he could not work at his job because of his hand; and that he eventually saw Dr. Bevin and had an operation.

Dr. Bevin testified that he first saw plaintiff in September 1969 for a mass "roughly the size of a half a pingpong ball" on the back of his left hand; that he found no active inflammation or disability and diagnosed either a foreign body or a "traumatic ganglion" related to the original injury; that he operated on his hand on 17 October 1969 and removed several wooden fragments which, in his opinion, had caused the swelling; and that the wound healed, and the swelling disappeared after the operation.

On cross-examination, Dr. Bevin testified that "splinters have a natural tendency to work themselves out to the surface and it is fairly common sometimes not to probe and wait for that to happen." He further stated: "I have removed a number of foreign bodies from the hand, some of them quite large and some of them very unusual but I have never seen this amount of material in a hand over a six-month period which caused essentially no symptoms from the functional point of view."

The only assignment of error on the record before us reads: "Did the plaintiff present sufficient evidence of negligence for his case to be resolved by the jury?" We answer "No" and affirm the order appealed from.

Our Supreme Court held in *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E. 2d 762, 765 (1955):

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient." (Citations omitted.)

On motion for judgment as of nonsuit, plaintiff's evidence is to be taken as true. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968); *Edwards v. Johnson*, 269 N.C. 30, 152 S.E. 2d 122 (1967); *Harris v. Wright*, 268 N.C. 654, 151 S.E. 2d 563 (1966). All the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of ever fact and inference of fact pertaining to the issues, which may be reasonably deducted from the evidence. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

We hold that the evidence presented by plaintiff was insufficient to raise a permissible inference: (1) that defendant did not possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess; (2) that defendant did not exercise reasonable care and diligence in the application of his knowledge and skill to plaintiff's case; and (3) that defendant failed to use his best judgment in the treatment and care of plaintiff. The doctrine, *res ipsa loquitur*, does not apply in cases of this character. *Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968), and *McLeod v. Hicks*, 203 N.C. 130, 164 S.E. 617 (1932).

We are compelled to affirm the order appealed from.

Judgment affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. GARCIA DAVIS

No. 7818SC832

(Filed 20 February 1979)

1. Criminal Law § 169.3— objectionable evidence—similar evidence subsequently admitted

Defendant in an armed robbery case was not entitled to a mistrial where defendant's accomplice, when asked if he had been convicted of armed robbery before, replied, "Yes, me and Garcia Davis both," since defendant himself testified that he had previously been convicted of armed robbery.

2. Criminal Law § 113.7— acting in concert—jury instructions proper

In a prosecution for armed robbery where the evidence disclosed that defendant formulated the robbery plan, recruited a friend to assist him, furnished the gun, acted as lookout, and drove the getaway car, the trial court properly instructed the jury on the "theory of acting in concert" rather than on the "theory of aiding and abetting."

APPEAL by defendant from *Wood, Judge.* Judgment entered 20 April 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 December 1978.

Defendant was indicted for the armed robbery of an attendant at a food store.

The evidence tended to show, among other things, the following. Defendant told James Hawthorne that they had to make a "hit" to pay for defendant's Cadillac. Defendant drove Hawthorne to the store, took a gun from his belt, handed it to Hawthorne and told him to go inside and commit the robbery while defendant kept the engine running. When defendant told Hawthorne that all was clear, Hawthorne went inside and robbed the attendant at gunpoint. After the robbery Hawthorne got in the car, and defendant drove away. The gun was returned to defendant, and the pair divided the money. They were arrested shortly thereafter.

Defendant testified that Hawthorne had borrowed his car at the time of the robbery; defendant was not with him and did not go to the scene of the alleged robbery. On cross-examination, he admitted he had been convicted of the armed robbery of a cabdriver. He further stated that James Hawthorne was with him on that occasion and that they also kidnapped the cabdriver.

The jury found defendant guilty as charged, and judgment imposing a prison sentence was entered.

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

Turner, Rollins, Rollins & Clark, by Walter E. Clark, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant directs his first assignment of error to the trial court's failure to declare a mistrial following an answer given by Hawthorne while he was being cross-examined by defendant's counsel. In response to the question, "have you been tried and convicted of armed robbery before?" Hawthorne replied, "Yes, me and Garcia Davis both." Defendant immediately moved for a mistrial. In non-capital criminal cases, the granting or refusal of a motion for mistrial rests within the discretion of the judge, and his ruling thereon is not reviewable without a showing of an abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). No abuse of discretion has been shown in this case. Furthermore, the defendant himself testified on cross-examination that he had previously been convicted of armed robbery. When evidence is admitted over objection, but the same evidence is later admitted without objection, the objection is waived. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971). This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in charging the jury on the "theory of acting in concert" rather than charging on the "theory of aiding and abetting." The assignment of error is without merit. The evidence discloses that defendant formulated the robbery plan, recruited Hawthorne to assist him, furnished the gun, acted as "lookout" and drove the getaway car. Not only was he present at the scene, but also he was an active participant in the robbery. The judge gave the proper instructions.

Defendant has failed to show prejudicial error.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. DONALD FOUST

No. 7818SC977

(Filed 20 February 1979)

Burglary and Unlawful Breakings § 6— burglary case—intent to commit larceny—failure of court to define larceny

In a second degree burglary prosecution in which the indictment alleged that defendant intended to commit larceny, the trial court erred in failing to define the term "larceny" in its jury instructions.

APPEAL by defendant from *Wood, Judge.* Judgment entered 8 June 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 February 1979.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Assistant Public Defender Deno Economou, for the defendant.

MARTIN (Robert M.), Judge.

Defendant was indicted for first degree burglary, and was ultimately tried (upon the State's election) for second degree burglary, upon a proper indictment and after the warrant for arrest was amended. From a conviction of second degree burglary and a sentence of 30 to 40 years, defendant appeals, assigning error to the instructions of the trial judge.

We find that defendant must have a new trial. He was charged with second degree burglary, an offense under G.S. 14-51. An essential element of that offense, as derived from the common law, is the intent of the perpetrator to commit a felony after accomplishing the breaking and entering of a dwelling house belonging to another in the nighttime. *State v. Whit*, 49 N.C. 349 (1857). In the case before us, the indictment alleged that defendant's intent was to commit larceny. The trial judge properly instructed the jury that the State had the burden of proof on the issue of defendant's intent. However, nowhere in the record does it appear that the trial court defined the term "larceny" in its instructions, an omission which was prejudicial to defendant and erroneous under our case law. *See State v. Elliott*, 21 N.C. App.

555, 205 S.E. 2d 106 (1974). The conviction appealed from is vacated and the case is remanded for new trial.

New trial.

Judges MITCHELL and ERWIN concur.

STATE OF NORTH CAROLINA v. RAPHAEL SMITH

No. 7813SC721

(Filed 6 March 1979)

1. **Criminal Law § 1— corpus delicti—defendant as perpetrator—proof required**

Proof of a charge in a criminal case requires the proving of two distinct matters: (1) the *corpus delicti* or, stated differently, that the act complained of was done, and (2) that it was done by the person or persons charged.

2. **Criminal Law § 106— motion for nonsuit—substantial evidence test**

In order to withstand motions for judgment as in the case of nonsuit or for dismissal, the State must present with respect to each essential element of the crime charged substantial evidence, or more than a scintilla of evidence, and those tests are in fact identical and only one test which is most frequently designated the "substantial evidence test."

3. **Criminal Law § 106— motion for nonsuit—exclusion of possibility of innocence not required**

The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss; rather, in ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited solely to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged *may* be drawn from the evidence.

4. **Homicide § 21.9— deceased's high blood alcohol level—injuries to deceased—death as murder—sufficiency of evidence**

A doctor's testimony constituted substantial evidence sufficient to support a reasonable inference that the crime of murder had been committed where the doctor, who specialized in pathology, testified that it was possible that the amount of alcohol in the blood of deceased caused her death, but it was his opinion that deceased died of a combination of high blood alcohol level and massive injuries which suppressed the respiratory reflexes of the lungs, and his testimony also indicated that these injuries could have been induced by a tobacco stick which was found broken into pieces at the scene of the death of deceased.

5. Homicide § 21.9— voluntary manslaughter—defendant as perpetrator—sufficiency of evidence

Evidence in a homicide prosecution was substantial evidence from which a reasonable conclusion could be drawn that defendant committed the crime charged and which required submission of the case to the jury where such evidence tended to show that deceased was murdered in her own home; her husband was present at the home during the entire night on which the murder took place; and a thorough investigation of the outside and inside of the home as well as the immediately surrounding area revealed no indication of an intruder or the presence of other persons, thus negating any implications arising from defendant's statement which might have been construed as tending to indicate that an intruder or some other person entered the home and killed defendant's wife.

APPEAL by defendant from *Herring, Judge*. Judgment entered 30 March 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 28 November 1978.

The defendant was indicted for first degree murder. Upon his plea of not guilty, the jury returned a verdict of guilty of voluntary manslaughter. From judgment sentencing him to imprisonment for a term of not less than seven nor more than ten years, the defendant appealed.

The State's evidence tended to show that the defendant and his wife lived together in a mobile home. The defendant's brother went to the defendant's mobile home on the morning of 17 December 1977, and there discovered the body of the defendant's wife on the floor. The defendant's brother called to Mrs. Smith twice. When she failed to answer, he went directly to his home which was immediately adjacent and got his watch. He returned with the watch and attempted to take Mrs. Smith's pulse when he noted that "she felt kind of funny." The defendant's brother picked up a curtain from the floor, covered Mrs. Smith's body and then called the Sheriff. Sergeant John Carr Davis of the Uniform Division of the Brunswick County Sheriff's Department arrived at the defendant's mobile home at 10:06 a.m. At the request of the defendant's mother and sister, Davis entered the defendant's home and found the defendant sitting on a couch and apparently intoxicated. He asked the defendant where his wife was, and the defendant directed him to the wrong room. He again questioned the defendant concerning his wife's whereabouts and was told, "[S]he's in the back bedroom, and I think she's dead." Davis then

found the body and allowed members of the rescue squad to enter the home and confirm the death.

Shortly thereafter, Detective C. Y. Pittman of the Brunswick County Sheriff's Department arrived at the defendant's home. He found the defendant sitting on a couch in the living room and noted that the defendant appeared to be incoherent and intoxicated. Detective Pittman then began his investigation by examining the premises. The body of the victim was lying in the doorway to a back bedroom in the same position as when it was found by the defendant's brother. A hammer was lying near the body. In a second bedroom nearby, a double bed was located. The mattress had been pulled from the bed. It was soaked with water and lying on the floor. There was also "a tremendous amount of broken straw from a broom" in the second bedroom. The broom itself was also found in this bedroom. The handle was off the broom and was found next to the mattress. Straw was also located along the hallway leading to the body in the doorway of the first bedroom and bits and pieces of the straw were found around the body.

Detective Pittman also found five pieces of a tobacco stick in the second bedroom. The pieces of stick were sent to the laboratory of the State Bureau of Investigation for examination where it was concluded that they were originally all parts of one stick. One piece of this stick was jagged on the end in "the shape of a stake." Several hairs were found entwined in the splinters at the end of the piece of the stick. These were examined by the Federal Bureau of Investigation which reported that they were: "Numerous white, gray, and black head hair of Negroid origin. . . ." The Federal Bureau of Investigation further reported that the hairs found on the end of the stick exhibited the same microscopic characteristics as hairs taken from the head of the deceased. Foreign matter analyzed as human blood was also found on some of the pieces of stick.

In the living room, Detective Pittman found an empty half gallon liquor bottle. In the kitchen, he found a drawer of one of the cabinets on the floor with its contents spilled onto the floor. In a third bedroom he found a robe of "a silky material type" which was spotted with a foreign material later analyzed and found to be human blood.

Detective Pittman found no other signs of a disruption or disturbance inside or outside the mobile home. His further inspection around the home revealed nothing else out of the ordinary. He checked the windows and doors and found them to be in working order. At the time of his investigation on the morning of 17 December 1977, several law enforcement officers were in the home. The front door was open, and the back door was unlocked.

Detective Pittman interviewed the defendant on January 10, 1978, after advising him of his constitutional rights. The defendant's statement was reduced to writing, signed on that date by the defendant, and witnessed by his attorney and Detective Pittman. After a *voir dire* hearing at trial, the statement was admitted into evidence without objection. In his statement the defendant indicated that he came home from work around 6:00 p.m. on 16 December 1977. He had a half gallon of liquor with him and began drinking with his wife. He did not leave the mobile home between the time he got home from work and the time his wife was found. He remembered her being found in bed. He and his wife had gone to the back bedroom to sleep, but he could not remember the time. He had carried the bottle of liquor to the bedroom with him and was drinking and could not remember where she slept. He remembered that when he found her she would not wake up. He went to the kitchen, got a pan of water and threw it on her several times in an attempt to wake her. He could not remember picking his wife up and moving her to another room. He remembered going to the store the next day and coming back when he recognized his wife was dead. The defendant could not remember having had any visitors.

The defendant's mother testified for the State that the defendant's wife came to her house at about 10:00 p.m. on 16 December 1977. The defendant's wife had been drinking at the time but did not have any bruises on her and was not hurt in any way.

An aunt of the defendant's wife testified for the State that she saw the defendant and his wife during the week prior to 17 December 1977. The two were standing in her yard on that occasion when the defendant slapped his wife and took out his knife. However, he did not attempt to cut his wife at that time.

Dr. Henry Singletary, a medical doctor specializing in the field of pathology, testified that he examined the body of the de-

ceased wife on 17 December 1977. His examination revealed very extensive bruising around the deceased's left eye and marks that were long and slim, linear on her forehead. There was also bruising about her cheeks, lips, neck, and shoulders. Her left eye was blackened more than her right eye. Her left ear was bruised and exhibited a swelling deformity and linear marks. Dr. Singletary cut open the scalp of the deceased and found hemorrhaging and a large flat blood clot about four inches long. Bruises on the deceased's elbows, arms, breasts and buttocks were so numerous that they were confluent or ran into each other. There was a laceration on the right side of her abdomen which was relatively superficial and went just under the skin and into the fatty tissue beneath. Several of her ribs were fractured. She additionally suffered from a fatty liver of a type seen in connection with the use of alcohol. Her lungs contained fatty globules of a type referred to as an embolism which resulted from mobilization of fatty tissue into the blood stream by the force of trauma. Her blood contained .35 percent alcohol to blood by weight.

Dr. Singletary testified that in his opinion the deceased died of a combination of two factors. One was the very high blood alcohol level. The other was "massive injuries to the soft tissues and mobilization of the fat into the lungs and suppression of respiratory reflexes due to chest injuries, the fat in the lungs, and the alcohol itself." In his opinion, the marks and bruises found on the body could have been caused by the tobacco stick that was introduced into evidence. On cross-examination, Dr. Singletary indicated that it was possible that consumption of alcohol alone could have caused the death of the deceased.

The defendant elected not to present evidence.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Ray H. Walton for defendant appellant.

MITCHELL, Judge.

The sole assignment of error presented and argued on appeal by the defendant is directed to the trial court's denial of his motion to dismiss made pursuant to G.S. 15A-1227. The defendant contends that the State failed to present sufficient evidence to

sustain his conviction and that his motion should have been allowed. In support of this contention, the defendant argues that the State's evidence failed to show either that a crime was committed or that the defendant committed any criminal act.

A motion for dismissal pursuant to G.S. 15A-1227 tests the sufficiency of the evidence to sustain a conviction. In that respect it is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. *See State v. Vaughan*, 268 N.C. 105, 150 S.E. 2d 31 (1966). Therefore, controlling cases dealing with the sufficiency of evidence to withstand a motion for judgment as in the case of nonsuit are equally applicable to the sufficiency of the evidence to withstand a motion for dismissal pursuant to G.S. 15A-1227.

[1] Proof of a charge in a criminal case requires the proving of two distinct matters: (1) the *corpus delicti* or, stated differently, that the act complained of was done, and (2) that it was done by the person or persons charged. Proof of both is necessary to sustain a conviction. *State v. Thomas*, 296 N.C. 236, 246, 250 S.E. 2d 204, 209 (1978); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533 (1939).

[2] Although it is clear that the State must offer evidence of each element of the offense charged and evidence that it was committed by the defendant, until recent years the test governing the amount or type of evidence required on each of these points has been stated in less than consistent terms. *E.g.*: *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955) ("more than a scintilla of competent evidence"); *State v. Gordon*, 225 N.C. 757, 36 S.E. 2d 143 (1945) ("any competent evidence"); *State v. Mann*, 219 N.C. 212, 13 S.E. 2d 247, 132 A.L.R. 1309 (1941) ("any evidence"); *State v. Shermer*, 216 N.C. 719, 6 S.E. 2d 529 (1940) ("more than a mere scintilla"); *State v. McLean*, 209 N.C. 38, 182 S.E. 700 (1935) ("any evidence reasonably sufficient to go to the jury"). The more modern cases, however, seem to agree that the amount of evidence required as to each essential element in order to withstand motions for judgment as in the case of nonsuit or for dismissal is controlled by the "substantial evidence" or "more than a scintilla of evidence" test. In *State v. Weinstein*, 224 N.C. 645, 31 S.E. 2d 920 (1944), the Supreme Court of North Carolina strongly implied that these two tests are in fact identical and interchangeable when it specifically stated that, in order to overcome such motions, the State was re-

quired to produce "any substantial evidence—more than a scintilla—to prove the allegations of the bill." To this day, it appears that the "more than a scintilla of evidence" test and the "substantial evidence" test are in reality only one test which is most frequently designated the "substantial evidence test." *Compare, e.g., State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978), *with State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978), *and State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978).

The interchangeable use of two designations for one test, although at times somewhat confusing, would appear correct. The requirement that the State's evidence of each element be "substantial" is simply a requirement that it be existing and real, not just seeming or imaginary. Webster's Third New International Dictionary 2280 (1971). Therefore, anything more than a scintilla of evidence is "substantial evidence." *See State v. Weinstein*, 224 N.C. 645, 648, 31 S.E. 2d 920, 923 (1944). Having so determined we must proceed to apply the substantial evidence test to the case at hand.

[3] The defendant contends that the substantial evidence offered by the State must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence in order to overcome his motion to dismiss. We are advertent to a line of cases tending to support this position. *See, e.g.*: *State v. Langlois*, 258 N.C. 491, 128 S.E. 2d 803 (1963); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Fulk*, 232 N.C. 118, 59 S.E. 2d 617 (1950); *State v. Frye*, 229 N.C. 581, 50 S.E. 2d 895 (1948); *State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948); *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947); *and State v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472 (1947). However, it is clear that the law is otherwise. The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974); *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969); *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1968); *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444 (1957); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956); *State v. Griffin*, 18 N.C. App. 14, 195 S.E. 2d 569 (1973). In ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited *solely* to the function of determining whether a reasonable inference of the defendant's guilt of the crime charged *may* be

drawn from the evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.

The controlling rule of law was best set forth in *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956). There, the Supreme Court of North Carolina speaking through Justice Higgins stated that:

> We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson*, 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. 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 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.

Therefore, it is for the trial court to determine whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. The trial court having found that such evidence has been introduced, it is *solely* for the jury to

determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E. 2d 204, 209 (1978).

[4] The State's evidence in the present case was clearly sufficient to support a reasonable inference that the crime charged had been committed. Dr. Henry Singletary, a medical doctor specializing in pathology, testified that it was possible that the amount of alcohol in the blood of the deceased caused her death. He specifically testified, however, that it was his opinion that the deceased died of a combination of a high blood alcohol level and massive injuries which suppressed the respiratory reflexes of the lungs. His testimony also indicated that these injuries could have been induced by the tobacco stick which was found broken into pieces at the scene of the death of the deceased. Therefore, Dr. Singletary's testimony constituted substantial evidence sufficient to support a reasonable inference that the crime of murder had been committed. This being the case, it was incumbent upon the trial court to permit the jury to determine whether the crime charged had in fact been committed.

Additionally, we think that substantial evidence was introduced to support a reasonable inference that the defendant committed the crime charged. In considering a motion for judgment as in the case of nonsuit or, as in the present case, a motion for dismissal pursuant to G.S. 15A-1227, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). All evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, and contradictions or discrepancies therein must be resolved in the State's favor. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978). The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

[5] The defendant's statement, whether it be viewed as an admission or as a confession, was introduced as evidence and indicated that he was in his home during the entire night of 16 De-

cember 1977. The physical evidence located at the scene revealed the pieces of a stick which could have caused the wounds resulting in his wife's death and to which were adhered human blood together with human hairs which exhibited the same microscopic characteristics as hairs taken from her head. The "tremendous amount of broken straw from a broom" and the fact that the stick was broken into numerous pieces would support a reasonable inference that an affray sufficient to be noticed occurred in the home on the evening of the death of the deceased. Other testimony indicated the deceased was alive and uninjured with no bruises apparent at 10:00 p.m. on 16 December 1977. She was found dead shortly before 10:00 a.m. the following day with bruises covering most of her body and severe internal injuries and broken bones.

In passing on a motion to dismiss or for judgment as in the case of nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. "This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt." *State v. Thomas*, 296 N.C. 236, 245, 250 S.E. 2d 204, 209 (1978). We find the foregoing evidence in the present case, taken as a whole and considered in the light most favorable to the State to be substantial and sufficient to warrant a reasonable inference of the defendant's guilt. Whether it also excluded every reasonable hypothesis of innocence was not a question for the trial court, and its action in denying the motion was correct.

We are, of course, aware that those portions of the defendant's statement, if any, which tend to rebut the inference of guilt are binding upon the State if uncontradicted by other evidence. The State is not precluded, however, from showing that the facts were different in such cases. This showing may be made by testimony of other witnesses, by other statements of the defendant and from the facts and circumstances of the occurrence itself. 1 Stansbury's N.C. Evidence § 40, p. 117 and n. 92 (Brandis Rev. 1973). Here, certain portions of the defendant's statement in the nature of an admission placed him at the scene of the crime and in the company of the victim. He contends, however, that other portions of his statement tend to be exculpatory as they tend to show that someone else may have had the opportunity to kill his

wife. Assuming arguendo that portions of the defendant's statement tended to be exculpatory, nevertheless, those portions were contradicted by physical evidence showing the circumstances surrounding the crime to be otherwise. The investigating officer specifically testified that he made a thorough search entirely around the outside of the mobile home for any sign of a disruption or anything out of the ordinary. A similar search was made of the interior of the mobile home and all doors and windows were checked. The search of the interior and exterior of the home produced no evidence tending to establish a breaking or entering or tending to corroborate any implications found in the defendant's statement to the effect that an intruder or some other person may have entered the home and committed the alleged crime. The arresting officer's testimony in this regard constituted some evidence, however slight, tending to negate and thereby contradict any possible implications that another person may have entered the home and committed the crime charged. Having made such showing, the State was not bound by any possible exculpatory inferences in the defendant's statement tending to indicate that another person may have had the opportunity to commit the crime charged.

The defendant places great reliance upon the case of *State v. Langlois*, 258 N.C. 491, 128 S.E. 2d 803 (1963), for the proposition that the evidence in this case reveals only that he had a "mere opportunity" to commit the crime and will not support the trial court's ruling in permitting the case to go to the jury. *Langlois* is, however, easily distinguishable on its facts from the present case. In *Langlois* the deceased was a three and one-half year old child who "had been suffering from anemia most of his life" and who was described as being clumsy and as falling often. The child's death in that case resulted from extensive peritonitis caused by the rupture of the small intestine which had occurred twenty-four to forty-eight hours prior to death. There appears to have been no evidence as to the whereabouts of the child for most of the period of time during which the injury most probably occurred. The facts in *Langlois* did not present a case such as the present case in which there was substantial evidence that the defendant was present when the blows that killed his wife were struck. Therefore, we do not consider that case to be controlling authority here.

The case of *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947), is another case frequently cited for the proposition that evidence introduced reveals only "mere opportunity" to commit a crime which will not support a trial court's ruling permitting a given case to go to the jury. We think that, for the reasons stated by Justice Seawell in his dissent in *Coffey*, more recent cases have cast serious doubt upon the reliability of *Coffey* as binding authority with regard to the nature and amount of evidence required to show more than mere opportunity to commit a crime and, thereby, to sustain a conviction. *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444 (1957); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). However, to whatever extent *Coffey* may still be taken as authoritative concerning such issues, it is easily distinguishable from the present case. In *Coffey* the deceased was killed while guarding a wagon load of whiskey which had been left beside a road apparently open to the general public. The defendant made an admission that he was present at the time of the acts causing the death of the deceased but contended that others had committed them. Various other witnesses, including the children of the deceased, indicated that others had been seen in the vicinity of the wagon at about the time the deceased must have been struck. Our Supreme Court found *inter alia* that this evidence established mere opportunity for the defendant to commit the crime and was not sufficient to require the submission of the case to the jury.

Here, however, the evidence presents a situation in which the jury could reasonably infer that the deceased was murdered in her own home in the presence of her husband. In addition, there was evidence tending to show that a thorough investigation of the outside and inside of the home as well as the immediately surrounding area revealed no indication of an intruder or the presence of other persons. This evidence tended to negate any implications arising from the statement of the defendant which might have been construed as tending to indicate that an intruder or some other person had entered the home and killed the defendant's wife. We find that such evidence for the State was substantial evidence from which a reasonable conclusion could be drawn that the defendant committed the crime charged and which required the submission of the case to the jury. Thereafter, it was solely the province of the jury to determine whether this evidence also established the defendant's guilt beyond a reason-

able doubt. *E.g., State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974); *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969); *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1968); *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444 (1957); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). *But see, e.g., State v. Langlois*, 258 N.C. 491, 128 S.E. 2d 803 (1963); *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947).

It appears that the holdings of the Court in both *Langlois* and *Coffey* were based upon an application of the rule requiring judgment as in the case of nonsuit or dismissal when the evidence considered in the light most favorable to the State failed to exclude every reasonable hypothesis of innocence. Therefore, we think that statements in those cases relative to situations in which mere opportunity to commit a crime charged have been shown are *obiter dictum* and not entitled to the same weight as authority given to statements which comprise the basis of a holding. For the reasons previously given, we think our Supreme Court has rejected the rule that the State's evidence must exclude every reasonable hypothesis of innocence before a case may be sent to the jury, which formed the basis of its holdings in *State v. Langlois*, 258 N.C. 491, 128 S.E. 2d 803 (1963) and *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947), and that those cases are, therefore, no longer to be viewed as authoritative concerning such matters.

To hold otherwise would be to license any man to brutally murder his wife with impunity upon finding himself alone with her in their home. He would then be free to testify without contradiction by her that she was killed by some other person or that he was drunk and some other person must have killed her. When the State was unable to contradict his tale by any means other than circumstantial evidence, as would be the situation in most cases, he would be set free to scoff at the law and proclaim his criminal deed to the general public without fear of again being placed in jeopardy. We simply do not believe this to be or to have been the law of this jurisdiction. Therefore, we find no error in the trial court's denial of the defendant's motion to dismiss made pursuant to G.S. 15A-1227.

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

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, AETNA CASUALTY AND SURETY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, GREAT AMERICAN INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HOME INDEMNITY COMPANY, HOME INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, MARYLAND CASUALTY COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SHELBY MUTUAL INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, TRAVELERS INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY, AND UNITED STATES FIRE INSURANCE COMPANY, APPELLANTS.

No. 7810INS238

(Filed 6 March 1979)

1. **Master and Servant § 80— workmen's compensation rates—new statutes—elimination of delay**

In enacting a new statutory procedure for workmen's compensation rate-making in 1977, G.S. Ch. 58, Art. 12B, it was the legislative intent to eliminate unfair and unnecessary delay in the rate-making process.

2. **Master and Servant § 80— workmen's compensation rates—*no* disapproval by inaction**

The Commissioner of Insurance can no longer effectively disapprove a workmen's compensation rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof.

3. **Master and Servant § 80— workmen's compensation rates—disapproval of filing—findings required of Commissioner of Insurance**

While the new statutory scheme for workmen's compensation rate-making does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the Rate Bureau has not

carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of *prima facie* correctness given to an order of the Commissioner by G.S. 58-9.4 and G.S. 58-9.6 is rebutted. G.S. 58-124.21(a).

4. Master and Servant § 80— workmen's compensation rates—appellate review of order disapproving

If the appellate court finds that an order disapproving a workmen's compensation rate filing is not supported by material and substantial evidence, the court must then determine whether the filing complies with statutory standards and methods and is supported by substantial evidence. If the appellate court does not find such compliance, the disapproval order will be vacated and the cause remanded for proceedings as directed; however, if the court does find such compliance, the disapproval order will be vacated and the filing approved, and this will constitute a final determination under G.S. 58-124.22.

5. Master and Servant § 80— workmen's compensation rates—effect of statutory changes—use of national distribution tables

A finding by the Commissioner of Insurance that a workmen's compensation rate filing violated G.S. 58-124.19 because it relied on national distribution tables in calculating the effect of statutory changes on the rate structure when credible North Carolina data was available was not supported by substantial evidence where the Rate Bureau presented substantial evidence to show that the filing was based on credible North Carolina data when such data was available, and the Rate Bureau only relied on national statistics in distributing injuries and medical cost frequencies; there was no evidence tending to show that the national data used in the filing was not representative of North Carolina experience or that the distribution data had no validity in North Carolina; and there was no evidence that credible North Carolina experience existed.

6. Master and Servant § 80— workmen's compensation rates—use of countrywide expense data

A finding by the Commissioner of Insurance that a workmen's compensation rate filing was defective because it relied on countrywide expense data when credible North Carolina experience was available was unsupported by substantial evidence where the Rate Bureau presented evidence that credible North Carolina expense data was not available because of the interstate nature of workmen's compensation insurance, and there was no evidence to the contrary.

7. Master and Servant § 80— workmen's compensation rates—use of national credibility factors

A finding by the Commissioner of Insurance that a workmen's compensation rate filing was defective because national credibility factors were used to supplement North Carolina credibility factors contrary to earlier rate-making procedure was unsupported by substantial evidence where there was testimony that the new procedure did not affect overall rates and reflected the class relativities more accurately than the old procedure, and there was no evidence that credible North Carolina evidence was ignored or given less weight than before or that the new procedure caused excessive or discriminatory rates.

8. Master and Servant § 80— workmen's compensation rates—consideration of expenses of stock companies only

A finding by the Commissioner of Insurance that proposed workmen's compensation rates were excessive because the expense allowance was based solely upon the expenses of stock companies without consideration of the expenses of mutual companies, which generally have lower expenses than stock companies, was unsupported by material and substantial evidence where there was testimony that averaging the expenses of mutual and stock companies would not provide a fair rate of return for either type of company and that the rates for mutual companies were not excessive because dividends paid by the companies to the policyholders compensate for any extra charges, and the Department of Insurance presented no contradictory evidence.

9. Master and Servant § 80— workmen's compensation rates—no breakdown of incurred losses

A finding by the Commissioner of Insurance that a workmen's compensation rate filing was inadequate because it did not contain a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported losses was not supported by substantial evidence, although the Commissioner requested that the Rate Bureau submit such a breakdown of incurred losses and there was substantial evidence that such data was available, where there was no evidence that the data requested would establish that the proposed rates were excessive; there was substantial evidence that the loss development factors would compensate for any overstating of reserves; no evidence was presented by the Insurance Department tending to show that the loss development factors used by the Rating Bureau were not sufficient to compensate for potential excessive reserves; and the breakdown requested by the Commissioner was therefore immaterial to a determination of whether the proposed rates were excessive due to overstated reserves.

10. Master and Servant § 80— workmen's compensation rates—underwriting margin—consideration of investment income

In a workmen's compensation rate hearing, the Commissioner of Insurance could properly consider investment income in determining whether a 2.5% margin for underwriting was reasonable; however, the Commissioner erred in requiring the investment income to be considered at a risk-free rate of return rather than the rate of return actually experienced by the companies, since such requirement would limit the range of investments by insurance companies contrary to the provisions of G.S. 58-79.1.

APPEAL by the North Carolina Rate Bureau and insurance companies from Order of the Commissioner of Insurance issued 7 December 1977. Heard in the Court of Appeals on 9 January 1979.

On 9 September 1977 the Rate Bureau filed for a 28.4% overall increase in the workers' compensation insurance premium rate with the Commissioner of Insurance. On 10 October 1977, the Commissioner issued a "Notice of Public Hearing" which contend-

ed that the Filing was not in compliance with Article 12B of Chapter 58 of the General Statutes, because (1) it failed to utilize North Carolina evidence when credible evidence was available, (2) due consideration had not been given to past loss experience in North Carolina because the schedules were based on a national Medical Cost Frequency Distribution Study, the Workers' Compensation Injury Tables and a distribution of wages called the 1973 Standard Wage Distribution Table, (3) the rates were excessive due to basing the rate formula solely on the expenses of stock companies when mutual companies have lower expenses, (4) the proposed rates were excessive due to excessive reserves being included in the incurred losses reported.

At the hearing on 9 November 1977, Roy Kallop, an actuary for the National Counsel on Compensation Insurance, testified for the appellant. Kallop was qualified as an expert in workers' compensation rate-making. W. Bryon Tatum, Director of Technical Operations for the North Carolina Department of Insurance, who was qualified as an expert in workers' compensation rate-making, testified for the Department of Insurance. Their testimony will be set out in detail later.

On 7 December 1977 the Commissioner issued an order disapproving the 9 September 1977 Filing by the Rate Bureau. The Commissioner made the following Findings of Fact and Conclusions of Law:

"FINDINGS OF FACT

1. That the North Carolina Rate Bureau (hereinafter called the Bureau) made a filing for revised worker's compensation insurance rates on September 9, 1977.

2. That said filing proposed a 28.4% increase in the overall level of worker's compensation rates and rating values presently in force in North Carolina.

3. That said filing proposed rate increases based on the alleged effect of legislative changes in benefits under the Workmen's Compensation Act and further based on the alleged effect of medical fee changes.

4. That the rate level effects of legislation and revised medical fee schedules were based on the medical cost fre-

quency distribution study of the National Council on Compensation Insurance, a distribution of accidents called the Worker's Compensation Injury Tables, and a distribution of wages called the 1973 Standard Wage Distribution Table, which are tables of countrywide data, when credible North Carolina experience was available on which to base the rate level effects of most of such legislation and revised medical fee schedules.

5. That the expense allowance in the rate-making formula was based on countrywide expenses when credible North Carolina expense experience was available.

6. That national credibility factors have been used to supplement the North Carolina credibility factors instead of the method of supplementing the North Carolina credibility factors used in previous worker's compensation filings in North Carolina.

7. That the proposed rates are excessive due to basing the expense allowance in the rate-making formula solely on the expense experience of stock companies when stock companies have greater expenses than other companies.

8. That on cross examination, witness Kallop testified that no audit of the loss experience reported by the companies had been made.

9. That said filing did not contain a breakdown of incurred losses into paid losses, reserves, bulk reserves, and incurred but not reported (IBNR) reserves.

10. That witness Tatum testified that a breakdown of incurred losses into paid losses, reserves, bulk reserves, and incurred but not reported (IBNR) reserves is required in order to properly analyze the incurred losses presented in the filing.

11. That an overstatement of incurred losses will cause an overstatement of the indicated rate level change.

12. That witness Tatum testified that in order to properly audit incurred losses for an indication of overstatement, in-

curred losses must be separated into paid losses, reserves, bulk reserves, and incurred but not reported (IBNR) reserves.

13. That by letter dated November 4, 1977 the Bureau reported that 'Loss reserves for North Carolina worker's compensation insurance are not available' and that 'Individual state data on net losses unpaid and incurred but not reported losses are also not available' and that 'Similarly unavailable are data with regard to bulk reserves.'

14. That the Insurance Expense Exhibit is a report that all casualty insurance companies are required to file with the Department of Insurance of each state in which they are licensed.

15. That the Insurance Expense Exhibit for calendar year 1976 was required to be filed by each company no later than April 1, 1977.

16. That the instructions for Part IV of the Insurance Expense Exhibit (Exhibit of Workmen's Compensation Earned Premiums and Incurred Losses by States (Direct Business)) provide that 'The reserves for unpaid losses used in calculating incurred losses should be the company's individual estimate of outstanding claims, including reserves for claims incurred but not reported.'

17. That in order to report incurred losses on Part IV of the Insurance Expense Exhibit each company must ascertain its paid losses, reserves, bulk reserves, and incurred but not reported reserves.

18. That the elements of North Carolina Incurred Losses (paid losses, reserves, bulk reserves and incurred but not reported reserves) were available to the Bureau from each company on April 1, 1977 for the calendar year 1976.

19. That the Bureau did not make a request of its member companies for a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported (IBNR) reserves.

20. That witness Tatum testified that the Bureau's failure to provide a breakdown of incurred losses into paid

losses, reserves, bulk reserves and incurred but not reported (IBNR) reserves when said information was available and requested was a dilatory action and amounts to bad faith by the Bureau.

21. That witness Tatum testified that the filing contained no calculation of anticipated income on investments of unearned premium reserves and of loss reserves.

22. That witness Tatum testified that invested income on investments of unearned premium reserves and of loss reserves at a risk free rate of return of no less than 6% should be anticipated as future earnings.

23. That an understatement of anticipated earnings for the future will cause an overstatement of the indicated rate level change.

CONCLUSIONS OF LAW

1. That due consideration has not been given to past and prospective loss experience within North Carolina.

2. That the proposed rates are excessive due to basing the expense allowance in the rate-making formula solely on the expense experience of stock companies when stock companies have greater expenses than other companies.

3. That the Bureau has not carried the burden of proving that it has not overstated the indicated rate level change by its failure to provide a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported (IBNR) reserves which was available from its member companies and which is necessary in order to properly analyze and audit incurred losses for an indication of overstatement of incurred losses.

4. That the Bureau was dilatory in not providing a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported (IBNR) reserves.

5. That the Bureau has not carried the burden of proving that the proposed rates are not excessive due to its failure to provide for investment income on unearned premium reserves and on loss reserves at a risk free rate of return."

From this order, the Rate Bureau appeals.

Attorney General Edmisten by Assistant Attorney General Isham B. Hudson, Jr. for plaintiff appellee.

Allen, Steed and Allen by Thomas W. Steed, Jr. and Charles D. Case; Young, Moore, Henderson & Alvis by Charles H. Young and George M. Teague for defendant appellants.

CLARK, Judge.

The Rate Bureau has appealed under the provisions of G.S. 58-124.22 and G.S. 58-9.4 from the order of the Commissioner of Insurance disapproving the 9 September 1977 Filing of the Rate Bureau in its entirety. This Court has the authority under G.S. 58-9.6(b) to reverse or modify the order of the Commissioner "if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are: . . . [u]nsupported by material and substantial evidence in view of the entire record as submitted . . . ." The insurers, represented in this case by appellant Rate Bureau, have the right to a premium rate which will assure a fair and reasonable profit and no more. *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977).

The problem of deciding whether the Commissioner has acted responsibly is a delicate one. In this case brevity must yield to the massive record and the need for construction of 1977 rate-making legislation, codified in Article 12B, Chapter 58, General Statutes of North Carolina. Having given some consideration to the record on appeal, the briefs, relevant statutes and opinions, we approach the decision-making with the desire to avoid the tendency to judicialize administrative rate-making procedures.

I. Workers' Compensation Rate of 1973

The last rate adjustment for workers' compensation insurance rates went into effect on 1 December 1973. See *State ex rel. Commissioner of Insurance v. Attorney General*, 19 N.C. App. 263, 198 S.E. 2d 575, *cert. denied* 284 N.C. 252, 200 S.E. 2d 659 (1973). Under the statutory scheme at that time the Compensation Rating and Inspection Bureau was required to submit its rate proposals to the Commissioner for approval. G.S. 97-100; G.S. 97-102 to -104. The 1973 rate change was based on the 21 September

1972 Filing made by the Bureau. After the 1973 rate became effective, a rate filing was made on 19 March 1974 and was denied by the Commissioner on 14 October 1975. Upon appeal, this Court on 4 August 1976 ordered a remand for appropriate findings. See *State ex rel. Commissioner of Insurance v. Rating and Inspection Bureau*, 30 N.C. App. 332, 226 S.E. 2d 822 (1976). Thereafter the Commissioner held a series of hearings in 1976 and 1977, issued his "Revised Findings of Fact" on 11 February 1977, and again disapproved the Filing. The Bureau again appealed, and this Court in an opinion filed on 18 April 1978 vacated the order of the Commissioner on the ground that his findings of fact were not supported by material and substantial evidence, but the proceeding was not remanded because of the 9 September 1977 Filing which is the subject of this appeal. *State ex rel. Commissioner of Insurance v. Rating and Inspection Bureau*, 36 N.C. App. 98, 242 S.E. 2d 887 (1978).

Since the 21 September 1972 Filing, the basis for the 1973 rate, there have been six legislative changes and three Industrial Commission changes which have increased benefit levels and costs for workers' compensation. These changes constitute substantially the basis for this 9 September 1977 Filing, an overall increase of 28.4% over the 1973 rate. Assuming that the 1973 rate was fair, in view of the nine changes resulting in increased benefit levels and costs, it is reasonable to conclude some increase in the rate is necessary to assure the insurer a fair and reasonable profit.

II. 1977 LEGISLATION

In 1977 the General Assembly modified G.S. 97-100 and repealed G.S. 97-102 to -104 and other statutes making up a patchwork system of rate-making procedures and enacted new and comprehensive legislation for the purpose of regulating workers' compensation and other types of insurance rate-making. Article 12B, Chapter 58, General Statutes of North Carolina.

The old "prior approval" method of setting workers' compensation insurance rates was replaced by a new "file and use" procedure which in substance authorized the Rate Bureau to make a rate filing and provided that "[e]ach filing shall become effective immediately on the date specified therein but not earlier than 90

days from the date such filing is received by the Commissioner." G.S. 58-124.20(a).

If the Commissioner contends that the Filing fails to comply with the law he must, within 30 days after the date of the filing, give written notice to the Bureau "specifying in what respect . . . he contends such filing fails to comply . . ." and fix a date for hearing. G.S. 58-124.21(a).

At such hearing the Commissioner shall consider the factors specified in G.S. 58-124.19 as follows:

> "*Method of rate making; factors considered.* — The following standards shall apply to the making and use of rates:
>
> (1) Rates shall not be excessive, inadequate or unfairly discriminatory.
>
> (2) Due consideration shall be given to past and prospective loss experience, within this State, to the hazards of conflagration and catastrophe, to a reasonable margin for underwriting profit and to contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses specially applicable to this State, and to all other relevant factors including judgment factors, deemed relevant, within this State; provided, however, that countrywide expense and loss experience and other countrywide data shall be considered where credible North Carolina experience or data is not available."

After hearing, if the Commissioner disapproves the filing, wholly or in part, G.S. 58-124.21(a) requires that he include in his order "wherein and to what extent such filing is deemed to be improper . . . ." And to insure proper appellate review upon appeal under G.S. 58-9.4 by the Rate Bureau from all or any part of the order, the Commissioner must make findings of fact which specifically point out the absence of, or deficiencies in, the evidence produced in support of the filing. These findings must be supported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b)(5); *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977).

Pending judicial review of the Commissioner's order of disapproval, the Rate Bureau has the option to continue to use the filing rate, provided that each insurer member of the Bureau shall place in escrow account "the purportedly unfairly discriminatory or excessive portion of the premium collected during such interim period and the court, upon a final determination, shall order the escrowed funds to be distributed appropriately, except that refunds that are de minimus shall not be required." G.S. 58-124.22(b).

This completes our attempt to present the new statutory scheme for workers' compensation insurance rate-making. Verbatim quotations from the various relevant statutes have been limited and many statutes have been summarized, hopefully avoiding accusations of voluminosity without sacrificing clarity. The purpose is not to present a detailed account of the new statutory scheme of rate-making but to present those parts of the scheme which are relevant and significant in understanding and interpreting the statutory scheme.

III. CONSTRUCTION OF 1977 LEGISLATION

In construing the new statutory procedures for workers' compensation rate-making our primary function is to insure that legislative purpose is accomplished. In addition to statutory language the court may also consider the circumstances surrounding the adoption which throws light upon the evil sought to be remedied, which involves a consideration of the terms and construction given to repealed statutes. *State ex rel. Commissioner of Insurance v. Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978); *State ex rel. Commissioner of Insurance v. Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977).

[1] Clearly, it was the legislative intent to eliminate unfair and unnecessary delay in the rate-making process. Such delay is clearly illustrated by the Filing, referred to heretofore, made under the old statutory scheme by the Compensation Bureau on 19 March 1974, which was disapproved by the Commissioner and on appeal vacated and remanded, again disapproved by the Commissioner, and finally determined by this Court on 18 April 1978, more than four years after the Filing. Further, this Court could not have made a final determination at that time if the 19 March

1974 Filing had not in effect been superseded by the Filing which is the subject matter of this proceeding, because the Court could only vacate the Commissioner's order of disapproval and remand again to him. It is apparent that under the old statutory rate-making procedure a Commissioner could delay *ad infinitum* a rate filing, even though the rate filing, wholly or in part, was clearly supported by substantial evidence and the contentions of the Commissioner were feckless.

In enacting the 1977 legislation it was understood by the General Assembly that the new statutory rate-making scheme would "inevitably . . . entail corresponding changes in the functions and operations of the Insurance Commissioner and the Department Staff" as well as those of the predecessor to the Rate Bureau. LEGISLATIVE RESEARCH COMMISSION, REPORTS OF THE 1977 GENERAL ASSEMBLY OF NORTH CAROLINA: FIRE AND CASUALTY INSURANCE RATE REGULATION (1977) at 47, 49.

[2, 3] In construing the new statutory rate-making process, the provisions having particular significance are the requirements that the Commissioner's disapproval order must determine "wherein and to what extent such filing is deemed to be improper," G.S. 58-124.21(a), and the "filing shall become effective immediately on the date specified therein," G.S. 58-124.20(a). It is evident that the Commissioner can no longer effectively disapprove a rate filing by inaction or a bare assertion that the Rate Bureau has not carried its burden of proof. Though the new statutory scheme does not shift the ultimate burden of proof from the Rate Bureau to the Commissioner, it does place on the Commissioner, in disapproving a filing, the burden of affirmatively and specifically showing how the Bureau has not carried its burden of proof, and, if the Commissioner fails to do so by substantial evidence, the presumption of *prima facie* correctness given to an order of the Commissioner by G.S. 58-9.4, -9.6 is rebutted.

[4] If the Commissioner fails to perform the affirmative duties imposed upon him by the 1977 legislation, this Filing shall be deemed to be approved, just as there is a deemed approval upon his failure to give notice of hearing within 30 days under G.S. 58-124.21(b). If this Court, on appeal from the Commissioner's order of disapproval, finds that the order is not supported by

material and substantial evidence, it is then the duty of the Court to determine whether the Filing complies with the statutory standards and methods and is supported by substantial evidence. If we do not find such compliance the disapproval order will be vacated and the cause remanded for proceedings as directed. If we do find such compliance, the disapproval order will be vacated and the Filing approved, and this will constitute a final determination under G.S. 58-124.22, which will require an order distributing the escrowed funds to the members of the Rate Bureau.

In *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720, it was held that the reviewing court has no inherent authority to fix rates nor to continue them in effect pending a hearing on remand. This decision was based on the pre-1977 legislative scheme of rate-making. Under the 1977 legislative scheme, this Court is not setting a workers' compensation rate. The rate is set by the Commissioner in failing to carry the burden of showing affirmatively and specifically that the Filing does not comply with statutory standards. Any other conclusion would be ineffectual in carrying out the purpose of the legislature to establish without unnecessary delay rates which "shall not be excessive, inadequate or unfairly discriminatory." G.S. 58-124.19(1).

We now reach the question of whether the Commissioner's order of 7 December 1977, disapproving the Filing, was within his authority and terminated the effectiveness of the Filing.

IV. USE OF COUNTRYWIDE DATA

The Commissioner found that the Filing by the Rate Bureau was deficient because the Bureau improperly relied on countrywide data in three instances in calculating the proposed rates. The Filing was held to be defective because the Bureau (A) relied on national distribution tables in calculating the effect of statutory changes on the rate structure, (Finding of Fact 4); (B) based its expense allowance on countrywide expenses, (Finding of Fact 5); and (C) supplemented North Carolina credibility factors with national credibility factors, (Finding of Fact 6).

A.

[5] In Finding of Fact 4, the Commissioner found that the Filing was in violation of G.S. 58-124.19 because the Filing relied on the

medical cost frequency distribution study of the National Council on Compensation Insurance, a distribution of accidents called the Workers' Compensation Injury Tables and a distribution of wages entitled the 1973 Standard Wage Distribution Table, in calculating the effect of statutory modifications on the rate structure when credible North Carolina data was available. The Rate Bureau contends that the Commissioner's finding was not supported by substantial evidence.

Since 1 December 1973, the date at which the current rates went into effect, the legislature and the Industrial Commission have provided for numerous increases in Workers' Compensation benefit levels. Roy Kallop, expert witness for the Rate Bureau, testified that some of the amendments were completely reflected in North Carolina experience and therefore no national data was relied upon in calculating the effect of those modifications on the rate structure. However, not all of the amendments were completely reflected in experience. Since the liability of the companies increased as a result of the amendments, it was necessary to include the anticipated effects of the changes in the Filing. In determining the effect of the statutory changes upon the rate structure the Rate Bureau used the following procedure: First, the Bureau calculated what portion of each statutory change was reflected in experience, applying a weighted average to those amendments which went into effect in the middle of a calendar year. The Filing then calculated the loss experience caused by the statutory changes which were already fully or partially reflected in experience. Second, the Bureau calculated the effect of the benefit level increases and medical fee changes not reflected in experience by (1) generating the old monetary costs and new monetary costs, based solely on North Carolina data such as the minimum weekly benefit and average weekly wage in this State, (2) dividing the new costs by the old costs to determine the percentage of change in costs and (3) distributing the percentage of change among the various types of injuries. Finally, applying North Carolina loss experience by the types of injuries and medical fees, the Bureau calculated the overall cost increase.

Kallop testified that the countrywide data was only used in calculating the effect of statutory changes not yet reflected in experience. The countrywide data was used in calculating distribution since a large pool of experience is necessary in order

to obtain reliable figures, and North Carolina experience is insufficient to distribute dependency groups and types of injuries such as death or dismemberment.

The Rate Bureau presented substantial evidence to show that the Filing was based on credible North Carolina data wherever such data was available, and that the Rate Bureau only relied on national statistics in distributing injuries and medical cost frequencies. There is no evidence which tends to show that the countrywide data utilized in the Filing was not representative of North Carolina experience or that the distribution tables had no validity in North Carolina. *See, State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977). Nor was there any testimony that credible North Carolina experience existed. G.S. 58-124.19 specifically authorizes the Rate Bureau to rely upon countrywide data if there is insufficient experience in North carolina to provide credible statistics. The Commissioner may not reject as untrustworthy evidence that is uncontradicted or unimpeached. *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977). The Commissioner's Finding of Fact 4 was not based on substantial evidence and therefore it is apparent that this finding provides no support for the Commissioner's Conclusion of Law 1.

B.

[6] The Commissioner also found in Finding of Fact 5, that the Filing relied upon countrywide expense data when credible North Carolina experience was available. There was testimony by Kallop that the workers' compensation business is inherently interstate in nature and that it is difficult and impractical to isolate expenses separately by state. The Department of Insurance presented no testimony to contradict Kallop, nor was there any evidence that credible North Carolina evidence was available or that the countrywide data did not reflect North Carolina expenses. In *State ex rel. Insurance Commissioner v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882, the court held that the evidence did not support the Commissioner's finding of fact that the Filing was defective because it relied on countrywide expense data. The uncontradicted evidence established that the countrywide data was representative of interstate experience. In *State ex rel. Commissioner of Insurance v. Attorney General*, 19

N.C. App. 263, 198 S.E. 2d 575, the court noted that most workmen's compensation insurers do business in many states and that a company employee is not paid more or less while working on a North Carolina transaction than while working on a matter from another state. These expenses tend to be uniform from state to state. In addition, the insurers are often multi-state corporations. Here, the testimony of Kallop tends to show that credible North Carolina expense data is not available because of the interstate nature of workers' compensation insurance. There is no evidence to the contrary. Thus the record reveals that the Commissioner's Finding of Fact 2 is not supported by substantial evidence and cannot support the Commissioner's Conclusion of Law No. 1.

C.

[7] The Commissioner also found in Finding of Fact 6 that national credibility factors were used to supplement the North Carolina credibility factors contrary to earlier rate-making procedures.

Kallop testified that in the former method of allocating losses among the individual classification groups the Rate Bureau assigned a percentage of credibility to actual North Carolina experience. The residual percentage of that class was assumed to parallel the loss changes in the broad industry group, "manufacturing", "contracting", or "all others" into which the class fell. Consequently, according to Kallop, the allocation of costs among the individual classifications was not accurate.

In the Filing *sub judice*, the Bureau assigned a percentage of credibility to North Carolina data following the established procedures. Then, half of the residual credibility was deemed to track the national rate of change for that classification. The other half of the residual credibility was treated as in previous filings in which the losses were assumed to track the rate of change in the broad industry group in North Carolina. This method, according to Kallop, does not produce any more or less premium. It is designed merely as a means of establishing the most accurate relationship of losses between the various classes of workers in North Carolina. There is no requirement that the Rate Bureau must always use the same rate-making formulas. *See, State ex rel. Commissioner of Insurance v. Rate Office*, 287 N.C. 192, 214

S.E. 2d 98 (1975). G.S. 58-124.19 provides that national data may be utilized where credible North Carolina experience is unavailable. Here, the countrywide data is used only to *supplement* the North Carolina evidence, so it is clear that the Filing is not in violation of G.S. 58-124.19. In addition, Kallop testified that the new procedure did not affect overall rates, and that under the new formula the class relativities were reflected more accurately. There is no evidence whatsoever that credible North Carolina evidence was ignored, or given less weight than before, or that the new formula caused excessive or discriminatory rates in violation of Article 12B, Chapter 58 of the General Statutes. The Commissioner's Finding of Fact 6 is unsupported by substantial evidence and cannot support his Conclusion of Law 1.

Therefore, there remains no finding of fact, based on substantial evidence, to support the Commissioner's Conclusion of Law 1.

V. EXPENSES OF COMPANIES

[8] In Finding of Fact 7, the Commissioner found that the proposed rates were excessive because the expense allowance was based solely upon the expenses of stock companies, without considering the expenses of mutual companies, and that stock companies generally have higher expenses than mutual companies.

The Rate Bureau contends that the Commissioner's finding was not based upon substantial and material evidence.

The testimony of Kallop tended to show that the insurance companies which write workers' compensation insurance are either mutual companies or stock companies. Stock companies, owned by stockholders, generally market insurance through commissioned agents. Mutual companies, on the other hand, utilize no agents since they are owned and operated by the policyholders. Mutual companies sell insurance through company offices thereby eliminating the additional costs of agents and commissions. The mutual companies then return the excess portion of the premiums to the policyholders by way of dividends. Kallop testified that if the expense costs are averaged, as urged by the Department of Insurance, the stock companies are unable to obtain a fair rate of return, and the mutual companies are unable to pay sufficient dividends to compete with the stock companies. Averaging the expenses of mutual and stock companies would not provide a fair rate of return for either type of company.

Bryon Tatum, witness for the Insurance Department, testified that calculating the expenses based solely upon the expenses of stock companies would provide excessive profits for mutual companies because of the higher expenses of stock companies. Tatum also testified that expenses are averaged in calculating expenses for automobile insurance.

G.S. 58-124.19 provides that the Commissioner may disapprove a rate filing if the proposed rates are "excessive, inadequate or unreasonable." According to Kallop's testimony, stock companies and mutual companies, because of their different structures, by definition have different expenses. The statutory scheme, however, does not allow deviations and therefore the Rate Bureau must generate a unified rate providing a fair rate of return for *both* types of companies. Kallop testified that the averaging method proposed by the Department of Insurance would create a rate that is inadequate to cover the expenses of stock companies and which did not accurately reflect the expenses of mutual companies. The proposed rate clearly provides an accurate expense allowance for stock companies, and also provides a fair rate of return for mutual companies since the excessive profits are returned to the policyholders in dividends.

The Commissioner's disapproval must be based on an affirmative showing that the proposed Filing fails to comply with statutory standards. *State ex rel. Commissioner of Insurance v. Rating Bureau*, 30 N.C. App. 487, 228 S.E. 2d 261 (1976), *aff'd* 292 N.C. 70, 231 S.E. 2d 882 (1977). The Commissioner may not reject as untrustworthy uncontradicted testimony or data. *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977).

There is substantial and uncontradicted evidence presented by the Department of Insurance that the Filing considered only the expenses of stock companies and that stock companies have greater expenses than mutual companies. This is conceded by the Rate Bureau. Therefore, the Department of Insurance contends, the rates are excessive for mutual companies. This contention is refuted by Kallop's testimony that the rates for mutual companies are not excessive because dividends paid by the companies to the policyholders compensate for any extra charges. The Department of Insurance presented no evidence contradicting or impeaching

Kallop's testimony. That part of the Commissioner's Finding of Fact 7 which finds that the proposed rates are excessive is not based on material and substantial evidence and thus there is no support for the Commissioner's Conclusion of Law No. 2.

VI. BREAKDOWN OF LOSS RESERVES

[9] In Findings of Fact 9 through 19, the Commissioner stated that the Filing did not contain a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported losses, and that an overstatement of such reserves would result in excessive rates. The Commissioner also found that the necessary information on the breakdown of reserves was available to the Bureau. The Commissioner concluded as a matter of law that the Rate Bureau had "not carried the burden of proving that it has not overstated the indicated rate level change by its failure to provide a breakdown of incurred losses into paid losses, reserves, bulk reserves and incurred but not reported (IBNR) reserves which was available from its member companies and which is necessary in order to properly analyze and audit incurred losses for an indication of overstatement of incurred losses."

The Notice of Public Hearing requested that the Rate Bureau submit a breakdown of incurred losses to the Commissioner. On 4 November 1977, the Bureau notified the Commissioner that such a breakdown was unavailable, and indicated that the annual change in loss reserves was reported on page 14 of Best's Executive Data Service. Kallop testified that the reserve figure in Best's data was a reflection of calendar year changes. In other words, that figure represented paid losses and incurred losses for the calendar year minus the initial loss reserve. The losses included all losses reported and incurred during that particular calendar year, regardless of when the policy covering the loss was written. Kallop also testified that, assuming that the reserves were excessive, the loss development factor which tracked losses over a period of years would correct for any underreserving or overreserving. The change in reserve would be reflected in the calendar year data, and that would feed into the next year's calendar year data and there would consequently be a correction for excess reserves. Therefore, the rates would not be excessive regardless of any overstatement of reserves. In addition, Kallop

testified that it is impossible to determine whether or not the reserves are excessive by a breakdown of reserves into the various components because the determination of liability must await the final resolution of each claim. The setting of reserves is essentially an *estimate* of liability. If the estimate should prove too high or too low, this would be corrected in the loss development factor.

Tatum testified that in the medical malpractice insurance companies, the case reserves were overstated and that the insurance companies could not justify the method of calculating incurred but not reported loss reserves. There is no uniform method currently utilized by the companies for computing reserves. The reports filed with the National Association of Insurance Commissioners lists the states and has columns for earned premiums, incurred losses and the loss ratio. In order to report such statistics, the workers' compensation insurance companies first had to determine the case reserves and incurred but not reported loss reserves. Therefore, the companies reported incurred losses, which is by definition the sum of paid losses, reserves and IBNR.

The Commissioner's findings as to the availability of the reserve statistics were based on substantial evidence. Tatum testified that such a breakdown of loss reserves was available. The Commissioner has the authority pursuant to G.S. 58-124.18(d) to compel the production of data necessary to compile statistics, and the Rate Bureau is required to maintain reasonable records of the experience of its member companies and the data used in rate-making. G.S. 58-124.20(c).

The purpose of the hearing before the Commissioner is to determine whether the proposed rates are "unreasonable, excessive or discriminatory." Although the breakdown of loss reserves was not provided by the Rate Bureau, there was no evidence that the proposed rates were excessive, or that the data requested would establish that the rates were excessive. On the contrary, there was substantial evidence that the loss development factors would compensate for any overstating of reserves. There was no evidence presented by the Insurance Department which tended to show that the loss development factors utilized by the Rate Bureau were not sufficient to compensate for poten-

tial excessive reserves. The information requested by the Commissioner was therefore immaterial to a determination of whether the rates were excessive due to overstated reserves. The Commissioner may not reject as untrustworthy uncontradicted testimony or data. *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977). There was therefore no substantial evidence upon which the Commissioner could base his Findings of Fact, and thus the Commissioner's Conclusions of Law 3 and 4 are unsupported by adequate findings of fact.

In the Commissioner's Finding of Fact 20, the Commissioner stated that the witness Tatum testified that the Rate Bureau was dilatory in failing to report a breakdown of loss reserves. We note that the Commissioner did not make a finding of fact that the Rate Bureau *was dilatory*, but only a finding that Tatum so testified. The Commissioner's so-called Finding of Fact 20 lends no support to Conclusion of Law 4.

VII. INVESTMENT INCOME

[10] In Findings of Fact 21 and 22 the Commissioner found that Tatum testified that the Filing contained no calculation of anticipated income and that investment income should be calculated at a risk-free rate of return. Again we find mere assertions of a witness' testimony, which are not findings of fact and cannot support the Commissioner's Conclusion of Law 5. In addition, Finding of Fact 23 states that an understatement of anticipated earnings would cause an overstatement of the indicated rate level change. The Commissioner's "Finding," however, is merely an observation that overstated anticipated earnings cause an overstatement of indicated rates and not a finding that the earnings are understated in the proposed rates. Therefore, the Commissioner's Conclusion of Law 5 is not supported by any competent findings of fact.

Nevertheless, even if we assume that the purported Findings of Fact 21-23 are competent, there was insufficient evidence to support them.

The Commissioner "found" that the Rate Bureau failed to include in the Filing the anticipated income on investments of unearned premium reserves and loss reserves, that investment in-

come of 6% at a risk-free rate of return should be anticipated as future earnings and that an understatement of investment income would cause an overstatement in the indicated rate level change.

Kallop testified that income from investments was not considered in the rate increase but that the investment income was reflected in the 2.5% underwriting profit. Kallop testified that the companies earned a 4.3% rate of return on unearned premium and loss reserves.

Tatum testified that in order to determine whether or not the 2.5% return on underwriting was reasonable, the rate of return on investment income must be considered as well.

The Rate Bureau contends that it is not required that investment income be considered in workers' compensation insurance. In *State ex rel. Commissioner of Insurance v. Attorney General*, 19 N.C. App. 263, 198 S.E. 2d 575, *cert. denied*, 284 N.C. 252, 200 S.E. 2d 652 (1973), this Court held that the Commissioner was not *required* to consider the investment income earned by the companies in reviewing rates. In *State ex rel. Commissioner of Insurance v. Attorney General*, 16 N.C. App. 724, 193 S.E. 2d 432 (1972), the Attorney General contended that the Commissioner must consider investment income. In construing the statute, this court noted that there was no specific statutory requirement that investment income be considered in the pertinent statute. Therefore, the Commissioner only needed to consider the underwriting profit. The Rate Bureau contends that those cases cited above are dispositive here since G.S. 58-124.19(2) provides that "Due consideration shall be given within this State . . . *to a reasonable margin for underwriting profit* . . . ." (Emphasis added). Since the new statutory provisions refer specifically to "*underwriting profit*," and not to "*investment income*," the Commissioner need not consider investment income. *See, State ex rel. Commissioner of Insurance v. Attorney General*, 16 N.C. App. 724, 193 S.E. 2d 432 (1972).

The cases cited above, however, merely hold that the Commissioner is not *required* to consider profits from investment income in every rate filing. The cases are not dispositive of the issue of whether the Commissioner *may* consider such evidence. In *State ex rel. Commissioner of Insurance v. Attorney General*, 16 N.C. App. at 729, 193 S.E. 2d at 435, the court noted that

"[w]hether, under the statutory provisions governing this proceeding, the Commissioner would have committed error had he required evidence on [investment income] is not before us."

We must therefore consider whether the Commissioner *may* consider investment income in reviewing rates. In *State ex rel. Commissioner of Insurance v. Attorney General*, 19 N.C. App. at 271, 198 S.E. 2d at 581, the court noted that the evidence indicated that "investment income from the unearned premium and loss reserves was taken into consideration in the establishment of the 2.5% allowance for profit and contingencies." Kallop's testimony in the case *sub judice* also indicated that investment income was considered in arriving at the 2.5% margin of profit for underwriting. Therefore, it is clear that the Rate Bureau and the Commissioner have implicitly considered the rate of return on investments in arriving at a reasonable rate of return for underwriting. It was not error for the Commissioner to request information on investment income or to consider investment income in determining whether or not the 2.5% underwriting profit was reasonable.

Kallop testified that the total return from investment income on both unearned premium and loss reserves, expressed as a percentage of premiums before taxes, was 4.3%. When combined with the 2.5% allowance for underwriting profit, the total return from both sources of income equalled 6.8%, before taxes. The after tax income was approximately 5.01%.

The Department of Insurance, however, contended that the rate of return on investment income should be calculated at a risk-free rate of return which amounted to 6.0%. The Insurance Department witness Tatum testified that this risk-free rate of return is the appropriate rate of return to consider. In support of this contention, the Department of Insurance cites *Attorney General v. Commissioner of Insurance*, 353 N.E. 2d 745 (Mass. Sup. Ct. 1976), in which the court held that investment income should be computed at a risk-free rate of return rather than the actual rate of return experienced by the companies.

G.S. 58-79.1 sets forth guidelines for investment by insurance companies. There is no requirement in the statute that insurance companies invest in risk-free ventures; rather, the statute pro-

vides that insurance companies may engage in a variety of investments.

To require the investment income to be calculated at a risk-free rate of return would limit the range of investments by insurance companies, contrary to the intent of the legislature, evidenced by the provisions of G.S. 58-79.1.

Although the Commissioner is empowered to consider investment income in determining whether the 2.5% margin for underwriting was reasonable, the Commissioner erred in requiring the investment income to be considered at a risk-free rate of return rather than the rate of return actually experienced by the companies.

There was considerable evidence by Kallop that the 2.5% allowance for underwriting profit was reasonable and that the 2.5% margin of profit for underwriting reflected the profits from investment income, amounting to a total of 5.01% profit allowance after taxes.

There was no evidence whatsoever that the 2.5% margin was unreasonable or excessive when the profits from investment income equaled 4.3% of the premiums. The Commissioner's Findings of Fact 21 to 23 were not based on substantial and material evidence and therefore cannot support the Commissioner's Conclusion of Law 5.

The Commissioner's order disapproving the Filing by the Rate Bureau is vacated, and the rates proposed in the 9 September 1977 Filing by the Rate Bureau are deemed approved, and remain in effect until changed as by law provided, and the escrowed funds placed by the member insurance companies in the escrow account pursuant to G.S. 58-124.22(b) shall be remitted to the member insurers by the escrow agents.

Vacated.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION: NANTAHALA POWER & LIGHT COMPANY, APPLICANT; APPELLEES v. RUFUS L. EDMISTEN, ATTORNEY GENERAL, HENRY J. TRUETT, COUNTY OF SWAIN, NORTH CAROLINA, TOWN OF BRYSON CITY, NORTH CAROLINA, INTERVENORS; APPELLANTS

No. 7810UC139

(Filed 6 March 1979)

1. **Electricity § 1; Utilities Commission § 5— Tapoco, Inc. as public utility**

Tapoco, Inc. is a "public utility" subject to control by the N.C. Utilities Commission since it owns and operates two electric generating facilities in western N.C. which transmit electricity to TVA; TVA distributes the power to the public under apportionment agreements with Tapoco and Nantahala Power and Light Co.; its charter states that the purpose of the corporation is to produce and provide electric power to the public; it has been given the power of eminent domain by its charter and by a certificate of public convenience and necessity and has exercised that power; and its certificate of public convenience and necessity requires it to make available to Nantahala the necessary power to serve two villages in western N.C.

2. **Electricity § 3; Utilities Commission § 36— electric rates—roll-in of assets of affiliated utility**

Since Nantahala Power and Light Co. and Tapoco, Inc. are both owned and controlled by the Aluminum Co. of America, have an integrated and interconnected electric transmission system, and are in reality one electric generating system, using waters from the same area of western N.C., selling all their production to TVA, and receiving in return entitlements to electric power from TVA which it transmits to other members of the public, and since the purpose of this arrangement is to insure a ready source of electricity for a plant owned by the Aluminum Co. of America, the Utilities Commission should determine whether the consuming public of N.C. would benefit by having the assets and costs of Tapoco rolled-in with those of Nantahala in determining Nantahala's rate structure.

APPEAL by intervenors from order of North Carolina Utilities Commission entered 14 June 1977 in Docket No. E-13, Sub 29. Heard in the Court of Appeals 14 November 1978.

Nantahala Power & Light Company ("Nantahala") made application to the North Carolina Utilities Commission ("Commission") for authority to adjust and increase its retail electric rates and to place into effect a revised Purchased Power Cost Adjustment Clause applicable to all retail electric rates.

The Attorney General, on behalf of the consuming public of North Carolina, the Town of Bryson City, the County of Swain, and Henry J. Truett were allowed to intervene in the proceedings.

The Commission ordered investigation, posting of required notices, and held public hearings.

Nantahala was incorporated in July 1929. It was created by, and is a wholly owned subsidiary of, Aluminum Company of America ("Alcoa"). It owns generating, transmission and distribution facilities supplying electricity to the public in six western counties of North Carolina. Since beginning operation in 1929, Nantahala has had only three general rate increases, based on the test years of 1960, 1971, and 6 June 1973. The test year for the pending application is 1975. For many years after 1929, a high percent (up to at least 92%) of Nantahala's total KWH production went to Alcoa. With the growth of western North Carolina after 1960, more and more of Nantahala's production was required for its North Carolina consumers. At the time of this application, Nantahala did not sell any electricity directly to Alcoa. In 1975, the test year, Nantahala's consumer load in North Carolina was 412,891,000 KWH and it generated 529,049,000 KWH. Nantahala purchased additional electricity from Tennessee Valley Authority ("TVA") at a cost of $1,588,270.

Tapoco, Inc. ("Tapoco") was incorporated in 1900 in Tennessee as Knoxville Power Company. The corporate name of Knoxville Power eventually was changed to Tapoco, Inc. Its charter provided it with the power of eminent domain. Tapoco owns and operates two electric generating facilities in North Carolina, Santeetlah and Cheoah. They are located on the Little Tennessee River in North Carolina, downstream from the TVA Fontana facility. Tapoco acquired these facilities in 1955 from Carolina Aluminum, a North Carolina public utility. It also owns and operates two generating facilities in Tennessee, downstream from its North Carolina plants. In 1955 and for years before, Alcoa owned both Tapoco and Carolina Aluminum. Carolina Aluminum is also an electric generating company with power of eminent domain. In 1954 Tapoco applied to be and was domesticated in North Carolina. On 16 February 1955, Tapoco, Carolina Aluminum, and Nantahala jointly filed for a certificate of

public convenience and necessity with the North Carolina Utilities Commission to permit Tapoco to acquire and operate the Santeetlah and Cheoah facilities. In the application, Tapoco agreed to make available to Nantahala such power as requested by Nantahala to serve the two small villages of Santeetlah and Tapoco in Graham County. (This power had previously been provided by Carolina Aluminum.) In the order granting the requested certificate, the Commission ordered Tapoco to supply to Nantahala the power necessary for this requirement. This certificate is still current and the villages still receive electricity.

Alcoa is the sole owner of both Tapoco and Nantahala. Alcoa controls the operation of both utilities. The chief executive officers of both report to an Alcoa vice president; employees of Alcoa are directors of Nantahala and Tapoco; Alcoa controls the accounting policies of Tapoco and Nantahala; Nantahala's transmission system is integrated with and interconnected to that of Tapoco.

In 1941 Alcoa entered into a twenty year agreement with TVA. Nantahala was not a party to the agreement. On this date Nantahala owned all or a large portion of the dam site eventually used in construction of TVA's Fontana dam. Nantahala's ownership had a value of approximately 3.5 million dollars. In this agreement Alcoa agreed to cause Nantahala to convey this property to TVA. In return, TVA agreed to furnish Alcoa a continuous supply of 11,000 KW electricity for the term of the contract. During the contract term, Nantahala had excess generation which it sold to Alcoa at "dump" price.

In 1962 the "New Fontana Agreement" was agreed upon. It modified and largely replaced the 1941 agreement. Nantahala, Tapoco, Alcoa, and TVA are parties. Under this agreement TVA stopped supplying Alcoa with the 11,000 KW of power. In this agreement, Nantahala and Tapoco sell all their electric generation to TVA (except three small facilities of Nantahala). In return, TVA grants to Nantahala and Tapoco entitlements to some 1,912,308,000 KWH annually, some of which is subject to certain curtailments and interruptions. The agreement does not deal with the division of the entitlements between Nantahala and Tapoco, except to state that Alcoa, Nantahala and Tapoco shall decide among themselves how the rights and benefits under the agree-

ment may be allocated, shared or enjoyed. The agreement allows TVA to control and coordinate the operations of Tapoco's four plants and eight of Nantahala's. TVA controls the operation of the twelve facilities, enabling them to work as an integrated unit in the production and distribution of electricity. One of the reasons for the agreement was to give TVA control over the Little Tennessee watershed for the purposes of flood control, navigation, recreation, and power production. The agreement also created a dependable source of power for Nantahala and Tapoco, subject to allocation by Nantahala, Tapoco and Alcoa.

In 1963 Nantahala and Alcoa executed an apportionment agreement concerning the TVA entitlements under the New Fontana Agreement. This apportionment agreement basically guaranteed Nantahala its primary generation and it could receive additional generation. Also, Alcoa was to pay annually $89,200 to Nantahala as compensation for allowing TVA to control and operate its facilities.

In 1971, the 1963 agreement was amended and replaced by an agreement between Nantahala and Tapoco. In 1971 Nantahala no longer sold electricity directly to Alcoa. Nantahala agreed to accept as its share of power from TVA 360,000,000 KWH annually. Tapoco was to receive the remainder of the power available from TVA under the New Fontana Agreement. The annual $89,200 payments by Alcoa were eliminated. Nantahala also executed an agreement with TVA to purchase additional power required by Nantahala from TVA. Nantahala was also required to pay a charge if the demand of its system exceeded 54,300 KW at any one time.

During the hearings, which extended from 15 March 1977 to 9 May 1977, motions were made by the intervenors to make Tapoco a party to the proceedings, and to require Nantahala to provide necessary data and information concerning Tapoco's assets and expenses in North Carolina to enable the Commission to consider such material in determining appropriate rate base for Nantahala as well as Nantahala's purchased power cost adjustment clause. These motions were denied by the Commission.

The Commission entered an order authorizing Nantahala to increase its North Carolina rates to produce additional annual gross revenues of not more than $1,598,918. It also approved the

requested increase in Nantahala's purchased power cost adjustment clause.

Intervenors appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin.

Crisp, Bolch, Smith & Davis, by William T. Crisp, and Spiegel & McDiarmid, by Robert H. Bear, for Henry J. Truett.

McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr., for County of Swain.

Joseph Pachnowski for Town of Bryson City.

Joyner & Howison, by R. C. Howison, Jr. and G. Clark Crampton, for Nantahala Power & Light Company.

MARTIN (Harry C.), Judge.

[1] Intervenors argue that the Commission erred in refusing to make Tapoco a party to these proceedings. At the threshold, this requires us to determine whether, on the record before us, Tapoco is a public utility. *Utilities Commission v. Water Co.*, 248 N.C. 27, 102 S.E. 2d 377 (1958). A public utility is defined in Section 62-3(23) of the General Statutes of North Carolina (1977 Supplement):

> (23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> 1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation;
>
> . . . .
>
> b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

"Person" includes a corporation. N.C. Gen. Stat. 62-3(21).

The record shows Tapoco is a "person," being a Tennessee corporation domesticated in 1954 to do business in the state of North Carolina. Since 1955 it has owned and operated electric generating facilities at Santeetlah and Cheoah in Graham County, North Carolina. At these two plants Tapoco generates and transmits electricity to TVA, a corporation chartered by acts of Congress. TVA distributes this electricity to or for the public for compensation.

On 16 February 1955, Tapoco, Nantahala, and Carolina Aluminum (a public utility in North Carolina and the previous owner, before Tapoco, of the Santeetlah and Cheoah plants) jointly filed for a certificate of public convenience and necessity with the North Carolina Utilities Commission to permit Tapoco to acquire from Carolina Aluminum the Santeetlah and Cheoah plants and to operate them. In the application Tapoco agreed to make available to Nantahala such electric power as requested by Nantahala to serve the villages of Santeetlah and Tapoco in Graham County. The certificate issued by the Commission ordered Tapoco to so do. Approximately 300 people live in these villages.

By virtue of the New Fontana Agreement of 1962, TVA acquires all the electricity of Nantahala and Tapoco as it is generated at the plants. This includes all four of Tapoco's plants, two being in Tennessee, and eight of Nantahala's eleven plants, Nantahala's three small facilities being excluded. In return for their pooling of this generation with TVA, Nantahala and Tapoco receive entitlements to some 1,912,308,000 KWH annually. These entitlements are shared by agreements of Nantahala, Tapoco and Alcoa executed in 1963 and 1971. With Tapoco still acting under its certificate of public convenience and necessity, Nantahala receives under the apportionment agreement sufficient electricity to serve the villages of Tapoco and Santeetlah and continues to provide this service. All of Tapoco's power is transmitted to TVA for distribution. TVA, through the apportionment agreements, distributes the power to the public. Nantahala receives some and Alcoa receives some. Any surplus over the New Fontana Agreement entitlements can be used by TVA to reduce its steam generated production and thus reduce the cost to the consuming public. Both Alcoa and Nantahala are members of the "public"

within N.C.G.S. 62-3(23). "Public" is not defined in Chapter 62 of the General Statutes of North Carolina. "Public" means the whole body politic, the body of the people at large, Black's Law Dictionary 1393 (4th ed. rev. 1968), the people as a whole, Webster's Third New International Dictionary 1836 (1967). Tapoco's delivery of its power to TVA and the distribution by TVA of that power under the pooling and apportionment agreements is the furnishing of electricity "to another for distribution to or for the public for compensation." N.C. Gen. Stat. 62-3(23).

In 1955 Tapoco secured a certificate of public convenience and necessity from the North Carolina Utilities Commission before commencing the generation and transmission of electricity in North Carolina. The articles of incorporation of Tapoco state the purpose of the corporation is to produce and provide electric power to the public. It does produce and sell electricity in North Carolina. To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission. *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). A public utility must obtain a certificate before beginning operation of any public utility plant. N.C. Gen. Stat. 62-110. "One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a public utility as defined in G.S. 62-3(23)." 267 N.C. at 267, 148 S.E. 2d at 108. In granting Tapoco's certificate, the Commission determined that the action would not be detrimental to the public interest. (Exhibit 7, Commission order in Docket E-27.) Tapoco has never petitioned to have its certificate of public convenience and necessity revoked or abandoned.

Tapoco has, by paragraph 4 of its articles of incorporation, the power of eminent domain. It is domesticated in North Carolina. The power of eminent domain is inherent in the certificate of public convenience and necessity. Carolina Aluminum acquired part of the Santeetlah development, now owned and operated by Tapoco, through the power of eminent domain. *Manufacturing Co. v. Aluminum Co.*, 207 N.C. 52, 175 S.E. 698 (1934). The very purpose of Tapoco seeking the certificate of public convenience and necessity was to allow it to acquire and operate the properties of Carolina Aluminum. After so doing,

Tapoco cannot abandon the public purpose status of the properties and convert them to private use. Having received the benefits of its chartered privileges, including the ownership of property obtained, at least in part, by the power of eminent domain, Tapoco is charged with the corresponding responsibilities in a business affected with a public interest. *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953).

In *Manufacturing Co. v. Aluminum Co., supra,* the Court was required to determine whether Carolina Aluminum Company was a public utility with the right of eminent domain. The tests applied by the Supreme Court there are pertinent here: (a) does the charter give it all rights and privileges of a public utility; (b) is it carrying out the purposes of its charter, generating and selling electricity; (c) does its charter grant it power of eminent domain. Tapoco meets each of these standards. The fact that a corporation has the authority to, and does, engage in private business in addition to its public service does not deprive it of its status as a public service corporation. A public service (public utility) corporation having the power of eminent domain makes such corporation amenable to state control through the Utilities Commission. *Id.*

One test to determine whether a plant or system is a public utility is whether the public may enjoy it by right or by permission only. *Utilities Commission v. Water Co., supra.* In applying this test to Tapoco, the Utilities Commission required Tapoco in its certificate of public convenience and necessity to make available to Nantahala such power as requested to serve the 300 persons in Santeetlah and Tapoco villages. Tapoco is *required* to furnish this electricity for these members of the consuming public. It cannot refuse so to do and remain in compliance with its certificate of public convenience and necessity. These persons receive this electric power as a matter of right. It is immaterial that the service is limited to a specified area and that the facilities are limited in capacity. *Utilities Commission v. Telegraph Co., supra.*

We hold Tapoco is a public utility within Chapter 62 of the General Statutes of North Carolina and is subject to control by the Utilities Commission.

[2] We turn now to the question of whether Tapoco should be made a party to these proceedings.

Alcoa is the sole stockholder of both Nantahala and Tapoco. Alcoa controls both companies; the same Alcoa vice president supervises Tapoco and Nantahala; all of the officers and directors of Tapoco are employees of Alcoa; four directors and one general officer of Nantahala are employees of Alcoa; Alcoa supervises the accounting of both companies and provides financing for both when required. Although Alcoa was not a party to the petition for Tapoco's North Carolina certificate of public convenience and necessity, it agreed in the proceeding to provide Tapoco with necessary financing. Alcoa, Nantahala and Tapoco are parties to the New Fontana Agreement.

Nantahala and Tapoco have an integrated and interconnected electric transmission system. Both are also interconnected with TVA and other electrical systems in western North Carolina. Tapoco's two North Carolina facilities have a nameplate capacity of 155,000 KW; Nantahala's eight plants (subject to New Fontana Agreement) have nameplate capacity of approximately 98,000 KW. All the generation is hydroelectric, utilizing the waters of the Little Tennessee, Cheoah, Snowbird, and other rivers in western North Carolina. This great watershed is one of the most valuable assets of the people of North Carolina, having especial impact upon western North Carolina.

Nantahala and Tapoco are in reality one electric generating system, using waters from the same area of western North Carolina, selling all their production to one customer, TVA, and receiving in return entitlements to electric power from TVA which it transmits to other members of the public. This arrangement was created by Alcoa, primarily to provide a ready source of electricity for its aluminum producing plant at Alcoa, Tennessee, which requires enormous amounts of electricity. Initially, Nantahala was the principal source of Alcoa's power needs. From its incorporation in 1929, to 1960, most of Nantahala's total production went to Alcoa. *See Utilities Commission v. Membership Corporation*, 260 N.C. 59, 66, 131 S.E. 2d 865, 870 (1963). As the demand of Nantahala's North Carolina consumers increased, it had less and less power available for Alcoa. In 1961 Nantahala sought permission of the Commission to divest itself of all its

distribution lines, transmission lines, (*except* its 161-KV line interconnecting with *Tapoco*), three small generating plants at Bryson, Dillsboro, and Franklin (not subject to New Fontana Agreement), by sale to Duke Power Company, and authority to abandon operation of its electric distribution system upon commencement of these operations by Duke. Consummation of this transaction would then allow Nantahala to send all of its hydroelectric production to its master, Alcoa, "which seeks and must have low-cost hydroelectric power." *Utilities Com. v. Mead Corp., supra* at 467, 78 S.E. 2d at 302. The Supreme Court prevented Nantahala from abandoning its duty to serve the public. "The public has the first claim on all power generated by Nantahala." *Utilities Commission v. Membership Corporation, supra* at 68, 131 S.E. 2d at 871. This statement also applies to Tapoco, insofar as its hydroelectric generation in North Carolina is concerned.

Since 1971 Nantahala has had no power available for direct sale to Alcoa. Its entitlements under the apportionment agreement have proved insufficient to meet the demands of its North Carolina consumers. Nantahala has been required to purchase steam-generated power from TVA with which to serve its North Carolina consumers. In the test year under consideration by the Commission, the evidence shows Nantahala generated 529,049,000 KWH, sold only 412,891,000 KWH, and yet purchased power from TVA in the amount of $1,588,270. This anomaly could only arise because of the 1971 apportionment agreement, which placed a capacity limitation of 54,300 KW on Nantahala. It must be remembered that in the negotiation of the 1971 apportionment agreement, both Nantahala and Tapoco were controlled by Alcoa.

The Commission should make a determination whether the consuming public of North Carolina would benefit by having the assets and costs of Tapoco rolled-in with those of Nantahala in determining Nantahala's rate structure. This can be accomplished by making Tapoco a party to these proceedings and requiring Tapoco and Nantahala to furnish the necessary information to the Commission to enable it to make this determination. The Commission could also then consider whether to require Tapoco to file application for wholesale rate schedules before the Federal Energy Regulatory Commission in order to allow it to wholesale electricity to Nantahala.

The roll-in method of rate making is used in North Carolina in such instances as establishing rates involving Duke, Virginia Electric & Power Company, and Carolina Power & Light Company with respect to their North Carolina and South Carolina facilities, or North Carolina and Virginia facilities. In general, Nantahala's and Tapoco's properties and expenses would be considered together to form the proper rate base for Nantahala and in establishing its purchased power cost adjustment clause. The amount of Tapoco's assets and expenses to be used for this purpose can be determined by applying a formula derived from the percent of Tapoco's total production that is required by Nantahala to serve its customers above its own primary generating capability.

Tapoco, a North Carolina public utility, is using the waters of North Carolina to produce low-cost hydroelectric power with generating facilities in North Carolina. It is transmitting this power to TVA and, except for the power made available by Tapoco for the villages of Santeetlah and Tapoco, it is then furnished to its master, Alcoa. At times, when Alcoa cannot use all the power it has available, TVA may use such excess hydropower to reduce the cost of steam-generated power. With Nantahala's resources basically no longer available to Alcoa, Tapoco now finds itself in a position similar to that of Nantahala as described by Justice Barnhill (later Chief Justice) in his concurring opinion in *Utilities Com. v. Mead Corp., supra* at 467, 78 S.E. 2d at 302:

> If they will only cut through the form to the substance, they will find just another hydroelectric power producing agency of Alcoa, . . . with the right to use the water power resources of this State, exercise the power of eminent domain, and enjoy the other monopolistic privileges accorded a public utility while it was, in fact, created and exists primarily to serve its master which seeks and must have low-cost hydroelectric power.

The Commission's ruling denying the motion to make Tapoco a party is reversed.

The order of the Commission dated 14 June 1977 authorizing increased rates for Nantahala and approving a new purchased power cost adjustment clause is vacated and set aside.

This cause is remanded to the Utilities Commission for the purposes of making Tapoco a party to this proceeding; ordering Tapoco and Nantahala to provide the Commission with necessary information as to the assets and expenses of Tapoco to enable the Commission to determine whether the people of North Carolina would benefit by use of the roll-in method of rate making involving Nantahala and Tapoco; and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

NYTCO LEASING, INC. v. SOUTHEASTERN MOTELS, INC.; J. WAYNE WILLIAMS; BILL CLEVE AND DAPHNE D. CLEVE

No. 783SC331

(Filed 6 March 1979)

1. **Evidence § 24; Rules of Civil Procedure § 32— use of deposition in court proceedings—deponents present in courtroom**

To the extent that they are in conflict, G.S. 1A-1, Rule 32 takes precedence over G.S. 8-83; therefore, the trial court did not err in admitting depositions of the defendants, though both were in court and available to be called as witnesses.

2. **Evidence § 24; Rules of Civil Procedure § 32— portions of depositions admitted—no prejudice to defendants**

Defendants' contention that it was prejudicial for only portions of their depositions to be admitted into evidence was without merit since defendants could have required plaintiff to introduce any other part of the depositions relevant to the part introduced or defendants could have introduced any part they chose. G.S. 1A-1, Rule 32(a)(5).

3. **Rules of Civil Procedure § 50.3— directed verdict—failure to state grounds**

An appellant who failed to state specific grounds for his motion for directed verdict is not entitled, on appeal from the court's refusal to allow the motion, to question the insufficiency of the evidence to support the verdict.

4. **Rules of Civil Procedure § 50— evidence introduced by defendants—motion for directed verdict waived**

By introducing evidence, defendants waived their motion for directed verdict made at the close of plaintiff's evidence.

5. Fraudulent Conveyances § 1— voluntary conveyance defined

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.

6. Fraudulent Conveyances § 3.4— no reasonably fair price paid for land—suggestion of unfair dealing and fraud—sufficiency of evidence

There was sufficient evidence that defendant wife did not pay defendant husband a reasonably fair price for parcels of land conveyed by him to them both as tenants by the entirety such as would indicate unfair dealing and be suggestive of fraud to take the case to the jury, where such evidence tended to show that each of the deeds in question recited a consideration of only $10; there were no revenue stamps affixed to any of the deeds; the properties were worth approximately $375,000; and there was no evidence to contradict the recitals in the deeds.

7. Fraudulent Conveyances § 3.4— retention of property sufficient to pay debts—sufficiency of evidence

Evidence was sufficient to be submitted to the jury on the question as to whether defendant husband retained properties fully sufficient to pay debts then existing so that the conveyances in question would be valid as to creditors where such evidence tended to show that defendant transferred most of his assets to a tenancy by the entirety, thereby placing them beyond the reach of his creditors; except for the parcels of land in question, defendant had few other assets at the time; and the transferred property was worth approximately $375,000 and therefore would have been adequate to satisfy plaintiff's judgment against defendant.

8. Fraudulent Conveyances § 3.4— conveyance to family member—fraudulent intent—sufficiency of evidence

When property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent; therefore, evidence of a close family relationship between grantor and grantee, *i.e.*, husband and wife, evidence that conveyances of the land in question were made less than five weeks after service of summons and complaint on defendant husband seeking substantial monetary damages, and evidence that a reasonably fair value was not paid for the conveyances was sufficient evidence from which the jury could reasonably infer fraudulent intent on the part of defendant husband.

9. Fraudulent Conveyances § 3.4— fraudulent intent—grantee's knowledge—sufficiency of evidence

In an action to set aside conveyances of real property on the ground that they were made with the intent to defraud creditors, evidence that the grantee knew of the grantor's fraudulent intent was sufficient to be submitted to the jury where it tended to show that defendant husband transferred all of his real estate to his wife for less than its reasonable value, that he had never before in 20 years of marriage transferred any real property to his wife, and that he transferred not some, but all, of his real property to himself and his wife in an estate by the entirety at that time.

10. Fraudulent Conveyances § 2— judgment obtained by creditor after assets transferred—attack on conveyance proper

A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished.

APPEAL by defendants from *Small, Judge.* Judgment entered 21 November 1977 in Superior Court, CRAVEN County. Heard in the Court of Appeals 17 January 1979.

This is an action by plaintiff to set aside certain conveyances of real property by defendant Bill Cleve, to himself and his wife as tenants by the entirety on the ground that the conveyances were made with the intent to defraud creditors, including plaintiff.

The parties stipulated to the following facts: Defendants Bill and Daphne Cleve are husband and wife; on 2 November 1973, plaintiff initiated an action in superior court against defendant Bill Cleve and others seeking to recover $286,113.98; on 13 November 1973, summons and complaint in the action were served on defendant Bill Cleve; on the date of service of process and up until 18 December 1973, defendant Bill Cleve owned as his separate property 10 parcels of real property in North Carolina; on 18 December 1973 defendant Bill Cleve conveyed all 10 parcels to himself and his wife as tenants by the entirety. On 19 June 1974, plaintiff obtained a $290,830.40 judgment in its action against defendant Bill Cleve, and the judgment was subsequently affirmed by this Court; executions on the judgment were issued between 15 July 1974, and 27 December 1976, but were returned unsatisfied each time; defendant Bill Cleve has paid nothing on the judgment.

Plaintiff offered evidence tending to show the following:

From 1950 to 1973, there were no other conveyances of real estate from defendant Bill Cleve to himself and his wife as tenants by the entirety. Each of the ten 1973 deeds recites a consideration of $10, and there were no revenue stamps affixed to any of the deeds.

By depositions previously taken of the defendants Cleve, plaintiff also offered evidence tending to show that defendants

Cleve had been married for 20 years; that on 18 December 1973, defendant Bill Cleve had very little money on deposit and was trying to borrow to pay off debts; that defendant Bill Cleve had a car and a life insurance policy but very few other assets that were worth anything; that he owned some stock, but it was either worth nothing or was pledged as collateral on loans; that he owed Wachovia Bank and Trust Company $60,000 and owed his wife $54,000; and that the property which he conveyed from himself to himself and his wife as tenants by the entirety on 18 December 1973 was worth approximately $375,000.

Defendants offered evidence tending to show that in the fall of 1973 defendant Bill Cleve's finances were not as solvent as they had been at one time and that he was seeking a loan to pay off his debt to Wachovia; that Production Credit Association agreed to make a loan only if defendant Daphne Cleve signed the loan application with her husband; that she refused to do so until her husband agreed to give her an interest in his real property as security; that she signed two loan papers on 11 December 1973; and that she also agreed to cancel her husband's $54,000 debt to her in exchange for the property. Mrs. Cleve admitted, however, that she had not demanded payment on her husband's note to her after its due date on 20 July 1973, prior to its cancellation.

Five issues were submitted to the jury and answered as follows:

1. Was anything of value given by Daphne D. Cleve for the conveyances by Bill Cleve of land on December 18, 1973 to himself and his wife creating an estate by the entirety?

Answer: No

2. If the answer to the first issue is yes, was it a reasonably fair value?

Answer: _____

3. Did the defendant Bill Cleve retain property fully sufficient and available for the satisfaction of his creditors after the conveyances of land on December 18, 1973?

Answer: No

4. Did the defendant Bill Cleve with the purpose and intent to delay, hinder or defraud his creditors convey land to himself and his wife creating an estate by the entirety?

Answer: Yes

5. If the answer to the fourth issue is yes, did the grantees, Bill Cleve and Daphne D. Cleve, participate in, or have actual notice of the purpose and intent to delay, hinder, or defraud the creditors of Bill Cleve?

Answer: Yes

Judgment entered pursuant to the verdict declared the ten deeds to be "utterly void and of no effect" as to creditors of defendant Bill Cleve, including plaintiff. From the judgment, defendants Bill and Daphne Cleve appealed.

Sanford, Cannon, Adams & McCullough, by E. D. Gaskins, Jr., Charles C. Meeker and Barbara Mills Larkin, for plaintiff appellee.

James, Hite, Cavendish & Blount, by E. Cordell Avery and Marvin Blount, Jr., for defendant appellants.

CARLTON, Judge.

[1] Defendant first assigns as error the admission of depositions of the defendants Cleve when both were in court and available to be called as witnesses. Timely objections and motions to strike were overruled and denied. We agree with the trial court's rulings.

The question presented here is whether G.S. 1A-1, Rule 32 takes precedence over G.S. 8-83. We hold that it does.

Rule 32 provides that at trial any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of several provisions. Among those provisions is Section (a)(3) which reads as follows:

The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing

agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose, *whether or not the deponent testifies at the trial or hearing.* (Emphasis added.)

G.S. 8-83 provides that depositions may be read at trial only in certain situations enumerated by the statute, and not otherwise. The statute covers such situations as when a witness is dead, insane, a resident of a foreign country or of another state and not present at trial, confined in a prison outside the county in which the trial takes place and when the witness is so old, sick or infirm as to be unable to attend court. None of the listed situations would apply to the case at bar.

Defendants concede that the two statutes are in conflict. They argue, however, that G.S. 8-83 controls because G.S. 1A-1, Rule 1 provides that, "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" (Emphasis added.) Defendants argue that G.S. 8-83 is a "differing procedure" and, therefore, should control.

We do not believe that G.S. 8-83 is a "differing procedure" within the contemplation of the quoted language from Rule 1. Prior to the effective date of the Rules of Civil Procedure (January 1, 1970), G.S. 8-83 was the controlling statute for "every deposition taken." It defined the general use of depositions in civil trials before the Rules of Civil Procedure became effective and was never intended to prescribe a "differing" or specialized procedure. Moreover, in enacting the Rules of Civil Procedure, the legislature removed any doubt about conflicting statutes such as these by providing that, "All laws and clauses of laws in conflict with this Act are hereby repealed." 1967 North Carolina Session Laws, c. 954, s. 9.

It is well established that when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but to the extent that they are necessarily repugnant, the

one last enacted shall prevail. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

We therefore hold that, to the extent they are in conflict, G.S. 1A-1, Rule 32 takes precedence over G.S. 8-83.

[2] Defendants also argue that it was prejudicial for only portions of the depositions to be admitted. That argument is obviously without merit in that defendants could have required plaintiff to introduce any other part of the depositions relevant to the part introduced or defendants could have introduced any part they chose. G.S. 1A-1, Rule 32(a)(5).

Defendants next assign as error the trial court's denial of their motions to dismiss and motions for directed verdict made at the close of plaintiff's evidence and again at the close of all the evidence.

A motion to dismiss under G.S. 1A-1, Rule 41(b), is properly made only in cases tried by a judge without a jury, the proper motion in jury cases being for a directed verdict under G.S. 1A-1, Rule 50(a). 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 50.1, p. 329. The denial of the motions to dismiss was therefore proper.

[3] G.S. 1A-1, Rule 50(a) contains the requirement that "a motion for directed verdict shall state the specific grounds therefor." The record before us is barren of grounds for a motion for directed verdict. Nor does the judgment supply the grounds. This Court has held that an appellant who failed to state specific grounds for his motion for directed verdict is not entitled, on appeal from the court's refusal to allow the motion, to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). The failure of the defendants in this case could have resulted in a dismissal of the appeal. However, we hereinafter review the matter on its merit.

[4] By introducing evidence, defendants waived their first motion for a directed verdict, *Hodges v. Hodges*, 37 N.C. App. 459, 246 S.E. 2d 812 (1978) and the assignment of error directed to the denial of that motion will not be considered on this appeal.

We, therefore, proceed to consider whether the trial court erred in failing to grant defendants' motion for directed verdict at

the close of all the evidence. At that stage, the trial judge must consider all of the evidence before him in ruling on the motion. *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976). However, the evidence in favor of the nonmovant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

The question presented by the defendants' motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

In evaluating the evidence, we first turn to plaintiff's claim for relief based on its allegations that defendants' conveyances were fraudulent and in violation of North Carolina law.

The statutory law of fraudulent conveyances in North Carolina is found in General Statutes of North Carolina, Chap. 39, Art. 3. The leading case is *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). In *Aman*, the Supreme Court set out the general principles deduced from the statutes as follows:

> (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid.

(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void.

Defendants argue that plaintiff failed to produce sufficient evidence to withstand the motion under the second, third, and fifth principles set forth above which were relied upon by the plaintiff. We do not agree.

[5] Under the first two principles relied upon by plaintiff, the definition of "voluntary" is crucial. Under cases similar to that before us, it has been established that 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. *Supply Corp. v. Scott*, 267 N.C. 145, 148 S.E. 2d 1 (1966); *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900). We note that the trial court in its charge to the jury, apparently to avoid confusion by the jury with the customary meaning of voluntary, used the approved language from the cited cases.

[6] The question arises, then, was there sufficient evidence that the defendant Daphne Cleve did not pay the defendant Bill Cleve a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud, to take the matter to the jury? We believe there was.

In considering the propriety of the trial court's ruling on a motion for nonsuit, our Supreme Court was presented with a factual situation similar in many respects to the instant case. In *Everett v. Gainer*, 269 N.C. 528, 153 S.E. 2d 90 (1967), the evidence tended to show that the grantor executed a deed to her sons for "$100.00 and other valuable consideration," that the deed had no revenue stamps affixed thereto, that at the time of the execution of the deed the grantor failed to retain assets sufficient to pay her then existing debts, and that the property had a value of approximately $5,000. The court held that the evidence was sufficient to overrule the motion for nonsuit in an action by a prior

creditor to set aside the deed as fraudulent. The court noted that $100 was "grossly inadequate" consideration and that the addition of the words "and other valuable consideration" failed to make the conveyance valid as to existing creditors. The court also held that the 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, each of the ten 1973 deeds recited a consideration of only $10 and no revenue stamps were affixed to any of them. We also note, as did the Supreme Court in *Everett*, that there was no evidence to contradict the recital in the deed, and the burden to explain the nature and character of the consideration is on the defendant.

We therefore hold that the evidence that defendant's wife did not pay him a reasonably fair price for the properties and that the conveyances were "voluntary" under the second and third principles enunciated in *Aman v. Walker, supra*, was more than sufficient for submission to the jury.

[7] Under the second principle promulgated in *Aman*, relied upon by plaintiff, the next consideration is whether the defendant retained properties fully sufficient to pay debts then existing so that the conveyances in question would be valid as to creditors. We find the plaintiff's evidence to be adequate in this respect as well.

It is well established, both in North Carolina and Florida (where defendants Cleve also owned real property), that property held by the entirety is not subject to judgments against either spouse alone. *Air Conditioning v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954); *Balding v. Fleisher*, Fla. App. 1973, 279 So. 2d 883. Accordingly, in determining the assets available to satisfy defendant Bill Cleve's creditors after the conveyances, all entirety property, whether located in North Carolina or Florida, must be excluded from consideration.

Moreover, a creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. *Everett v. Mortgage Co.*, 214 N.C. 778, 1 S.E. 2d 109 (1939).

In the present case, defendant Bill Cleve effectively transferred most of his assets to a tenancy by the entirety, thereby placing them beyond the reach of creditors. The evidence is plenary that, except for the parcels of land in question, defendant Bill Cleve had few other assets at the time. Evidence also tended to show that the transferred property was worth approximately $375,000 and would, therefore, have been adequate to satisfy the judgment against defendant Bill Cleve. There is also evidence that the judgment still has not been paid. Under the rules stated above, *i.e.*, that the conveyances were "voluntary" and that the plaintiff is a "creditor", the evidence presented by plaintiff was more than adequate to go to the jury under the second principle enunciated in *Aman*.

[8] Plaintiff also argues, and we agree, that its evidence was sufficient to go to the jury under the third theory enunciated in *Aman*. That theory eliminates the requirement that the defendant did not retain adequate property to satisfy existing debts but adds the requirement that the defendant have actually intended to defraud his creditors.

In proving defendant's fraudulent intent, it is only necessary that plaintiff show that defendant conveyed his property with an intent to hinder or delay, or an intent to defraud his creditors. *Peeler v. Peeler*, 109 N.C. 628, 14 S.E. 59 (1891). It is not necessary that intent to defraud be proven by expressed declarations, but it may be shown by the acts and conduct of the parties, from which it may be reasonably inferred. *Manufacturing Company v. Building Company*, 177 N.C. 103, 97 S.E. 718 (1919). Our Supreme Court has also held that when property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent. *McCanless v. Flinchum*, 89 N.C. 373 (1883).

In the present case, a substantial amount of evidence was presented from which the jury could reasonably infer fraudulent intent on the part of defendant Bill Cleve. Some of the evidence for the plaintiff tended to show a close family relationship between grantor and grantee, *i.e.*, husband and wife, that the conveyances were made less than five weeks after the service of summons and complaint on defendant Bill Cleve seeking substan-

tial monetary damages, and that a reasonably fair value was not paid for the conveyances. Under the third principle enumerated in *Aman*, the evidence was sufficient for jury consideration.

[9] The fifth principle enumerated in *Aman*, also relied on by plaintiff, removes the element of the conveyances being "voluntary" but adds the requirement that the grantee knew of the grantor's fraudulent intent. We agree with plaintiff that adequate evidence on this theory was presented for jury consideration.

In *Peeler, supra*, the Supreme Court stated:

> The fact that the wife appeared to be the purchaser from the husband when he owed another debt to the plaintiff, for the payment of which he had made no provision, still threw such suspicion on the transaction as to call for close scrutiny, as would evidence of any other badge of fraud, notwithstanding the husband and wife may have come upon the witness stand, offered their explanation of it, and thereby removed the presumption that would have arisen from the suppression of evidence within their peculiar knowledge.

Id. at p. 634, 14 S.E. 62.

In the present case, plaintiff offered evidence tending to show that defendant Bill Cleve transferred all of his real estate to his wife for less than its reasonable value, that he had never before in 20 years of marriage transferred any real property to his wife and that he transferred not some, but all, of his real property to him and his wife in an estate by the entirety at that time. Clearly, this evidence creates an inference that defendant Daphne Cleve knew of and participated in her husband's intent to defraud creditors.

We therefore hold that, under the second, third and fifth principles enumerated in *Aman*, the evidence was sufficient to go to the jury and defendants' motion for a directed verdict was properly denied.

Defendants' next assignment of error is that the trial court improperly denied defendants' motion to set the verdict aside as contrary to the greater weight of the evidence, in denying their motion in arrest of judgment, and in denying their motion for judgment notwithstanding the verdict. We find no error in the trial court's rulings on these motions.

Defendants' motion for arrest of judgment is not applicable to civil cases, but was a criminal remedy formerly available under G.S. 15-179. *State v. Pinkney*, 25 N.C. App. 316, 212 S.E. 2d 907 (1975).

The motion to set aside the verdict as being against the greater weight of the evidence is directed to the sound discretion of the presiding judge whose ruling is not reviewable on appeal in the absence of abuse of discretion. *Dixon v. Shelton*, 9 N.C. App. 392, 176 S.E. 2d 390 (1970). There is clearly no abuse of discretion in this respect in the case at bar.

A motion for judgment notwithstanding the verdict is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 50.4, p. 333. The same standards which are applied to a motion for directed verdict are applicable to a motion for judgment notwithstanding the verdict. Thus, upon motion for judgment *non obstante veredicto* under G.S. 1A-1, Rule 50(b)(1) all the evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may be legitimately drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E. 2d 118 (1971). As stated above, the evidence was abundant to withstand the motion for directed verdict. Here, that same evidence is considered in the light most favorable to the plaintiff. Additionally, at this stage in considering post-verdict motions, the court had before it evidence presented by the defendant which was favorable to the plaintiff. With all the evidence before it, the trial court properly ruled that this was a case for the jury.

Defendants' next assignment of error is that the trial court improperly failed to submit to the jury the issue tendered by him which reads as follows: "Was there an existing debt owing between Bill Cleve and Nytco Leasing, Inc., of which Bill Cleve had knowledge at the time he conveyed property to his wife Daphne Cleve and himself as tenants by entirety on December 18, 1973?"

We agree with the trial court's ruling.

Defendants argue that before intent to defraud creditors can be found, it must be shown that creditors existed. Defendants correctly point out that at the time of the conveyances in question no money judgment against Bill Cleve in favor of plaintiff had been rendered. Defendants argue that the mere filing of a complaint against Bill Cleve does not prove that plaintiff was a creditor of Bill Cleve and therefore an answer to this issue was essential to a finding of fraudulent conveyance.

[10] A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. *Everett v. Mortgage Co., supra.* In other words, one need not be a judgment creditor to be entitled to the protection of G.S. 39-17. In the present case, the issue tendered by defendants was not raised by the pleadings or the evidence, defendants having stipulated that plaintiff's summons and complaint were served on Bill Cleve prior to the conveyances in question. This assignment of error is, therefore, without merit.

A review of the record with respect to the other assignments of error argued in defendants' brief impels us to conclude that they too are without merit. In the trial below, we find

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

TANGLEWOOD LAND COMPANY, INC. v. JAMES E. WOOD AND FLORENCE G. WOOD

No. 7814DC349

(Filed 6 March 1979)

1. Courts § 21.7— contract governed by laws of state where made

Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made, that is, where the last act to make a binding contract took place; therefore, Virginia law governed in this case since the contracts and promissory notes were executed by all parties in Virginia; the papers dealt with real property located in

Virginia; plaintiff was a Virginia corporation, though domesticated in N.C.; and the contracts expressly provided that they should be construed according to the laws of Virginia.

2. **Contracts § 4.1— mutual promises to buy and sell land—consideration adequate**

Under the law of the place where the contract in question was made, Virginia, the mutual promises to buy and sell land afforded reciprocal considerations and constituted a valid contract binding upon both parties.

3. **Vendor and Purchaser § 1— right to mortgage and prior sale retained by seller—buyer protected**

Provisions in contracts for the sale of land that seller could mortgage the property or make a prior sale did not make the contracts "totally one-sided in favor of plaintiff," since Virginia law protected defendants by (1) requiring plaintiff seller, who promised to convey a "special warranty deed," to convey title free and clear of any and all claims against himself, and (2) permitting vendee, upon breach of the contract to convey by vendor, to sue for specific performance or for the breach of contract.

4. **Vendor and Purchaser § 4— contract to convey special warranty deed—title not unconscionable**

Defendants' contention that the very nature of the title plaintiff contracted to convey upon payment of the purchase price was unconscionable was without merit since plaintiff promised to convey a "special warranty deed" which would effectively transfer a fee simple interest in the real estate.

5. **Contracts § 6— contract to convey land—inexperienced buyers—contract not against public policy**

In an action to recover the balance due upon contracts for the sale of land, defendants' contention that the contracts and promissory notes were in contravention of public policy and unfair to defendants because they were not experienced in the analysis of legal documents and did not perceive the significance of many of the terms and conditions contained in the agreements was without merit, since there was no evidence or argument that defendants did not understand fully what they were doing or that they did not have the opportunity to have the paperwritings examined and explained to them by someone more experienced than they.

APPEAL by defendants from *Gantt, Judge.* Judgment entered 30 November 1977 in District Court, DURHAM County. Heard in the Court of Appeals 29 January 1979.

On 20 June 1976, defendants entered into two executory contracts with plaintiff for the sale of land and executed two promissory notes payable to plaintiff, which is a Virginia corporation, domesticated in North Carolina. The real estate involved is located in Virginia, and the paperwritings were executed there. Defendants were residents of Durham County, North Carolina.

Under the contracts, defendants agreed to buy and plaintiff agreed to sell designated real estate for a sum certain. The "total of payments" was to be paid in 84 consecutive monthly installments as "evidenced by the promissory note attached. . . ." Both the contracts and promissory notes provided that plaintiff could declare all remaining installments immediately due and payable upon default by defendants in any payment. Under the contracts, plaintiff retained a security interest in the property and agreed, upon receipt of all payments under the notes, to deliver a "special warranty deed" to defendants.

Plaintiff alleged that defendants were in default on 25 February 1977. Plaintiff, therefore, declared the entire obligation under the contracts and notes due and payable and brought this action for the balances.

Defendants did not deny execution of the paperwritings but filed a counterclaim. They alleged that the contracts and notes were illusory and void and of no force and effect because of a total failure of consideration. They prayed for a refund of the monies they had already paid.

The case was tried without a jury. At the close of plaintiff's evidence, defendants made a "motion for a directed verdict in favor of the defendants' counterclaim and against the plaintiff on the ground that it is required as a matter of law." The motion was renewed at the close of all the evidence. The motions were denied.

Applying Virginia law, the trial judge made findings of fact and conclusions of law and entered judgment directing that defendants pay the balance due on the notes and contracts and that plaintiff deliver to defendants a deed conveying the property. Defendants made other post-verdict motions which were denied. Defendants appealed.

C. Barrett Graham, for plaintiff appellee.

Clayton, Myrick & Oettinger, by Kenneth B. Oettinger, for defendant appellants.

CARLTON, Judge.

Defendants assign as error the denial by the trial court of their motions for a directed verdict at the close of plaintiff's

evidence and at the close of all the evidence, and the denial of their post-verdict motions for a new trial and for judgment notwithstanding the verdict.

Directed verdicts are appropriate only in jury cases. *Bryant v. Kelly*, 279 N.C. 123, 181 S.E. 2d 438 (1971). In nonjury civil cases, the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b), N.C. Rules of Civil Procedure. *Higgins v. Builders and Finance, Incorporated*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973). This case was tried without a jury. Though defendants' motions were incorrectly designated, we shall treat them as having been motions for involuntary dismissal under G.S. 1A-1, Rule 41(b). *Neff v. Coach Co.*, 16 N.C. App. 466, 192 S.E. 2d 587 (1972).

By introducing evidence, defendants waived the right to have reviewed on appeal the question whether their motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) made at the close of plaintiff's evidence was erroneously denied. *Redevelopment Comm. of Greenville v. Unco, Inc.*, 23 N.C. App. 574, 209 S.E. 2d 841 (1974), *cert. denied*, 286 N.C. 415, 211 S.E. 2d 795 (1975). Moreover, G.S. 1A-1, Rule 41(b) does not provide for a motion for involuntary dismissal made at the close of all the evidence. *Reid v. Midgett*, 25 N.C. App. 456, 213 S.E. 2d 379 (1975). However, the fact that defendants made such a motion which is not sanctioned by the rules, and that the trial judge ruled thereon, is of no real consequence since the judge entered a judgment on the merits by making findings as required by G.S. 1A-1, Rule 52. *Castle v. B. H. Yates Co., Inc.*, 18 N.C. App. 632, 197 S.E. 2d 611 (1973).

In spite of the procedural deficiencies noted above, we shall pass on the merits of the questions appellants seek to raise by this appeal. Defendants contend that the trial judge erred in applying Virginia law in the trial of this action. We disagree.

[1] The North Carolina rule, concerning conflicts of law in contract cases, is well settled. Our rule is that the *lex loci celebrationis* (also referred to as the *lex loci contractus*)—the substantive law of the State where the last act to make a binding contract takes place—controls all aspects of the contract. 48 N.C.L. Rev. 243 at 275. Our Supreme Court has held on numerous occasions that matters bearing upon the execution, interpretation, and the

validity of a contract are determined by the law of the place where it is made. Moreover, the law of the place where the contract is made is *prima facie* that which the parties intended and such law ought therefore, to prevail, in the absence of circumstances indicating a different intention. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967); *Roomy v. Allstate Insurance Company*, 256 N.C. 318, 123 S.E. 2d 817 (1962).

In the present case, the contracts and promissory notes were executed by all parties in the Commonwealth of Virginia. The papers dealt with real property located in Virginia and the plaintiff is a Virginia corporation, though domesticated in the State of North Carolina. Moreover, the contracts expressly provided that "this contract shall be construed according to the laws of the Commonwealth of Virginia."

We, therefore, hold that the substantive issues in the present case are to be resolved under the law of Virginia, of which we are required to take judicial notice by G.S. 8-4. North Carolina law, however, governs the procedural matters. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974).

Defendants next contend that the contracts and promissory notes are, as a matter of law, ". . .unconscionable, illusory, totally lacking in consideration and in contravention of the public policy of this State and are, therefore, null and void and of absolutely no force and effect as to the defendants." On this basis, defendants argue their right to rescind the agreements and recover what they have paid to the plaintiff. We do not agree.

[2] We first address the question of consideration. Under Virginia law, a naked offer to sell land, without consideration, may become binding by an acceptance before withdrawal, the purchaser's promise implied in his acceptance being a consideration for the seller's promise. *Turner v. Hall*, 128 Va. 247, 104 S.E. 861 (1920). Moreover, a promise by the seller to convey, in return for a promise by the buyer to pay the unpaid remainder of the purchase price, furnishes a valid and sufficient consideration to bind the buyer and his estate to pay the remainder of the purchase money. *Midkiff v. Glass*, 139 Va. 218, 123 S.E. 329 (1924). In the present case, we hold that the mutual promises to buy and sell afforded reciprocal considerations and constituted a valid contract binding upon both parties.

[3] We next address the question of whether the contracts and promissory notes were "totally one-sided in favor of the plaintiff", unconscionable and illusory.

Paragraph twelve of the contracts provides in part as follows: "Buyer expressly consents that Seller and its grantees and/or assigns may mortgage said premises and the rights of Seller and Buyer shall be subordinate to the lien of all such mortgages, whether the same shall be given hereinbefore or hereinafter."

Defendants argue that this paragraph is inequitable in that it allows the plaintiff to mortgage the property regardless of the existence of any interest of the defendants. Defendants state that the net effect of the paragraph is that if the mortgage is foreclosed, the defendants in all likelihood, would, through no fault of their own, lose all monies which they had paid to the plaintiff under the terms of the contracts. We do not agree. Under paragraph four of each contract, plaintff agrees to convey title in each lot to the defendants free of blanket encumbrances by a "special warranty deed" upon payment of the full purchase price. Under Virginia law, a "special warranty deed" requires that the grantor convey title free of any and all claims against himself. Plaintiff is, therefore, merely maintaining its right to encumber the legal title still in its possession, subject to its obligation under the contract to convey a marketable title to the property free of all claims against itself to the defendants upon payment of the purchase price. If for any reason the plaintiff would be unable to convey an unencumbered title to the property to defendants, plaintiff would then be answerable in damages to the defendants for breach of contract.

Paragraph six of the contracts provides as follows:

> Buyer agrees that in the event of prior sale of said lot(s), this agreement and note shall be cancelled and voided without further liability to either party, except for refund of all payments made hereunder to Buyer, and to accept the decision of Seller without recourse, that said prior sale of lot(s) has been made.

Defendants argue that this paragraph is ambiguous as to whether it refers to a sale made prior to the date of the contracts in question or prior to the time when the defendants have paid the en-

tire purchase price to the plaintiff and the plaintiff has conveyed title to the defendants to consummate the sale. Defendants argue that the effect of this provision is to give the plaintiff the right to sell and convey the property to another purchaser at any time up to the time the entire purchase price has been paid. Defendants' contention is without merit, because they are fully protected by Virginia law. The rule is well established in that Commonwealth that when a vendor breaches a contract to convey, the vendee is entitled to sue for specific performance or for breach of contract. In case of the latter, the vendee is entitled to the return of all purchase money plus interest paid to the vendor prior to the breach, said monies being the measure of damages for failure to convey. *Davis v. Beury*, 134 Va. 322, 114 S.E. 773 (1922). Moreover, in paragraph six, the defendants expressly agree to accept refund of all payments made to plaintiff in the event of any prior sale of the real estate.

Defendants also argue that various other paragraphs of the contracts are unfair. Paragraph nine provides that the contracts may not be assigned or conveyed by the defendants without the prior written consent of the plaintiff. Paragraph eleven provides that the plaintiff may assign and/or grant a security interest in its rights under the agreements and notes and that the assignee's rights shall be free from all defenses, set-offs or counterclaims which the defendants might be entitled to assert against the plaintiff and paragraph two provides that the defendants shall pay all taxes and assessments on the lots and provide a hazard insurance policy insuring the improvements located on the premises, designating the plaintiff as loss payee and for such amount as the plaintiff or its assigns approve. Paragraph five requires that the defendants assume all risks of loss or damage to the lots by any means whatsoever and paragraph three provides for the plaintiff's remedies in the event the defendant should default on any of the provisions in the agreements or promissory notes. We have carefully examined each of these paragraphs and find them to be in compliance with the prevailing Virginia law and not unfair to defendants.

[4] Defendants also contend that the very nature of the title plaintiff contracted to convey upon payment of the purchase price is unconscionable. Paragraph four of the contracts provides in part as follows:

> (Seller) . . . agrees upon receipt of all payments provided herein (said payments to be made to the assigns of Sellers upon notice to Buyer) to *record* (if fee is charged Buyer therefor) *and deliver a conveyance* of said Lot(s) to Buyer consisting of a SPECIAL WARRANTY DEED, free of any blanket encumbrance, ...

Defendants argue that this provision is unfair in that plaintiff is not required to convey to defendants a *general* warranty deed, warranting the title against the claims and demands of all persons whomsoever. Defendants state that it is conceivable that the title conveyed would be subject to an encumbrance other than a blanket encumbrance, thereby rendering the value of the title conveyed to the defendants worthless. We find no merit in this contention.

A "special warranty deed" is a creation of the Virginia Legislature. Va. Code, 55-69. That statute provides that a deed under a special warranty is one under which the grantor agrees ". . . to forever warrant and defend such property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through or under him."

Title to realty may be effectually conveyed by either a special or a general warranty deed. A covenant of general warranty does not enlarge the title conveyed and does not determine the character of the title. 26 C.J.S., Deeds, § 117, p. 944. The only distinction we discern under Virginia law between a deed of general warranty and a deed of special warranty is the nature of the warranty itself, not the property interest conveyed. The special warranty deed effectively transfers a fee simple interest in the real estate. Hence, paragraph four of each contract requires plaintiff to convey to defendants marketable title to the real estate, constituting valid consideration for the purchase price.

[5] We also address defendants' argument that the contracts and promissory notes were generally in contravention of public policy and unfair to defendants since the defendants were not experienced in the analysis of legal documents and did not perceive the significance of many of the terms and conditions contained in the agreements. The authorities cited by defendants with respect to

the paperwritings in question do not support this contention, nor does our research disclose any authority in support of defendants' position.

A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals. Since the right of private contract is "no small part of the liberty of the citizen", the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of illegality. A contract is not unenforceable merely because it may have been unwise on the part of one of the parties. 17 C.J.S., Contracts, §§ 189, 190, pp. 981, 982. As our own Supreme Court has stated: "Liberty to contract carries with it the right to exercise poor judgment as well as good judgment." *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E. 2d 277, 283 (1945). We also note that there are no allegations of fraudulent misrepresentations and that the defendant, James E. Wood, submitted a letter into evidence at the trial below indicating his ability to read and write. There is also no evidence or argument that defendants did not have the full opportunity to inspect the paperwritings before executing them. While plaintiff's agent was undoubtedly more experienced than defendants in transactions such as these, there is no evidence or argument that defendants did not understand fully what they were doing or that they did not have the opportunity to have the paperwritings examined and explained to them by someone more experienced than they.

We have also examined the defendants' remaining contentions, which were not properly brought forth in their brief under appropriate assignments of error as required by Rule 28, N.C. Appellate Rules, and find they are without merit. In summary, we find that there was sufficient evidence for the trial court to find, as it did, that the parties entered into two valid and enforceable executory land sale contracts, that the defendants breached the contracts and that the plaintiff was entitled to enforce the terms of the contracts by the lawsuit.

We have previously discussed our treatment of defendants' motions for a directed verdict as motions for involuntary dismissal. Plaintiff's evidence was abundant to establish its right to relief and the trial court properly denied the motions.

Defendants' post-verdict motion for a new trial is not reviewable on appeal in the absence of abuse of discretion. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). We find no abuse of the trial court's discretion in the case before us and denial of the motion was proper.

Finally, defendants' motion for judgment notwithstanding the verdict was improperly made. The motion for judgment notwithstanding the verdict must be preceded by a motion for a directed verdict which, as previously stated, is improper in non-jury trials. It is obvious that the motion for judgment notwithstanding the verdict is inappropriate when addressed to the trier of fact.

For the reasons stated, the judgment of the court below is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

ROBERT D. STARR AND ROBERT D. STARR, GUARDIAN *AD LITEM* FOR BRETT R. STARR v. JOHN G. CLAPP, JR., AND GLADYS C. CLAPP

No. 7818SC185

(Filed 6 March 1979)

1. **Negligence § 60— duty to trespassers**

The duty owed trespassers on one's premises is that they must not be willfully or wantonly injured.

2. **Negligence §§ 7, 45— cable across private driveway—injury to minor motorcyclist—no willful or wanton negligence**

In an action to recover for injuries sustained by minor plaintiff when he drove his motorcycle into a cable gate on a private driveway on defendants' farm, the evidence was insufficient to support a jury verdict finding that plaintiff was injured as a result of willful or wanton conduct on the part of defendants where it showed that minor plaintiff was a trespasser on the property; defendants erected the cable gate across the driveway to protect their property from trespassing motorists; defendants did not know that minor plaintiff or anyone else had ever ridden a motorcycle on their property; and the cable was visible from a distance of 100 to 180 feet away.

Judge HEDRICK dissenting.

Starr v. Clapp

APPEAL by defendants from *Graham, Judge.* Judgment entered 22 November 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 November 1978.

Booth, Fish, Simpson, Harrison & Hall, by E. Jackson Harrington, Jr., and Konrad K. Fish, for plaintiff appellees.

Henson & Donahue, by Daniel W. Donahue, for defendant appellants.

VAUGHN, Judge.

The minor plaintiff was awarded $12,500 for damages sustained when he drove his motorcycle into a cable gate on a private driveway on defendants' farm. The jury found that he was injured by the "willful or wanton negligence of the defendants." The sole question presented is whether the court erred in failing to grant defendants' timely motions for directed verdict and for judgment notwithstanding the verdict. A majority of this panel of judges is of the opinion that the evidence fails to show that plaintiff's injuries were sustained as a result of any willful or wanton conduct on the part of defendants.

[1] Whether defendants' conduct was "willful or wanton" was properly selected as the standard by which that conduct must be judged. The duty owed a person on the premises of another depends upon, among other things, whether that person is an invitee, licensee or trespasser. *Hood v. Queen City Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959). "The duty owed to trespassers is that they must not be willfully or wantonly injured." *Jessup v. High Point, Thomasville and Denton Railroad*, 244 N.C. 242, 245, 93 S.E. 2d 84, 87 (1956). "As to a licensee the duties of a property owner are substantially the same as with respect to a trespasser; but an essential difference arises out of conditions which impose upon the owner or occupant of property the duty of anticipating the presence of a licensee." *Jones v. Southern Railway*, 199 N.C. 1, 3, 153 S.E. 637, 638 (1930).

An act is said to be wanton "when, being needless, it manifests no rightful purpose, but a reckless indifference to the interests of others." *Wise v. Hollowell*, 205 N.C. 286, 289, 171 S.E. 82, 84 (1933). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference

to the rights of others." *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929). The term "wanton negligence" always implies more than negligence. It implies turpitude. "Ordinary negligence has as its basis that a person charged with negligent conduct *should have known* the probable consequences of his act. Wanton and willful negligence rests on the assumption that he *knew* the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." (Emphasis added.) *Wagoner v. North Carolina Railroad*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953).

We now review the evidence as it relates to the foregoing principles. Plaintiffs called as their first witness the defendant, John Clapp, whose testimony in material part, was as follows. In January, 1975, he and his wife purchased the 100 acre farm on which the accident occurred. It adjoins a 130 acre tract owned by his parents. Defendants did not live on the property and usually were on the premises only on weekends. At the time of the accident there was an old unoccupied dwelling on the property. It was located some distance from any public road, and defendants reached the dwelling over a private dirt and gravel driveway that ran in a northerly direction from the public road. Defendants' agreement with Carl Pegram, the former owner, provided that Pegram could occupy the old dwelling for ninety days after the sale. Pegram experienced some delay in his plans and was allowed to remain on the property until September of 1975. After defendants purchased the property, they suffered considerable harassment from trespassing motorists. On at least two occasions, Mrs. Clapp was in the old house painting when strange male trespassers drove up in automobiles. Defendants also had problems with trespassers dumping trash, including beer cans and whiskey bottles. Clapp posted a "Private Road, Keep Out" sign at the entrance to the property. He also put up several signs along the driveway reading, "Warning, Posted Land, No Trespassing, Violators Can Be Prosecuted." Some of the signs were black and red metal, others were of multi-colored plastic and others were of cardboard. After Pegram moved away in September, defendants decided, in late September or early October, to block the driveway with a cable gate in an effort to stop the trespassing motorists. Clapp decided that he would block the driveway at what he considered the most logical spot. An aluminum cable,

formerly used by the telephone company and three-eighths of an inch in diameter, was attached to a pine tree on the east side of the road. The cable then ran about ten or twelve feet across the road and was attached to a post defendants planted in the edge of a seven acre field. The gate was locked at the end that was affixed to the telephone post. The cable swung about three feet off the ground in the center but was slightly higher at the ends. It was located down the road from defendants' property line so as to take advantage of an open field that was on one side of the road. The gate site was about 180 feet from where one would come out of a curve and could be seen by one coming down the road for that distance. The gate was from one eighth to one quarter of a mile from the old house. The sole purpose of installing the gate was to try to prevent people in automobiles from driving over the defendants' property. Clapp used cable for the gate because he had the cable on hand and because of its convenience. Neither of the defendants had ever seen the minor plaintiff or any other motorcyclists, bicyclists or horseriders on their property. Clapp said that he had no reason to know that plaintiff or anyone else with a motorcycle had ever been on his property.

Plaintiff then called Dr. R. T. Copeland, a Greensboro veterinarian who, along with G. S. Patrick, went to defendants' farm on the afternoon of 16 November 1975. The pair, with the written permission of defendants, frequently visited the farm to plant bird patches, release quail and train hunting dogs. Dr. Copeland was familiar with the bad situation that defendants faced with reference to trespassing motorists. He had seen carloads of trespassers parked on the property and had seen their discarded beer cans, wine bottles and other litter. On one occasion, he had taken his wife out to watch the dogs run, but she did not want to stay because of that situation. He was also familiar with the numerous signs that were posted warning people to stay off of the property because it was privately owned. He described the cable across the driveway as being a "shiny aluminum cable" and said that it was plainly visible to one coming down the driveway for at least 180 feet. As was their custom, they parked the truck just south of the barricade and started walking down the driveway. They then saw plaintiff lying on the ground ten or fifteen feet north of the cable and the motorcycle about fifteen feet north of plaintiff. Plaintiff was unconscious and had scrapes and

bruises on his chest and neck. An ambulance was called, and plaintiff was taken to the hospital.

The minor plaintiff took the stand in his own behalf. He knew nothing about what caused him to wreck his motorcycle. In fact, he did not remember riding it on the day that he was injured. He had, however, ridden his trail bike on the property many times before Pegram, the former owner, moved. He said, however, that the road had gotten "old" to ride on. By getting "old" he meant that he had ridden on it "so many times it was getting dull, nothing to it." At times in the past, he had also ridden on the property in the company of other people on motorcycles. The last time he remembered riding on the property was about a month before the accident. He did remember seeing a new "No Trespassing" sign about two months before the accident. He understood that Pegram had given him permission to ride on the property and did not know that Clapp had purchased the property until after the accident.

The minor plaintiff's grandfather, Ralph Stubblefield, also testified for the plaintiff. He operates a garage on McConnell Road almost directly across the road from the entrance to defendants' private farm road. He knew Carl Pegram, the former owner. With Pegram's permission he, his daughter and his son-in-law, had ridden horses on the property. His wife had ridden a motorbike on the property in the presence of Pegram about a year before the accident. As a result of a conversation with Pegram, Stubblefield told the minor plaintiff that he could ride his trail bike on the Pegram farm. He knew, however, that Pegram had sold the farm and he helped Pegram move away. He did not know until after the accident that his grandson had been on the property after Pegram moved. While operating his garage, he saw quite a few cars go in and out of the driveway leading to the house on defendants' farm. He had, however, never seen any other type of vehicles go in or out. When he helped Pegram move, there were no signs posted along the driveway, and the signs had to have been put up after Pegram moved. He learned of the accident after his grandson had been taken to the hospital. He went to the scene to identify the motorcycle. He returned the next day and looked at the cable from a distance of eighty feet. He had to look closely to see it because it blended in with the sun and the background. If he had not known it was there, he would not have seen it.

There was no reflective device, rag or anything else on the cable. The cable was not bright. There were soybeans about two and one-half feet high in the field west of the cable. All the leaves were off the beanstalks, and they had turned brown. The sun was shining brightly on the day of the accident.

After their motion for a directed verdict was denied, defendants offered the testimony of James Fryar, an ambulance driver. He testified that upon arriving to answer the emergency call, he saw the cable when he was at least 100 feet away and had no difficulty in doing so. He also recalled seeing a series of "No Trespassing" signs as he proceeded down the driveway to the scene of the accident. Trooper Bullard of the Highway Patrol went to the scene of the accident and testified that the cable was extremely shiny and that he had no trouble seeing it as he approached. Defendants also offered the testimony of G. W. Patrick who was with Dr. Copeland when the accident was first discovered. He testified that the cable could easily be seen from a distance of 180 feet. There were a number of "No Trespassing" posters that were signed by Mr. and Mrs. Clapp. Defendant, Gladys Clapp, also related the problems she and her husband had experienced with trespassing motorists. She did not know plaintiff and did not know that he or anyone else had ever ridden motorcycles or bicycles on the property.

The duty of the court in passing upon a motion for a directed verdict

> "has been stated so frequently and so clearly, that to attempt to restate it would be like carrying coal to Newcastle. Suffice it to say that on such a motion the court interprets the evidence in the light most favorable to plaintiff, and gives to him the benefit of every inference which the testimony fairly supports." *Wagoner v. North Carolina Railroad, supra,* at 167.

[2] The evidence discloses that defendants erected a cable gate on a private road owned by them and that plaintiff, while riding a motorcycle, crashed into that gate and seriously injured himself. The evidence, however, falls far short of showing that defendants, as they erected and maintained the gate, *knew* that the minor plaintiff would probably run into the gate and, notwithstanding that knowledge, were recklessly, wantonly or intentionally indif-

ferent to the probable result. The evidence discloses that the gate was erected to meet a legitimate need and to serve a rightful purpose. It was a reasonable means for defendants to employ in order to protect their property from trespassing motorists. The evidence further discloses that defendants did not know (or even have reason to suspect) that plaintiff or anyone else had ever ridden a motorcycle on their property. Even plaintiff's grandfather who operated a business across the road from defendants' private driveway never observed anything other than automobile traffic go in or out of defendants' driveway. Finally, it is very clear that we are not here faced with a situation where a landowner, expecting the arrival of trespassers, deliberately creates an inherently dangerous condition and leaves it with a deceptive appearance of safety in order to trap or harm the intruders.

In summary, the evidence fails to disclose that defendants breached a duty they owed plaintiff. They are, therefore, not responsible for his injuries, as unfortunate as they may be. The judgment should have been directed in favor of the defendants. The judgment for plaintiff is vacated, and the case is remanded.

Vacated and remanded.

Judge ARNOLD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In North Carolina, the "duty owed to trespassers is that they must not be wilfully or wantonly injured." *Hood v. Queen City Coach Co.*, 249 N.C. 534, 540, 107 S.E. 2d 154, 158 (1959); *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). The degree of "willfulness" or "wantonness" necessary to impose liability upon a landowner for injury to a trespasser has been defined as follows:

> To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences *probable* to

> result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he *knew the probable consequences*, but was recklessly, wantonly or intentionally indifferent to the results. (Emphasis added.)

Wagoner v. North Carolina R. R. Co., 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953); *Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977); *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E. 2d 50 (1970).

Since there is plenary evidence that the defendants intentionally stretched the cable across the roadway, I focus on the questions whether there is any evidence to support a finding that the defendants "knew the probable consequences" of their act and whether they were "recklessly, wantonly or intentionally indifferent to the results."

While the defendants testified that they had no actual knowledge that the minor plaintiff had ever ridden his motorbike on their private drive, there is ample evidence in the record tending to show that automobiles, motorcycles, and even horses, were ridden by trespassers on the roadway in question on numerous occasions over a period of many months after the defendants purchased the property, and while the defendants were working on the house located on the property. Although there is evidence in the record that the 3/8 inch aluminum cable was easily visible at a distance of 180 feet, there is also evidence tending to show that the cable blended in with the surroundings and was barely visible even to a person who knew it was there.

This evidence, when considered in the light most favorable to the plaintiff, gives rise to the following inferences: (1) that the defendants knew that trespassers were riding motorcycles or trail bikes over their private driveway; (2) that the 3/8 inch aluminum cable was difficult to see, even if one knew it was there; and (3) that the cable stretched across the driveway at a height of 3½ to 4 feet would be dangerous to persons riding motorcycles or trail bikes. These inferences would permit the jury to find that the defendants knew the probable consequences of their act, and that they were recklessly, wantonly, and

heedlessly indifferent to the results in creating the condition that proximately caused the minor plaintiff's injuries.

The defendants argue that the trial judge should have granted their motions for a directed verdict and for a judgment notwithstanding the verdict because the minor plaintiff was contributorily negligent as a matter of law. However, the rule in North Carolina is that when willful or wanton conduct for which defendant is responsible is a proximate cause of the injuries complained of, the contributory negligence of the plaintiff will not bar recovery. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971); *Pearce v. Barham*, 271 N.C. 285, 156 S.E. 2d 290 (1967); *Jarvis v. Sanders, supra.* The case of *Pafford v. Jones Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408 (1940), cited by the defendants, is not authority to the contrary.

For the reasons stated above, I vote to affirm.

DAVID B. LEE v. CAPITOL TIRE COMPANY, INC.

No. 7810SC318

(Filed 6 March 1979)

1. **Evidence § 49.1 — hypothetical question — exclusion of facts proper**

In an action to recover for damages suffered by plaintiff when a wheel on his tractor-trailer separated from the hub because defendant allegedly failed to tighten inner lug nuts, factors which defendant contended were improperly omitted from a hypothetical question asked of plaintiff's expert were either facts within the expert's personal knowledge, and thus not required to be included in the question, or were facts as contended by defendant which were the object of vigorous cross-examination.

2. **Rules of Civil Procedure § 50.3 — motion for directed verdict — failure to state grounds — assertion of grounds on motion for judgment n.o.v. improper**

The trial court did not err in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict, since defendant did not state the grounds for his motion for directed verdict, and he could not assert grounds for his motion for judgment notwithstanding the verdict which had not been included in the motion for directed verdict.

APPEAL by defendant from *Clark, Judge.* Judgment entered 11 January 1978, in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1979.

Plaintiff filed suit to recover for damage to his tractor-trailer outfit and for the loss of its use due to the damage which occurred when the left front drive wheel of the tractor separated from the hub and completely came apart from the Kenworth tractor. The dislodged wheel collided with the undercarriage of the 1973 Utility trailer and caused damage in the alleged amount of $2,138.64. Plaintiff also alleged that due to the loss of use of the trailer during the period of time necessary for repairs, he suffered damages of $3,600.

Plaintiff's complaint avers that defendant, who installed ten new Michelin tires on the Kenworth tractor, mounted them in a negligent manner, *i.e.* failed to tighten properly the inner lug nuts, which caused the wheel hub lugs to wear rapidly and fail due to metal fatigue. Plaintiff also alleged breach of an implied warranty, but abandoned that theory at trial.

Defendant Capitol Tire Company, Inc., admitted installing the tires, but denied any negligence with respect to that installation. Defendant counterclaimed for $1,750 plus interest, this amount representing the cost of the tires and installation for which it had never been paid, and for the balance of an open account plaintiff maintained with defendant in the amount of $62.10. Plaintiff replied admitting that upon his recovery these amounts should be charged as a setoff.

Plaintiff's evidence tended to show that David B. Lee, a trucker by occupation, took his 18-wheel tractor-trailer into Capitol Tire Company, Inc., on 11 October 1975 to have ten new Michelin tires installed on the tractor. The best tires from the tractor were to be transferred to the trailer. Lee's son Marty accompanied him. They both remained at the shop most of the approximately five hours time required for the installation. Lee testified that at no time during the day while he observed the defendant's two employees mounting the tires did he see anyone chisel off old lug nuts. He also denied receiving any instructions from L. C. Norris, President of Capitol Tire Company, Inc., that he needed more lug nuts on the wheel hubs to replace the old ones that had to be chiseled off.

The wheel eventually separated from the hub when plaintiff was driving about 50 miles per hour near Fort Worth, Texas, on the Fort Worth-Dallas Turnpike. He was making his second trip

to the west coast since the new tires were mounted. The mileage on the new tires amounted to between 11,000 and 12,000 miles. Plaintiff testified that no one had performed any maintenance work on the wheels or tires since defendant completed the mounting. At the time of the incident, Lee heard a "big blow, boom" and was thrown around the cab of his truck. He stopped, noticed that the wheel was missing from the hub, and observed where the errant wheel had apparently hit the underside of the trailer causing damage to the tandem. The next day Lee and his son found the wheel where it had come to rest down an embankment beside the highway.

Plaintiff spent the remainder of 11 November 1975, and the next two days arranging for his tractor and trailer to be repaired. The trailer was left at Fort Worth Trailer Company, the local Utility dealer, to be repaired. The contents of the damaged trailer were transferred to a new trailer Lee had obtained from El Paso. The tractor was repaired at Sam's Truck Service in Fort Worth. Plaintiff and his son resumed their trip with the replacement trailer under tow on the night of 13 November 1975.

Plaintiff testified that he could tell the wheel came off due to loose inner lug nuts because, as he stated, ". . . I see no other way they could have come off if they hadn't been loose and running the others off." On cross-examination, plaintiff admitted that the wheel could come off if some nuts had been left off. In such a case, the wheel would begin to wobble and eventually strip out the stud from the hub of the wheel. Plaintiff's expert witness John C. Jeffries explained during his testimony how the dual-disc wheel arrangement on this "Budd-type" ten-hole wheel functions. The ten lug bolts (or studs) are passed through the hub and pressed into place from the inside of the hub. The wheel is then pushed onto the hub by aligning the wheel so that the studs pass through the ten holes on the wheel. The large hole in the center of the wheel is then fitted to the machined area on the hub to provide load-bearing capacity. Each of the ten nuts is then supposed to be tightened onto each stud in sequence with the beveled edge to the wheel. The outer wheel is then placed onto the studs over the inner lug nuts and tightened into place by another set of lug nuts in the same manner. The expert then testified in substance that in his opinion, based upon his examination of the wheel, the

separation occurred because the inner lug nuts were not properly tightened.

Defendant's President L. C. Norris testified that his employees Joe Moore and Charles Dunn mounted the tires for Mr. Lee. He stated that he was in and out of his office to check on the progress of the installation and that it took a long time to install the new tires because they had to chisel the inner nuts off the lug bolts to remove the wheels because someone had put the nuts on "cross-threaded". Norris called around town to find replacements for the nuts, but because it was past noon on Saturday he was unable to find any. Norris testified that plaintiff knew about the problem, told him to replace those nuts that were still good, and that he was going to have them replaced Monday before he went out. Joe Moore and Charles Dunn testified to substantially the same facts.

The case was submitted to a jury which returned a verdict finding that plaintiff was entitled to damages totalling $3,547.51. A directed verdict was granted for defendant on the counterclaim in the amount of $1,750 with interest. Defendant appeals.

Blanchard, Tucker, Twiggs & Denson, by R. Paxton Badham, Jr., for plaintiff appellee.

L. Bruce McDaniel for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant challenges the sufficiency of the hypothetical question propounded to plaintiff's expert witness concerning the cause of the separation of the outer wheel from the hub of the Kenworth tractor. The witness, John C. Jeffries, was tendered and accepted without objection as an expert mechanic, damage analyst, and appraiser. Jeffries personally examined the wheel that separated from the plaintiff's truck. At trial he described the wheel assembly and the proper mounting technique. Plaintiff's counsel then submitted the following question to the witness:

> "Q. Okay. Now, I'm going to ask you to assume some facts, if you will, please. If you could assume that the jury should find by the evidence and the greater weight that on November

11th, 1977 (sic), while driving on a highway near Fort Worth, Texas, at a speed of approximately fifty miles an hour, this wheel, the same wheel that has been designated as Plaintiff's Exhibit A, came off of a 1971 Kenworth tractor then being operated by the plaintiff, David Lee, and that approximately one month earlier than that, Mr. Lee had had this wheel installed by the defendant, Capitol Tire Company, and in the meantime driven some twelve to fourteen thousand miles. Now, based on those facts and on your personal examination of this wheel, do you have an opinion as to what caused this tire and wheel to separate from the hub and come off?

MR. MCDANIEL: Objection.

COURT: Overruled. EXCEPTION NO. 1

A. Yes, sir, I do.

Q. And what is that opinion?

A. In my opinion, the inner nuts were not properly tightened before the outer wheel was put on, . . ."

After the witness elaborated on the basis of his opinion, defendant moved to strike the testimony essentially on the grounds that the question failed to include any hypothesis with respect to the pre-existing condition of the wheel, *i.e.* defendant's contention that plaintiff insisted that the tires be mounted despite his knowledge that some of the lug nuts could not be replaced. Defendant objects to the question on the basis of the well-established rule in this State that a hypothetical question omitting facts which go to the very essence of the case may be so incomplete that an expert's opinion based thereon would be unreliable and objectionable. *See State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975). The rule is to prevent the submission of opinions which are based on information clearly insufficient to form the basis of an opinion, not to require a propounded hypothetical question to assume every state of facts which could be found from the evidence. It is permissible in this State to ask an expert for an opinion based upon different combinations of facts. If a party is concerned that omitted facts might elicit a different opinion from the expert, it is incumbent upon him to elicit an opinion based upon a counter-hypothetical question containing other facts which the jury could find from the evidence. *See Dean v. Coach Co.*,

supra; Godfrey v. Power Co., 190 N.C. 24, 128 S.E. 485 (1925); *State v. Stewart*, 156 N.C. 636, 72 S.E. 193 (1911). Similarly, it has been suggested that the better practice is to permit questions which contain less than all facts material to the issue because to require the inclusion of all facts would lead to lengthy, meaningless questions. The safeguards preventing misleading questions include cross-examination (*see generally* E. Cleary, McCormick on Evidence § 14 (2d ed.)), and the rule disallowing an opinion based on a set of facts clearly insufficient as a basis for an opinion.

It is elementary that a hypothetical question submitted to an expert should include only those facts which a jury could be justified in inferring from the evidence. *See generally* 1 Stansbury's N.C. Evidence § 137 (Brandis rev. 1973). Defendant contends that plaintiff's hypothetical question was fatally defective for failing to include facts relating to (1) how the wheel was initially installed, (2) the previous condition of the wheel assembly, (3) interim use or misuse of the wheel, and (4) the fact that some of the lug nuts may have intentionally been left off. The only evidence in the record prior to the questioning of the witness negated defendant's contentions that there was pre-existing damage to the wheel and that some of the lug nuts were intentionally not replaced. There was no evidence concerning the other facts. Therefore, the plaintiff's hypothetical question could not properly assume facts not in evidence.

Furthermore, defendant was afforded the opportunity to vigorously cross-examine the expert concerning the basis of his opinion. He questioned the expert with respect to the possibility that the damage may have existed prior to defendant's mounting of the wheels and that some lugs may not have been replaced at plaintiff's insistence. This is the proper function of cross-examination and raised weaknesses perceived by defendant to exist in the expert's opinion testimony.

The objection to the hypothetical question was properly overruled. The factors not included in the question were either facts within the expert's personal knowledge, and thus not required to be included in the question (*see generally* 1 Stansbury's N.C. Evidence § 136 (Brandis rev. 1973)), or were facts as contended by the defendant which were the object of vigorous cross-

examination. Those facts included in the hypothetical question were supported by plaintiff's evidence. The expert's personal knowledge and those facts supplied by the question provided a sufficient foundation for the witness' opinion testimony. It was incumbent upon defendant's cross-examination to expose any weakness in that testimony. Defendant's first assignment of error is overruled.

[2] Defendant excepts to the court's denial of its motions for a directed verdict and judgment notwithstanding the verdict and assigns error to these rulings. We note initially that the record does not disclose the specific grounds for defendant's motions for a directed verdict. G.S. 1A-1, Rule 50(a) mandates: "A motion for a directed verdict shall state the specific grounds therefor." Our Supreme Court has recognized that the requirement is mandatory, although the courts need not enforce the rule infexibly when the grounds for the motion are apparent to the trial court and the parties. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *see also Clary v. Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975). Defendant subsequently moved for a G.S. 1A-1, Rule 50(b) judgment notwithstanding the verdict following the jury verdict in plaintiff's favor and did state grounds for the motion. The reviewability of the trial court's rulings on similar motions was addressed by this Court in *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978), which is controlling. We quote:

> "Upon failure to state specific grounds, an appellant cannot question on appeal the insufficiency of the evidence to support the verdict. *Wheeler v. Denton*, [9 N.C. App. 167, 175 S.E. 2d 769 (1970)]. The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict. *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F. 2d 64 (5th Cir., 1972)." *Love v. Pressley*, 34 N.C. App. at 511, 239 S.E. 2d at 580.

Even if we were to infer from the record that defendant's motion for a directed verdict was based on the insufficiency of the evidence of negligence to go to the jury, defendant is deemed to

have abandoned that exception by failing to assign this specific ground of error and by failing to make supporting arguments in the brief. *See* N.C. Rules of Appellate Procedure, Rule 10(c) and Rule 28(a).

Furthermore, we note that defendant did not plead the affirmative defenses of contributory negligence and assumption of the risk as required by G.S. 1A-1, Rule 8(c). Consequently, defendant is not entitled to that defense upon a motion for directed verdict, nor was it entitled to instructions regarding the issues of contributory negligence or assumption of risk.

Defendant further assigns error to the trial court's summary of the evidence indicating that plaintiff rented a substitute trailer and the instruction concerning damages for loss of use of the trailer, to the court's failure to charge the jury concerning the expert's testimony that failure to replace the lug nuts could cause the wheel to come off, and to the denial of defendant's motion for a new trial. We note initially that defendant's brief fails to refer to the proper exception numbers in certain instances and refers to the wrong page numbers of the exceptions in every instance. *See* North Carolina Rules of Appellate Procedure, Rule 28(e) (*see also* Drafting Committee Note to Subdivision (e) (1977 Cum. Supp.)). This Court will not "fish out" an appellate's exceptions which are not referred to by the proper printed page number. *See e.g., Shepard v. Oil & Fuel Co.*, 242 N.C. 762, 89 S.E. 2d 464 (1955); *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175 (1927). Thus defendant's remaining assignments of error are not properly before this Court and need not be considered. Nevertheless, we have reviewed the record and have found no valid reason for disturbing the result reached in the trial court.

No error.

Judges MARTIN (Harry C.) and CARLTON concur.

RICHARD EDWIN HEATH v. SWIFT WINGS, INC., THE BANK OF VIRGINIA TRUST COMPANY, FRANK W. KISH, RICHARD H. KISH AND KERMIT ROCKETT

No. 7824SC367

(Filed 6 March 1979)

1. **Aviation § 3.1— airplane crash—standard of care of pilot—erroneous instruction**

In an action to recover for the deaths of two passengers in an airplane crash, the trial court erred in referring in the instructions to the "ordinary care and caution, which an ordinary prudent pilot having the same training as [the pilot in this case], would have used in the same or similar circumstances," since such instruction permitted the jury to consider the pilot's own particular experience and training in determining the standard of care required of him rather than applying a minimum standard generally applicable to all pilots.

2. **Aviation § 3.1— deaths in airplane crash—instruction on emergency procedure—insufficient supporting evidence**

In an action to recover for the deaths of two passengers in an airplane crash, testimony that a pilot is taught to switch magnetos when the airplane is experiencing engine roughness was insufficient to support the court's instruction that switching magnetos constituted an emergency procedure.

3. **Aviation § 3.1; Trial § 36.2— contentions of parties—expression of opinion**

In an action to recover for the deaths of two passengers in an airplane crash, the trial court expressed an opinion on the evidence in violation of G.S. 1A-1, Rule 51(a) when, in summarizing the contentions of the parties, the court stated that "plaintiff would have [the pilot] adhere to a perfect standard of care whereas the standard is that of the ordinary prudent pilot."

APPEAL by plaintiff from *Howell, Judge.* Judgment entered 7 November 1977 in Superior Court, WATAUGA County. Heard in the Court of Appeals 31 January 1979.

On 3 August 1975 a Piper 180 Arrow airplane crashed immediately after takeoff from the Boone-Blowing Rock Airport. Killed in the crash was the pilot, Fred Heath; his wife, Jonna; their son, Karl; and a family friend, Vance Smathers. Valerie Heath, a daughter of Fred and Jonna Heath, and sister of Karl, became the sole survivor of the Heath family. This action was instituted by Richard E. Heath as ancillary administrator of the estates of Jonna and Karl Heath against (1) Swift Wings, Inc., the corporate owner of the aircraft, on the grounds of agency; (2) the four shareholders of Swift Wings, Inc.—Fred Heath, Frank

Kish, Richard Kish, and Kermit Rockett—alleging they actually constituted a *de facto* partnership, and (3) The Bank of Virginia Trust Company, Executor of the Estate of Frederick B. Heath, Jr.

The plaintiff's complaint alleged several grounds of negligence: (1) operation of the aircraft in an overloaded condition beyond its performance capabilities, (2) failure to follow the operating manual with regard to takeoff distance for short and soft field takeoffs, (3) failure to take into account specific runway and weather conditions, (4) failure to take appropriate emergency steps including aborting takeoff, (5) flying below safe speed, (6) improper control after takeoff, and (7) violation of federal aircraft safety regulations.

Defendants answered, generally denying negligence, the existence of agency, and a *de facto* partnership.

Plaintiff's evidence, except to the extent it is quoted from the record, is briefly summarized as follows: Mary Payne Smathers Curry, widow of Vance Smathers, observed the takeoff of the Piper aircraft shortly after 5:00 o'clock on 3 August 1975. She observed Fred Heath load and reload the passengers and luggage, apparently in an effort to improve the balance of the aircraft. He also "walked around [the airplane] and looked at everything . . . She remembers seeing him and thinking that he's doublechecking it to be sure no one has slashed the tires." The airplane engine started promptly and the plane was taxied to the end of the runway where it paused for approximately five minutes before takeoff. The airplane came very close to the end of the runway before takeoff. However, "[t]he engine sounded good the entire time, and she did not recall hearing the engine miss or pop or backfire." After takeoff, the airplane "gained altitude but it didn't go up very high" and then "leveled off pretty low".

Joe Maples, the golf pro at Boone Golf and Country Club, was, at the time of the crash, in his pro shop which is located 600 to 800 yards from one end of the runway. He is a licensed pilot and operates on a voluntary basis a "Unicom" radio in the pro shop to issue aircraft traffic advisories. He heard the takeoff and testified that the engine sounded normal. He observed that his thermometer at the time of takeoff registered between 78° and 80° Fahrenheit. Later on that day, he also observed that the grass appeared to have grown to a height of five to six inches on

parts of the runway, although it was worn somewhat in the middle. The soil was hard and flat. The crash occurred approximately one mile from the end of the runway. There is a gradual, unobstructed rise in the terrain to an altitude of about 200 feet within one mile from the end of the runway. Only crops, isolated trees, and drainage ditches lie on the terrain between the runway and the rise.

Joe Shuford testified that he resides in a house approximately 2,000 feet from the end of the runway from which the Piper aircraft took off. The house overlooks a cornfield which is beneath the path of aircraft departing the runway. He heard the aircraft taking off and "remarked to his wife that it seemed like it was taking a long time for the airplane to get down the runway." When the plane came in sight it was "bobbing up and down like a 'yo-yo' just above the corn. He saw the plane touch into the corn twice. The engine sounded like it was having a hard time flying." The landing gear was up. As the plane approached a set of power lines extending across the cornfield, it lifted several feet and he heard a loud "pop". The aircraft then passed between two power poles, made a right bank, the left wing struck a tree, and the aircraft continued down the valley without gaining any altitude. The plane eventually crashed near a set of power lines with which the plane apparently collided on Holiday Hills Road.

Robert Bumgardner, a representative of the local electric membership corporation, testified that at the point where they were apparently struck by the plane, the power lines were close to 30 feet above the ground. One pole had been broken some distance above the ground, the cross arm on another had been broken, and one of four power lines had been snapped.

Richard G. Rodriquez, an investigator for the National Transportation Safety Board, testified that his investigation indicated that the grass runway was firm and essentially level. The landing gear was apparently down and locked at the time of the crash. The flaps were up. He testified that the fuel was flowing to all four cylinder injectors and that a test of each magneto indicated that they were functioning properly. He concluded, "Yes, my testimony would be that we found no evidence of preimpact malfunction."

William B. Gough, Jr., a free-lance mechanical engineering consultant and pilot, testified concerning the operation and flight performance of the Piper 180 Arrow. He testified concerning the many factors affecting the takeoff capabilities of the Piper and the calculations to be made by the pilot before takeoff, utilizing flight performance charts. He testified that in his opinion, according to his calculations, the pilot should have used flaps to aid in the takeoff. Furthermore, he stated that in his opinion the reasonably prudent pilot should have made a controlled landing in the cornfield shortly after takeoff if he were experiencing difficulty attaining flight speed, and that if he had done so Jonna Heath and Karl Heath would have survived.

The defendant offered no testimony, but instead relied solely on testimony elicited on cross-examination which is briefly summarized below. Witness Joe Maples conceded that he did not hear the airplane's engine as it neared takeoff, because the takeoff was from the end of the runway fartherest from the pro shop. He also stated that he had utilized the airport on numerous occasions before he was ever aware of the power line obstructions in the cornfield. Joe Shuford testified with respect to the engine noise that, "Yes, sir, I have indicated that when I heard this 'pop' my first impression was that it was an engine backfiring." Mrs. Curry admitted that, although she testified that the engine sounded good during takeoff, she would not recognize the sound of an engine that was unable to develop full power. Mr. Rodriquez conceded, under extensive cross-examination, that there were some malfunctions which his inspection may not have detected, and would not deny absolutely that malfunction could have caused the crash. Plaintiff's expert Gough testified concerning several malfunction possibilities that could conceivably have caused power loss.

After the customary motions at the conclusion of all the evidence, the case was submitted to the jury upon voluminous instructions by the trial court. The jury returned a verdict answering the following issue as indicated: "1. Was Fred Heath, Jr., negligent in the operation of PA—28R 'Arrow' airplane on August 3, 1975 as alleged in the complaint?" Answer: "No". Plaintiff appeals assigning error to the exclusion of certain evidence and to the charge to the jury. Defendants cross-appeal assigning

error to the denial of the motions for a directed verdict by Swift Wings, Inc.

Adams and Jenkins, by W. Thad Adams, III, for plaintiff appellant.

Smith, Anderson, Blount and Mitchell, by James G. Billings, for defendant appellees.

MORRIS, Chief Judge.

Plaintiff has brought forward on appeal 15 assignments of error directed to 26 exceptions to rulings and instructions of the trial court. We direct our inquiry to a very limited number of assignments of error which identify substantial errors of law sufficiently prejudicial to the plaintiff to require a new trial of this matter. We will not address the remaining assignments of error because of the probability that the same errors, if any, will not recur upon retrial of the cause.

[1] Assignment of error No. 4 is directed to the trial court's charge concerning the definition of negligence and the applicable standard of care:

> "Negligence, ladies and gentlemen of the jury, is the failure of someone to act as a reasonably and careful and prudent person would under the same or similar circumstances. Obviously, this could be the doing of something or the failure to do something, depending on the circumstances. With respect to aviation negligence could be more specifically defined as the failure to exercise that degree of ordinary care and caution, which an ordinary prudent pilot having the same training and experience as Fred Heath, would have used in the same or similar circumstances."

It is a familiar rule of law that the standard of care required of an individual, unless altered by statute, is the conduct of the reasonably prudent man under the same or similar circumstances. *See Williams v. Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977); *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132 (1964). While the standard of care of the reasonably prudent man remains constant, the quantity or degree of care required varies significantly with the attendant circumstances. *Pinyan v. Settle*, 263 N.C. 578, 139

S.E. 2d 863 (1965); *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281 (1963).

The trial court improperly introduced a subjective standard of care into the definition of negligence by referring to the "ordinary care and caution, which an ordinary prudent pilot *having the same training and experience as Fred Heath*, would have used in the same or similar circumstances." (Emphasis added.) We are aware of the authorities which support the application of a greater standard of care than that of the ordinary prudent man for persons shown to possess special skill in a particular endeavor. *See generally* Prosser, Law of Torts (4th ed.) § 32. Indeed, our courts have long recognized that one who engages in a business, occupation, or profession must exercise the requisite degree of learning, skill, and ability of that calling with reasonable and ordinary care. *See e.g., Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966) (fire sprinkler contractor); *Service Co. v. Sales Co.*, 261 N.C. 660, 136 S.E. 2d 56 (1964) (industrial designer); *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955) (physician); *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954) (attorney). Furthermore, the specialist within a profession may be held to a standard of care greater than that required of the general practitioner. *See generally Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). Nevertheless, the professional standard remains an objective standard. For example, the recognized standard for a physician is established as "the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice." *Dickens v. Everhart*, 284 N.C. at 101, 199 S.E. 2d at 443.

Such objective standards avoid the evil of imposing a different standard of care upon each individual. The instructions in this case concerning the pilot's standard of care are misleading at best, and a misapplication of the law. They permit the jury to consider Fred Heath's own particular experience and training, whether outstanding or inferior, in determining the requisite standard of conduct, rather than applying a minimum standard generally applicable to all pilots. The plaintiff is entitled to an instruction holding Fred Heath to the objective minimum standard of care applicable to all pilots.

[2] Plaintiff assigns error to the portion of the trial court's summary of the defendant's evidence as elicited during cross-

examination. Plaintiff excepts to the following statement by the court:

> "That the ignition was on one of the magnetos which would indicate that the pilot, having encountered difficulty, had switched from both, which is an emergency procedure; . . ."

Plaintiff contends that the evidence did not reasonably support the trial court's statement that the pilot had initiated an emergency procedure. Defendants argue that the court drew a reasonable inference from the evidence. It is conceded by defendants that there was no testimony precisely stating that switching magnetos is an "emergency procedure".

It is fundamental in this State that the trial court may not submit for the consideration of the jury facts material to the issue of negligence not fully supported by the evidence. *Dove v. Cain*, 267 N.C. 645, 148 S.E. 2d 611 (1966). The issue of whether the pilot of the Piper 180 Arrow was in fact confronted with an "emergency" due to engine malfunction is a crucial element of the case. Testimony that a pilot is taught to switch magnetos when the aircraft is experiencing engine roughness is, under the facts of this case, insufficient evidence in this record to support the court's charge which intimated that switching magnetos constitutes *per se* an emergency procedure. Moreover, there is no evidence to suggest that engine roughness presents an emergency situation when proper safety factors are taken into consideration prior to an attempted takeoff.

[3] Plaintiff also assigns error to the following portion of the court's summary of the contentions of the parties:

> "[T]hat the plaintiff would have Fred Heath adhere to a perfect exact standard whereas the standard is that of the ordinary prudent pilot; . . ."

Such a statement may appear to the jury as an indication of the trial court's opinion with respect to the merits of plaintiff's lawsuit. It is clear from the pleadings that the plaintiff is proceeding only on the theory of a failure to exercise the due care required of the ordinary prudent pilot. There is no basis for the trial court's statement that plaintiff insists on a perfect standard as opposed to a reasonable standard. This Court has held that when the manner of stating the contentions of the parties is in-

dicative of the court's opinion on the case, the charge is violative of G.S. 1-180. *Voorhees v. Guthrie*, 9 N.C. App. 266, 175 S.E. 2d 614 (1970). G.S. 1-180 is now embodied in substance within G.S. 1A-1, Rule 51(a). *Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971). Furthermore, exceptions to an expression of opinion within the context of the summary of the contentions of the parties may be raised for the first time on appeal. *Voorhees v. Guthrie, supra*; *State v. Powell*, 6 N.C. App. 8, 169 S.E. 2d 210 (1969).

This matter was well tried by both counsel for plaintiff and counsel for defendants, and several days were consumed in its trial. Nevertheless, for prejudicial errors in the charge, there must be a

New trial.

Judges MARTIN (Harry C.) and CARLTON concur.

STATE OF NORTH CAROLINA v. GARY DENNIS LEE

No. 7815SC1033

(Filed 6 March 1979)

1. **Criminal Law § 180— petition for writ of error coram nobis—replacement by statute**

A petition for a writ of error *coram nobis* was the appropriate procedure on 18 November 1977 by which a defendant not in prison could challenge the validity of a criminal judgment on the ground that he had been denied his constitutional right to counsel, a matter which was extraneous to the record, and the prior permission of the Supreme Court was not a prerequisite to the filing of the petition since there had been no appeal from the challenged judgment. However, relief formerly available by *coram nobis* is now available by a motion for appropriate relief under G.S. 15A-1411(c).

2. **Constitutional Law § 47— willful failure to support illegitimate child—right to counsel—absence of waiver**

A defendant charged with willful refusal to support an illegitimate child in violation of G.S. 49-2 had a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waived that right, whether or not he was an indigent, since a sentence of imprisonment may be imposed for such offense. Therefore, a suspended sentence imposed on a non-indigent defendant after his plea of guilty must be set aside where the record shows that defendant was not represented by counsel and did not knowingly and intelligently waive counsel.

3. Constitutional Law § 49— failure to employ counsel—no waiver of counsel

Defendant's failure to employ counsel during the period between 20 August, when a warrant was served on him, and 2 September, when he was tried, would not, standing alone, support a finding that he knowingly and intelligently waived his right to counsel.

APPEAL by defendant from *Farmer, Judge.* Order and Judgment dated 17 June 1978 entered in Superior Court, CHATHAM County. Heard in the Court of Appeals 8 February 1979.

On 20 August 1977 defendant was arrested on a warrant charging willful refusal to support his illegitimate child in violation of G.S. 49-2. On 2 September 1977 he pled guilty to this charge in District Court and received a six months prison sentence, suspended on his paying the court costs and $100.00 per month for the support of the child. He did not appeal. He paid the court costs but thereafter failed to pay the monthly support payments. Defendant was not represented by counsel when his plea and the judgment against him were entered on 2 September 1977.

On 21 October 1977 an order was entered for defendant's arrest for failure to comply with the judgment, and defendant was ordered to appear in District Court on 18 November 1977. On that date defendant filed in the District Court through employed counsel his verified petition for a writ of error *coram nobis* seeking to have the judgment and suspended sentence entered against him on 2 September 1977 vacated on the ground that he had been denied his constitutional right to be represented by counsel. He alleged that at the time of his trial on 2 September he was not represented by counsel, had not been advised of his right to be represented by counsel, and had not waived his right to counsel. The District Court denied defendant's petition. In a separate order the District Court found that defendant had violated a valid condition upon which his sentence had been suspended and ordered the suspension revoked and defendant imprisoned. Defendant appealed to the Superior Court from these rulings of the District Court.

After hearing in the Superior Court on defendant's petition for writ of error *coram nobis*, Judge Farmer entered an order dated 17 June 1978 which, under the heading "Findings of Fact," contained the following:

III. That, the Defendant is more than 20 years of age, is a member of the United States Army, stationed at Fort Bragg, North Carolina, and is earning $477.00 per month, plus other allowances as paid by the United States Army.

IV. That the Defendant is not an indigent and that he has had from August 20, 1977, until September 2, 1977, to employ Counsel.

V. That the Defendant made no payments for the support of his illegitimate child and that after process was served on him to show cause why his suspended sentence should not be put into effect, he filed, through his Attorney on November 18, 1977, a WRIT OF ERROR CORAM NORBIS. (sic).

VI. That the violation of G.S. 49-2; failure to support an illegitimate child is not a serious misdemeanor so as to require appointment of counsel or intelligent waiver thereof under the 6th and 14th Amendment of the United States Constitution.

VII. That the plea of guilty was the informed choice of the Defendant and was freely, voluntarily and understandably made, and that the Defendant was advised of his right to appeal on September 2, 1977.

VIII. That the Petitioner's objections to the judgment of September 2, 1977, could have been, but were not raised by the Petitioner on a direct appeal on the Judgment of the District Court of Siler City.

Based on these findings, Judge Farmer denied the petition for writ of error *coram nobis*. By separate judgment, also dated 17 June 1978, Judge Farmer found that defendant had willfully violated the terms of his suspended sentence and ordered the six months prison sentence put into effect. From the order denying his petition and the judgment activating his prison sentence, defendant gave notice of appeal to the Court of Appeals.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua for the State.

Edwards & Atwater by Phil S. Edwards and W. Ben Atwater, Jr., for defendant appellant.

PARKER, Judge.

[1] When defendant filed his petition for writ of error *coram nobis* on 18 November 1977, the filing of such a petition was the appropriate procedure by which a defendant not in prison could challenge the validity of a criminal judgment against him on grounds extraneous to the record. *State v. Green*, 277 N.C. 188, 176 S.E. 2d 756 (1970). There having been no appeal from the challenged judgment, the prior permission of the Supreme Court was not a prerequisite to the filing of the petition. *Dantzic v. State*, 279 N.C. 212, 182 S.E. 2d 563 (1971). Therefore, at the time defendant's petition was filed, he adopted the appropriate procedure to challenge the 2 September 1977 judgment on the ground that he had been denied his constitutional right to counsel when that judgment was entered against him, a matter which was extraneous to the record.

After the order was entered in Superior Court denying defendant's petition and while the present appeal from that order was pending, Art. 89 of G.S. Ch. 15A became effective on 1 July 1978. That Article "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." Sec. 39, Ch. 711, 1977 Session Laws. One of the provisions in that Article, G.S. 15A-1411(c), provides that "[t]he relief formerly available by . . . *coram nobis* and all other post-trial motions is available by motion for appropriate relief." Such a motion "is a motion in the original cause and not a new proceeding." G.S. 15A-1411(b). A motion for appropriate relief on the ground that the defendant's conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina may be made more than 10 days after entry of judgment, G.S. 15A-1415(b)(3), and "may be heard and determined in the trial division by any judge who is empowered to act in criminal matters in the judicial district and trial division in which the judgment was entered." G.S. 15A-1413(a). The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review by writ of certiorari if the time for appeal from the conviction has expired and no appeal is pending when the ruling is entered. G.S. 15A-1422(c). Since G.S. 15A-1422(c) is applicable to the present case, we treat defendant's appeal from the order denying his petition as a peti-

tion for a writ of certiorari and allow the writ in order to provide defendant appellant review in this case.

[2] Turning to the merits of defendant's position, we find that the order of the Superior Court denying defendant's petition for writ of error *coram nobis* was based upon an erroneous conclusion of law. Finding No. VI, although included under the heading "Findings of Fact," is actually a conclusion of law and is erroneous. In this "Finding," the Court concluded that a violation of G.S. 49-2 "is not a serious misdemeanor so as to require appointment of counsel or intelligent waiver thereof under the 6th and 14th amendment of the United States Constitution." In reaching this conclusion, the Superior Court may have been influenced by the majority opinion of our North Carolina Supreme Court in *State v. Green, supra,* which held that a violation of G.S. 49-2 is a "petty offense" for which the offender may be tried without assistance of counsel. That case, however, was decided prior to the decision of the United States Supreme Court in *Argersinger v. Hamlin,* 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972) in which the court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at his trial." 407 U.S. at 37, 32 L.Ed. 2d at 538, 92 S.Ct. at 2012. G.S. 49-8(1) provides that a violation of G.S. 49-2 may be punished by imprisonment for a term not to exceed six months, and thus the holding in *Argersinger* is clearly applicable to the case of a defendant charged with such a violation. The conclusion of the Superior Court to the contrary in the present case is in error.

We note that following the decision in *Argersinger,* our General Assembly in 1973 enacted Ch. 151 of the 1973 Session Laws which amended G.S. 7A-451(a)(1) to provide that an indigent person is entitled to services of counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." It is true that the defendant in the present case was found not to be an indigent. Nevertheless, under *Argersinger* he had a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waived that right. In this case there was no finding that defendant waived his right to counsel. Moreover, the record in the present case would not support such a finding. On the contrary, the

record on appeal, which was settled by agreement between the attorney for defendant and the Assistant District Attorney who represented the State, contains the following stipulation:

> It is further stipulated by the State and defendant that at the original trial in the District Court of Chatham County held September 2, 1977, the following events transpired:
>
> The warrant for arrest charging defendant with neglecting and refusing to support and maintain Latesha Degraffenreidt, his illegitimate child born to Annette Degraffenreidt on September 9, 1975 after due notice and demand was made upon defendant on March 1, 1977 by Annette Degraffenreidt in violation of N.C. G.S. 49-2 was issued August 9, 1977 and served on the defendant August 20, 1977. Case was called for trial at the September 2, 1977 and defendant requested that the case be continued to allow defendant time to employ counsel to represent him stating that defendant was a member of the United States Armed Forces and stationed at Fort Bragg and had been unable since the time of his arrest to employ counsel to represent him in this matter. At this time the State objected to the defendant being granted a continuance and the Court denied defendant's motion for a continuance. Defendant was not informed of his right to have an attorney to represent him and did not execute either a written or oral waiver of his right to counsel. When called upon to plead, defendant entered a plea of guilty and the verdict of the Court was guilty and sentence as hereinbefore set out was imposed. Defendant immediately thereafter paid $27 court costs but at no time thereafter paid any sums of money into the Clerk of Superior Court for the use and benefit of the illegitimate child named in the warrant.

[3] These stipulated facts negate any knowing and intelligent waiver of counsel. That defendant failed to employ counsel during the period between 20 August, when the warrant was served on him, and 2 September, when he was tried, would not, standing alone, support a finding that he had knowingly and intelligently waived his right to counsel. Certainly we do not suggest that a non-indigent defendant may continue stubbornly to refuse to employ counsel after being advised of his right to do so and thereby frustrate the State's ability to bring him to trial; there

may be circumstances under which the continued neglect by such a defendant to provide himself with counsel would in itself amount to a knowing and intelligent waiver of counsel. However, no such circumstances appear in the present case.

The finding by the Superior Court made in its Finding No. VII that defendant's plea of guilty in his case "was the informed choice of the Defendant and was freely, voluntarily and understandingly made, and that the Defendant was advised of his right to appeal on September 2, 1977," is not sufficient to sustain the judgment entered on defendant's plea in this case. The stipulated facts show that defendant was called upon to plead when he was neither represented by counsel nor had waived his right to counsel. As pointed out by the United States Supreme Court in *Argersinger:*

> Beyond the problems of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.
>
> 407 U.S. at 34, 32 L.Ed. 2d at 536-37, 92 S.Ct. 2011.

In recognition of this problem, our General Assembly by Ch. 1286, 1973 Session Laws, enacted G.S. 15A-1012(a), which was in effect when defendant was called upon to plead in this case and which provides as follows:

> G.S. 15A-1012. *Aid of counsel; time for deliberation.* (a) A defendant may not be called upon to plead until he has had an opportunity to retain counsel or, if he is eligible for assignment of counsel, until counsel has been assigned or waived in accordance with Article 36 of Chapter 7A of the General Statutes.

Because the judgment of the District Court entered 2 September 1977 imposing a suspended sentence on defendant was entered when he was neither represented by counsel nor had knowingly and intelligently waived counsel, that judgment must be vacated. The order of the Superior Court denying defendant's petition for writ of error *coram nobis* is reversed. The 2 September 1977 judgment of the District Court imposing a

suspended sentence on the defendant and the judgments of the Superior and District Courts activating that sentence are vacated, defendant's plea of guilty entered in the District Court is stricken, and this case is remanded to the Superior Court of Chatham County with instructions to that Court to further remand this case to the District Court, where defendant will be entitled to a new trial.

Reversed and remanded and defendant granted a

New trial.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. HOWARD BENTON BYRD

No. 7825SC874

(Filed 6 March 1979)

1. **Criminal Law §§ 66.3, 169— pretrial identification procedure—evidence introduced by defendant—no objection permitted**

Defendant may not object to the prejudicial effect of a pretrial identification procedure, regardless of whether it may be improper, when he, not the State, has placed that information before the jury.

2. **Criminal Law § 66.18— in-court identification of defendant—when voir dire required**

Though it is the better practice for the trial judge, even upon a general objection, to conduct a voir dire outside the hearing of the jury, find facts, and determine the admissibility of the in-court identification testimony, failure to hold a voir dire is harmless error where the evidence is clear and convincing that the in-court identification of defendant originated with the observation of the defendant at the time of the crime.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 18 May 1978 in the Superior Court, CALDWELL County. Heard in the Court of Appeals 15 January 1979.

The evidence as it relates to defendant's assignments of error tends to show the following sequence of events: Officer Grant Howard of the Lenoir Police Department was on duty around 1:00 a.m. on a rainy 5 November 1977, monitoring traffic from the N.C.N.B. parking lot on Morganton Boulevard. Howard observed a

flatbed Ford truck, license number CV-7253, traveling west on the boulevard. The officer began following the truck, which he estimated to be traveling 50 miles per hour in a 45 mile-per-hour zone. Officer Howard noticed the driver was a white person with dark, shoulder length hair. The officer activated his blue light and siren and shined his spotlight into the cab. The truck did not stop but increased its speed to about 55 miles per hour. A chase ensued wherein the truck failed to heed several stop lights, and its speed reached, at times, 100 miles per hour. Another city patrol car joined the chase and was soon followed by a county unmarked patrol unit. The chase eventually proceeded down U.S. 321 where the second city patrol car attempted to get in front of the speeding vehicle to slow it down. The truck driver refused to slow down and, instead, ran into the back of the unit four or five times.

At the intersection of U.S. 321 and Ideal Drive, the truck driver slowed as if he were attempting to stop, and turned onto the cross-over section between the north and southbound lanes. The truck slowed to 10 to 15 miles per hour. A Hudson Police Department Patrol Unit was sitting in the northbound left turn lane at the intersection waiting for the truck. The truck struck the right front fender of the Hudson unit causing $736 damage. The truck "stopped cross-ways in the turn" and Trooper R. R. Corbin, who had joined in pursuit of the truck, jumped out of his car, crossed the median, and approached the truck. The driver was working the gears and fighting the steering wheel. Corbin testified that he got a look at the driver from a 90 degree angle and that the road at that point was well lighted by street lights. Corbin testified that the person he saw in the truck was a person he had seen before and identified him as the defendant. Trooper Corbin described the defendant's dress on the night of the chase as including a T-shirt with a dark blue ring around the neck.

The truck proceeded up Ideal Drive and onto several other rural roads. On Mt. Herman Road the truck missed a turn and went straight into a cow pasture. By the time the officers arrived at the truck, the driver had fled. Officers found two full unopened cans of beer and one empty can in the seat. The truck was registered to Winkler Construction Company.

Trooper R. R. Corbin described the defendant to Officer Grant Howard. Corbin testified that he recognized the person he

observed in the cab of the truck as the defendant, Howard Benton Byrd, whom Corbin had known "between five, maybe six years". The defendant went to the Lenoir Police Station about 2:00 a.m. to report that his truck had been stolen. Officer Grant Howard was called to the stand by the defense and testified that he observed the defendant at the station and "smelled a strong odor of alcohol on his breath". He appeared at that time to be under the influence. He recognized defendant as the suspect described by Trooper Corbin. Officer Howard informed defendant of his rights and "detained him for questioning". Officer Howard then telephoned Trooper Corbin and asked him if he could identify the suspect, to which Corbin replied in the affirmative. Officer Howard drove defendant to Trooper Corbin's house that same morning where Corbin identified him as the driver of the truck.

The defendant produced substantial evidence tending to show that his truck was stolen from the parking lot at John Dula's poolroom while he and some companions were eating at Cotton Smith's Restaurant. Witness Larry Moore testified that in fact he had stolen the truck and had been the driver in the chase.

Defendant was cited for (1) failure to stop at the scene of an accident, (2) running a red light, and (3) reckless driving. Defendant was found guilty in the district court and appealed. Upon trial de novo, a superior court jury found defendant guilty as charged. From entry of judgment on the verdict sentencing defendant to six months in the Caldwell County jail, suspended for two years upon payment of $425 in fines, defendant appeals.

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

Ted S. Douglas, by Linda G. Hebel, for defendant appellant.

MORRIS, Chief Judge.

The defendant has brought forward six assignments of error, all of which relate to defendant's contention that the testimony identifying the defendant should have been suppressed. Defendant contends that the identification procedure of showing the suspect individually to Trooper Corbin was under the circumstances so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate due process. There-

fore, defendant contends, any testimony concerning the show-up and any in-court identification of the defendant should have been suppressed. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *modified and affirmed*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976).

We note from the record that the trial court did not conduct a voir dire on the admissibility of the identification of the defendant. The defendant objected to the State's introducing any testimony through the witness Trooper Corbin which identified the defendant or referred to the show-up of defendant at Trooper Corbin's house. The trial court ruled that defendant had waived any objection to the admissibility of the identification testimony by conducting the following cross-examination of Officer Howard prior to the State's calling Trooper Corbin:

"Q. Mr. Officer, when Mr. Byrd came into the police station on that occasion, you arrested him, is that right?

A. No, sir.

Q. You didn't arrest him?

A. Not at that point; no, sir.

Q. All right, Did you take him into custody?

A. I detained him for questioning.

Q. Did you later convey Mr. Byrd over to Mr. Corbin's house?

A. Yes, sir, I did.

Q. And that was in the same morning?

A. Yes, sir.

Q. And what did you do—did you call Mr. Corbin before you took him over there?

A. Yes, sir.

Q. What did you tell him when you called him?

A. I asked him if he could identify the man, the man who he observed in the truck.

Q. And what did he say?

A. Yes, he could.

Q. And so you took him over there?

A. Yes, sir.

Q. And Mr. Corbin said this is the man?

A. Yes, sir.

Q. You didn't have a lineup?

A. No, sir."

[1] The defendant's own cross-examination of Officer Howard placed before the jury the identification procedure to which defendant now objects. Defendant may not object to the prejudicial effect of a pretrial identification procedure, regardless of whether it may be improper, when he, not the State, has placed that information before the jury. It is a well-established principle of law that an exception to the admission of evidence is generally waived when testimony of the same import is elicited by the objecting party, *see e.g., Elledge v. Welch*, 238 N.C. 61, 76 S.E. 2d 340 (1953) (dead man's statute); *Shelton v. R.R.*, 193 N.C. 670, 139 S.E. 232 (1927) (offer of compromise), or when evidence of the same import is admitted without objection. *See Mills, Inc. v. Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735 (1968); *McNeil v. Williams*, 16 N.C. App. 322, 191 S.E. 2d 916 (1972). Similarly, once defendant has elicited such testimony, there could be no prejudicial effect on the defendant by the State introducing similar testimony. Indeed, the record before us indicates that the State's only questions with respect to the pretrial identification of the defendant occurred during the examination of Trooper Corbin:

"Q. Now, sir, did you later on the 5th day of November, have an occasion to see the defendant?

A. Yes, sir, I saw a subject that was brought to my house.

Q. And state whether or not the person who was brought to your house is the same man you saw in the truck?

MR. DOUGLAS: OBJECTION.

THE COURT: SUSTAINED.

Q. Is the man who was brought to your house in the courtroom today?

A. Yes, sir."

Assuming *arguendo* the testimony was improperly admitted, such evidence is not prejudicial when it is merely cumulative. *See Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970).

[2] Our Supreme Court has suggested that the better practice is for the trial judge, even upon a general objection, to conduct a voir dire outside the hearing of the jury, find facts, and determine the admissibility of the in-court identification testimony. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied*, 400 U.S. 946, 91 S.Ct. 253, 27 L.Ed. 2d 252 (1970). Nevertheless, where the evidence is clear and convincing that the in-court identification of defendant originated with the observation of the defendant at the time of the crime, failure to hold the voir dire is harmless error. The evidence in this case tends to indicate that Trooper Corbin had known defendant for five or six years, recognized him in the truck, and gave his description to Officer Howard. These facts along with the opportunity to see defendant from within six to eight feet on a well-lighted street present clear and convincing evidence that Trooper Corbin's out-of-court identification of the defendant originated with the observation of defendant at the scene of the crime and not with the pretrial show-up.

Because we find no prejudicial error in permitting testimony concerning the pretrial identification, it follows that any in-court identification of the defendant was properly admitted. *State v. Williams*, 38 N.C. App. 183, 247 S.E. 2d 620 (1978). Similarly, defendant's remaining assignments of error relating to the court's failure to strike testimony and to direct a verdict for defendant, which motions were made on the grounds that the evidence identifying the defendant was incompetent, are overruled.

No error.

Judges MARTIN (Harry C.) and CARLTON concur.

STATE OF NORTH CAROLINA v. JOHN ALBERT WILLIAMS

No. 7826SC966

(Filed 6 March 1979)

1. **Constitutional Law § 51— five and one-half year delay in trial—no denial of speedy trial**

Defendant was not denied his right to a speedy trial despite a five and one-half year delay between the offense charged and his trial where the evidence tended to show that a concerted effort was made to locate defendant and, when he was found in N.Y., to have him returned to N.C. for trial; defendant made no demand for speedy trial and in fact resisted extradition; and defendant failed to show that the delay was due to the State's wilfullness or neglect.

2. **Criminal Law § 158.1— matter not included in record—no error shown**

Defendant's contention that a witness's identification of him as the man in a poolroom who threatened to kill a third person should have been excluded was without merit, since the record did not disclose the substance of the hearing to suppress.

3. **Criminal Law § 116— defendant's failure to testify—instruction given without request—no error**

Though it is the better practice not to give an instruction on defendant's failure to testify in the absence of a request, the giving of such an instruction is not reversible error.

APPEAL by defendant from *Ervin, Judge*. Judgment entered 18 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 February 1979.

George Feaster was killed on 14 July 1972. Defendant was indicted for the murder in August 1975 and initially tried in February 1978. After a mistrial he was brought to trial a second time in May 1978 for second degree murder. The State called James Roseborough, who testified that he had known George Feaster, and that Feaster and a Bob Blue "looked like brothers." Feaster and Blue and some others lived in a house on South Irwin Street. On the night of 14 July 1972 Roseborough drove Feaster home and waited for him outside. About five seconds after Feaster went inside his house, "I heard something that went off, sounded like dynamite." Earlier that day Roseborough had been in the poolroom in his apartment building when defendant came in looking for Bobby Blue and said "tell the son-of-a-bitch, I'm going to kill him when I see him." On cross-examination Rosebor-

ough testified that he had glaucoma, and that in July 1972 he didn't wear glasses. The light was dimmer in the poolroom than in the courtroom. Asked why he didn't mention the incident until five years later, Roseborough answered that he had never seen the man any more, until the probable cause hearing in November 1977.

Lizzie Wilson, Feaster's neighbor on Irwin Street, testified that on the night of 14 July she heard a shotgun blast. "The noise came from Bob Blue's house. I saw [defendant] come out the back of Bob Blue's house after I heard the loud blast. . . . I saw a long object in [his] hand. . . ." The next day she was present at a fight between Feaster's brother, Sam, and the defendant, and "I heard the defendant say to Sam Feaster that he was sorry and that he killed the wrong man."

The county medical examiner testified that Feaster died of a shotgun wound. George Hamilton testified that he and defendant were friends. On the evening of 14 July defendant came by his house and talked about how Bob Blue had beaten him up. "His eye was all swollen up, and the side of his face was swollen, where he had been beaten. He had a shotgun with him. He said he was going to kill him if it was the last thing he did." Later that night Hamilton heard a gun blast. The next morning defendant passed by in a car with one of his friends and said, " 'I shot the wrong man last night.' " Hamilton too testified that Feaster and Blue "looked just alike."

Officer Kirkpatrick of the Charlotte police testified that he found a billfold containing a Social Security card bearing defendant's name outside Feaster's back door after the killing. Sam Feaster testified that he got in a fight with defendant the day after the killing, and "[w]hen I asked him why he killed my brother, he said he ain't mean to do it. He said he didn't know it was my brother."

Bobby Blue Hubert testified for defendant that he shared the house on Irwin Street with Feaster and another man. The night before the killing Hubert had put defendant in the trunk of his car and had planned to kill him, but had let him go. After the killing a girl named Hazel told Hubert (Bobby Blue) that defendant had killed Feaster, so Hubert and some others left and beat up

defendant. "When I was beating him up, he did not say that he had killed anybody. He never admitted to murdering my friend."

Defendant was found guilty of second degree murder and sentenced to 16-20 years. He appeals.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette and Associate Attorney Grayson G. Kelley, for the State.

Michael S. Scofield for defendant appellant.

ARNOLD, Judge.

[1] Defendant makes two arguments in support of his assertion that he was denied his constitutional right to a speedy trial. He first contends that the five and one-half year delay was both wilful and prejudicial.

The trial court found that defendant was in North Carolina on parole from New York at the time of Feaster's killing; that defendant was questioned and released on the day of the killing and left a week later for New York; that a warrant for defendant's arrest was issued on 20 July 1972, six days after the killing, and numerous unsuccessful attempts were made to locate the defendant and serve the warrant on him; that subsequent to march 1974 the North Carolina police learned that defendant was in the New York State Prison System and requested that he be returned to North Carolina for trial; that about 4 August 1975 defendant was indicted for Feaster's murder; that despite repeated requests from North Carolina the New York authorities were unable to find defendant in their prison system; that when he was found defendant fought extradition; that on 12 November 1977 a warrant was served on defendant in New York and he was returned to North Carolina for trial; and that defendant never made any demand for a speedy trial. From these findings the court concluded that defendant was not denied his right to a speedy trial.

The trial court ruled correctly. While the delay was long, the defendant has not met his burden of showing that the delay was due to the State's wilfulness or neglect. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). Indeed, defendant made no showing that the facts were otherwise than those found. Nor did the

defendant make a written request for final disposition of the indictment under G.S. 15A-761, Art. III(a).

The standards for determining whether a defendant has been deprived of his constitutional right to a speedy trial are set out in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). We have applied the required balancing test and have determined that defendant was not denied his right to a speedy trial. The delay was a long one, but this factor is essentially a triggering mechanism which requires consideration of the other factors. There is no showing that the delay was due to either negligence or wilfulness on the part of the State. It appears that a concerted effort was made to locate defendant and, when he was found, to have him returned to North Carolina for trial. Defendant made no demand to be brought to trial, and in fact resisted extradition. The trial court found some prejudice to defendant in the unavailability of two alibi witnesses, but noted that there was no showing as to when the witnesses became unavailable, or that they were available at any earlier time.

Defendant also argues that he was denied his right to a speedy trial by the court's refusal to allow him to limit his testimony at the hearing on the motion to dismiss to his knowledge of the detainer that had been filed against him. Defendant cites no authority for this proposition, and we find the contention without merit. The court correctly ruled that defendant could take the stand "to testify to anything relating to this particular motion," but could not limit his testimony to just one point.

[2] Defendant next argues that Roseborough's identification of him as the man in the poolroom who threatened to kill Bobby Blue should have been excluded. It appears from the record that a voir dire hearing was held on the motion to suppress, but the substance of the hearing does not appear. Since the record is bare concerning the hearing there is no basis for this Court to conclude that the trial court's ruling on the motion was error. Defendant's counsel in preparing the record on appeal has failed to include the "evidence . . . necessary for understanding of all errors assigned." Rules of Appellate Procedure, Rule 18(c)(v). This assignment of error is unavailing.

Defendant contends that hearsay evidence was admitted, to his prejudice. Some of the statements to which he refers us were not hearsay. Others were hearsay, but their admission was cured by the immediate sustaining of an objection and motion to strike and an instruction to the jury to disregard the testimony. Thus, there was no prejudice to defendant.

[3] Error is also assigned to the trial court's comment in the charge to the jury on defendant's failure to testify. It is not the content of the instruction which he contests, but the fact that it was given in the absence of a special request by defendant. Though our courts have emphasized that it is better practice not to give such an instruction in the absence of a request, the giving of the instruction has not been found to be reversible error. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115, *cert. denied* 404 U.S. 1023 (1971).

We have considered defendant's remaining assignments of error and conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and WEBB concur.

BOARD OF TRANSPORTATION v. MAUDE REVIS AND HUSBAND, J. C. REVIS; BERLON HENSLEY AND WIFE, SUZANNE MILLER HENSLEY

No. 7828SC392

(Filed 6 March 1979)

Eminent Domain § 6.1— amount of compensation—evidence of original purchase price—physical changes in the property

In an action to determine compensation due to defendants for the condemnation of a portion of their property for highway purposes, physical changes in the property during the six-year period the property had been owned by defendants were not so extensive so as to render inadmissible evidence of the original purchase price of the property where those changes consisted of the placement of new roofs on a seven-unit motel and a store on the property, the placement of new siding, new floor coverings and new tile in the motel bathrooms, the repainting of all motel rooms and the store, the addition of gas

heating units to the motel rooms, the addition of a sidewalk in front of the motel, and the installation of storm drains.

APPEAL by defendants from *Lewis, Judge.* Judgment entered 24 January 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 February 1979.

This is an action pursuant to Article 9, Chapter 136, North Carolina General Statutes for jury determination of just compensation due defendants for lands condemned and appropriated by the State for highway purposes. The action was instituted on 13 January 1975 in Superior Court, Buncombe County.

The property in question was located in Buncombe County, between N. C. Highway 81 and the Swannanoa River, containing in excess of one acre and having frontage along N. C. Highway 81 in excess of 1,000 feet. Seven motel units were located on the property and were taken by the plaintiff, along with approximately 22,000 square feet of land, leaving defendants with a grocery store building and a produce building on the remaining property. Defendants also alleged that they lost approximately one half of the space normally used for parking in connection with the business. Defendant Berlon Hensley continues to operate the grocery and fruit stand but is no longer able to operate the motel.

The only facts pertinent to this appeal relate to the question of value.

Defendants offered the testimony of Claude DeBruhl, a licensed real estate broker and experienced in appraisal work since 1950. In his opinion, the value of the land and improvements on 13 January 1975 was $64,376. His opinion of the value immediately after the taking of the property by plaintiff was $29,343. He therefore believes defendants suffered damages of $35,033.

Berlon Hensley, one of the defendant owners and the operator of the business located on the property, testified that his opinion of the value of the property before the taking was $77,500 and that the property was only worth $30,000 after the taking, with resulting damages of $47,500. On cross-examination, this witness testified, over objection by the defendants, that the purchase price of the property in 1969 was over $30,000 but less than $40,000. Defendants objected on the basis that the purchase of the

property was too remote in time from the taking and that improvements had been made to the property.

Elizabeth Hensley, who is married to Berlon Hensley's uncle and is a property owner in the vicinity, testified that in her opinion the property was worth $90,000 before the taking and $42,500 thereafter, with damages amounting to $47,500.

Doug Henson testified that he is president of a construction company and familiar with the property and land values in the area. His opinion of the fair market value of the property immediately before the taking was $70,000 and $30,000 after the taking, with a difference of $40,000.

The plaintiff presented several witnesses who gave testimony about the value of the property. Francis J. Naeger testified that he had been engaged in the business of real estate appraisal for approximately 15 years. In his opinion, the value of the property just prior to 13 January 1975 was $44,600. Immediately after the taking, he believed the property was worth $28,000 with a damage figure of $16,600.

Charlie Torian testified that he is in the business of real estate appraisal and brokerage. His opinion of the value of the property just prior to the taking was $38,075, with the value of the property immediately after the taking being $20,955, the resulting damage being $17,120.

The following issue was submitted to the jury: "What sum are the defendants, . . ., entitled to recover from the plaintiff, Board of Transportation, for the appropriation of a portion of their property for highway purposes on the 13th day of January, 1975."

The jury answered the issue in the amount of $20,000. From judgment entered thereon, defendants appealed.

Attorney General Edmisten, by Senior Deputy Attorney General R. Bruce White, Jr. and Assistant Attorney General Alfred N. Salley, for the plaintiff appellee.

Bennett, Kelly & Cagle, by Robert F. Orr, for defendant appellants.

CARLTON, Judge.

The sole question for determination is whether the trial court property admitted into evidence the purchase price of the property.

On cross-examination, one of the defendants testified, over objection of defendants' counsel, that the purchase price of the property in 1969 was over $30,000 but less than $40,000. At the time of the ruling, the court advised that counsel for defendants would be permitted to reexamine the witness "on the phases" not covered in questions by counsel for plaintifff. Immediately following this testimony, counsel for defendants reexamined the witness and elicited testimony which tended to show that during the six-year period the property had been owned by the defendants, a new roof had been placed on the motel and store, and that new siding, new floor covering and new tile had been placed in all the bathrooms of the motel. He also testified that all the motel rooms had been repainted and gas heating units added. He also testified that the store had been repainted, that a sidewalk had been added in front of the motel and storm drains had been installed to take care of overflow water.

Defendants' contention is that these represented major physical changes to the property during the six-year period and that the original purchase price was therefore an unfair criterion for establishing the value of the property at the time of the taking by the State and that the trial court's ruling had a prejudicial effect on defendants' case. We disagree.

We review the established rules in North Carolina governing the competency and admissibility of evidence of purchase price paid by a condemnee for land later appropriated for public use, in a proceeding to establish just compensation for the taking:

(1) It is competent as evidence of market value to show the price at which the property was bought if the sale was voluntary and not too remote in point of time.

(2) When land is taken by condemnation, evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking.

(3) Such evidence must relate to the value of the property sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking.

(4) The reasonableness of the time is dependent upon the nature of the property, its location, and the surrounding circumstances. Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by the condemnee and the time of taking by the State, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value.

(5) The fact that some changes have taken place does not *per se* render the evidence incompetent. If the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining value at the time of the taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded.

(6) The ultimate criterion is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking.

The foregoing rules have evolved from numerous decisions of our Supreme Court and this Court, including the following: *North Carolina State Highway Commission v. Moore*, 3 N.C. App. 207, 164 S.E. 2d 385 (1968); *Highway Commission v. Coggins*, 262 N.C. 25, 136 S.E. 2d 265 (1964); *Redevelopment Commission of Winston-Salem v. Hinkle*, 260 N.C. 423, 132 S.E. 2d 761 (1963); *State Highway and Public Works Commission v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314 (1940); *Palmer v. North Carolina State Highway Commission*, 195 N.C. 1, 141 S.E. 338 (1928).

Applying the foregoing rules to the facts disclosed by the record before us, we note that no question has been raised as to voluntariness of the purchase of the property by defendants. Moreover, defendants do not contend that there were changes in the nature of the property, its availability for valuable usage, or changes in the vicinity of the property which might have affected its value. Defendants point solely to physical changes in the property itself.

The question then becomes whether the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining value at the time of the taking, when purchase price is considered with other evidence affecting value. We do not believe the changes were so extensive.

Surely it is not unusual for a commercial building eventually to need a new roof and repainting. These are ordinary necessities resulting from normal depreciation. Nor do we believe that the addition of a sidewalk in front of a seven room motel and the installation of gas heat and storm drains represent "extensive" changes to the property. Indeed, such improvements would be classified under modern business practices as normal and necessary for the property to maintain its value in the market place.

We also note that plaintiff's lead witness testified that the after taking value of the property was $28,000. This is only $2,000 difference from the after taking value established by two of defendants' witnesses and only $1,343 from the after taking value established by defendants' lead witness. In other words, there is relatively little difference in the after taking value established by witnesses for both parties. The major differences established by the witnesses for both parties were in the value of the property before the taking and, obviously, before the improvements relied on by defendants were made. Moreover, the jury's verdict established a damage figure in excess of the figure given by both of the witnesses for the plaintiff. It is obvious that the jury considered the other relevant factors affecting value as well as the evidence of the purchase price. Finally, we note that the trial court carefully put the evidence of purchase price in proper context at the time of its admission by allowing defendants' counsel, by redirect examination, to question the defendant concerning the improvements made.

In the trial below we find

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

EVERETT A. LUDWIG AND WIFE, BARBARA A. LUDWIG v. MALCOLM S. HART AND WIFE, DORIS ANN HART

(No. 781SC363

(Filed 6 March 1979)

1. **Mortgages and Deeds of Trust § 24.1; Rules of Civil Procedure § 19—foreclosure of deed of trust—trustee as necessary party**

Portion of a judgment directing foreclosure of a deed of trust and the sale of the property described therein was void where the trustee was not made a party to the action, since the trial court could not determine the claim before it without prejudicing the rights of the trustee, and it was required, even in the absence of a motion by one of the parties, to order the trustee summoned to appear in the action. G.S. 1A-1, Rule 19.

2. **Cancellation and Rescission of Instruments § 10.2— mental incapacity to contract—sufficiency of evidence**

Defendants' evidence was sufficient to support their claim that a contract, note and deed of trust were unenforceable because of the mental incapacity of the male defendant to contract at the times in question where a physician testified that he had observed the male defendant during the significant time period, that the male defendant fantasized and did not test reality well, and that reality testing is that which allows people to conduct their affairs in a normal fashion, and where an accountant testified that, based on his observations of and conversations with the male defendant, he was of the opinion that the male defendant did not have the mental capacity to understand the nature and consequences of his acts.

3. **Rules of Civil Procedure § 50.2— directed verdict in favor of party having burden of proof**

The trial court erred in granting a directed verdict in favor of plaintiffs in an action on a note where plaintiffs alleged and had the burden of proving that defendants defaulted on the note, defendants denied they had defaulted, and plaintiffs' right to recover depended on the credibility of their witnesses.

APPEAL by defendants from *Cowper, Judge.* Judgment entered 26 October 1977 in Superior Court, DARE County. Heard in the Court of Appeals 31 January 1979.

This action arose from the transactions and activities of the parties relating to the sale and transfer of a business by the plaintiffs to the defendants. On 22 October 1974, the plaintiffs to this action signed a written agreement by which the plaintiffs promised to sell all of the corporate stock and specified assets of a business known as Four B's Rental, Inc. to the defendants in exchange for the defendants' promise to pay the plaintiffs $75,000.

The purchase price called for in the agreement was tendered to the plaintiffs by the defendants on 2 November 1974 in the form of a promissory note signed by the defendants and secured by a deed of trust. Thereafter, on or about 29 December 1974, the defendants made the first scheduled payment of $10,000 on the note but failed to make the second scheduled payment of $15,000 when it became due on 1 June 1975. Upon this default by the defendants, the plaintiffs declared the entire balance due and payable. The plaintiffs instituted this action against the defendants on 28 August 1975 to obtain judgment for the balance owed them under the note and to foreclose on the deed of trust securing the note. As defenses to the plaintiffs' action, the defendants alleged that the note and deed of trust were not supported by consideration, that there was a failure of consideration supporting the contract to purchase the business, that the consideration supporting the contract to purchase was grossly inadequate, that the defendant, Mr. Hart, did not have mental capacity to enter into a contract, and that the defendants' signatures were procured by fraud. Additionally, the defendants counterclaimed seeking to have the contract, note and deed of trust set aside for the same reasons asserted as defenses in their answer.

This action came on for trial before the trial court and a jury and evidence was presented. After all of the evidence had been presented, the plaintiffs moved for a directed verdict as to the defendants' counterclaim. The trial court granted the plaintiffs' motion for a directed verdict and, on its own motion, allowed judgment for the plaintiffs on their original claim. From the entry of that judgment, the defendants appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for plaintiff appellees.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by John G. Gaw, Jr., for defendant appellants.

MITCHELL, Judge.

[1] The defendants first contend that the failure of the plaintiffs to join the trustee in the deed of trust as a party to this action

renders the judgment of foreclosure void. G.S. 1A-1, Rule 19(a) requires that a person must be joined as a party to an action if that person is "united in interest" with another party to the action. A person is "united in interest" with another party when that person's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court. In the present case, the trial court's determination of the plaintiffs' claim resulted in the divestment of the trustee's legal title to the property held under the deed of trust. The trustee had both a right and an obligation to present evidence of any defenses he might have to that divestment. As the trustee was not before the court, however, his right to present evidence of possible defenses to the plaintiffs' action was prejudiced by the court's determination of their claim. Since the trial court could not determine the claim before it without prejudicing the rights of the trustee, it was required, even in the absence of a motion by one of the parties, to order the trustee summoned to appear in the action. G.S. 1A-1, Rule 19(b). A judgment which is determinative of a claim arising in an action to which one who is "united in interest" with one of the parties has not been joined is void. Therefore, in this action to which the trustee in the deed of trust was not made a party, that portion of the judgment directing foreclosure and the sale of the property described in the deed of trust is void.

The defendants next contend that the trial court erred in granting the plaintiffs' motion for a directed verdict with regard to the defendants' counterclaim. A motion for a directed verdict requires the trial court determine whether the evidence presented at trial is sufficient as a matter of law to support the nonmoving party's claim against the moving party. *Sibbett v. Livestock, Inc.*, 37 N.C. App. 704, 247 S.E. 2d 2 (1978). In determining whether the evidence presented is sufficient to withstand a motion for a directed verdict, the trial court must consider all of the evidence in the light most favorable to the nonmoving party giving that party the benefit of every reasonable inference to be drawn therefrom. *Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978). If the evidence tends to establish the claim of the nonmoving party when considered in this light, the trial court commits reversible error by granting the motion.

The defendants' counterclaim in the present case alleged among other things that the contract to purchase the business, the note, and the deed of trust were each unenforceable as the defendant Malcolm S. Hart did not have sufficient mental capacity to enter into a contract. A person has sufficient mental capacity to enter a contract if he is possessed of

> the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases . . . but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts.

Sprinkle v. Wellborn, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). *Accord, Goins v. McLoud*, 231 N.C. 655, 58 S.E. 2d 634 (1950); *Cameron v. Power Co.*, 138 N.C. 365, 50 S.E. 695 (1905). Anyone may testify as to his or her opinion of the mental condition of another person if he or she has a reasonable basis upon which to form that opinion. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966); *Clary v. Clary*, 24 N.C. 78 (1841); Annot., 40 A.L.R. 2d 15 (1955).

[2] Dr. Franklin Stanford Burroughs, a licensed physician, testified in the present case that he had observed Mr. Hart during September, October and November of 1974 and that he had an opinion satisfactory to himself as to whether Mr. Hart knew the nature and consequences of his acts. Dr. Burroughs indicated that during that period of time Mr. Hart fantasized and that such fantasizing was associated with all psychotic illnesses. He was of the opinion that Mr. Hart did not test reality well and that reality testing is that which allows people to conduct their affairs in a normal fashion. Additionally, Edgar M. Johnson, Jr., a certified public accountant, testified that, based upon his observations of and conversations with Mr. Hart, he was of the opinion that Mr. Hart did not have the mental capacity to understand the nature and consequences of his acts.

Such evidence, when considered in the light most favorable to the defendants, was sufficient to support their claim that the contracts in question were unenforceable due to the mental incapacity to contract of the defendant, Malcolm S. Hart, at the times in question. Therefore, that portion of the trial court's judgment granting the plaintiffs' motion for a directed verdict with regard to the defendants' counterclaim was erroneous and must be reversed.

[3] Although not specifically assigned as error by the defendants, we have chosen as a matter of judicial efficiency to consider *ex mero motu* whether the trial court erred in granting a directed verdict in favor of the plaintiffs with regard to their original claim. The plaintiffs alleged in their complaint, and therefore had the burden of proving, that the defendants had defaulted on a note. By their answer, the defendants denied that they had defaulted on the note. At no time either before or during the trial did the defendants admit they had defaulted on the note.

> The trial judge may not direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, even though the evidence is uncontradicted, the defendants' denial of an alleged fact, necessary to the plaintiff's right of recovery, being sufficient to raise an issue as to the existence of that fact, even though he offers no evidence tending to contradict that offered by the plaintiff. *Cutts v. Casey*, 278 N.C. 390, 417-422, 180 S.E. 2d 297.

Rose v. Motor Sales, 288 N.C. 53, 61-62, 215 S.E. 2d 573, 578 (1975). Therefore, the trial court erred in granting a directed verdict in favor of the plaintiffs on their original complaint and this portion of the judgment must be reversed.

We have reviewed the defendants' remaining assignments of error but find it unnecessary to discuss them as they are not likely to recur should this action again be tried. For the reasons previously set forth, that portion of the judgment of the trial court directing foreclosure and the sale of property described in the deed of trust is vacated. That portion of the judgment granting a directed verdict for the plaintiffs with regard to the defendants' counterclaim is reversed. That portion of the judgment granting a directed verdict in favor of the plaintiffs with regard

to their original claim against the defendants is reversed. The cause is remanded for further proceedings in accordance with this opinion and applicable law.

Vacated in part, reversed in part and remanded.

Judges MARTIN (Robert M.) and ERWIN concur.

DOROTHY N. ROBERSON v. WILLARD ROBERSON

No. 789DC281

(Filed 6 March 1979)

1. **Trial § 57— trial without jury—argument by counsel discretionary**

In a trial without a jury, argument of counsel is a privilege, not a right, which is subject to the discretion of the presiding judge.

2. **Divorce and Alimony § 21.3— alimony order—ability to pay**

Defendant's contention that the trial court erred in concluding that defendant willfully violated a judgment of the court ordering defendant to pay certain sums as alimony because defendant was financially unable to pay and therefore not in willful disobedience of the order is without merit where the court made a specific finding of ability to pay which was supported by competent evidence.

3. **Divorce and Alimony § 21.5— willful violation of alimony order—punishment as for contempt—imprisonment until compliance proper**

Since punishment for willful violation of orders for alimony is as for contempt as provided by G.S. 5-8 and G.S. 5-9 and since the court found that defendant was capable of complying with the court's order of alimony, the court did not exceed its authority in ordering defendant confined for a term of four months in jail or until he purged himself of the contempt violation.

APPEAL by defendant from *Allen (Claude W.), Judge.* Judgment entered 29 November 1977 in District Court, VANCE County. Heard in the Court of Appeals 15 January 1979.

Defendant appeals from an order of the district court finding that he willfully and without just cause violated a judgment of the court entered 19 August 1977. The judgment ordered that defendant pay into the Clerk of Superior Court $480.29 for maintenance of the house occupied by the plaintiff and $200 for plaintiff's attorney's fees within 10 days of the entry of judgment.

A hearing was conducted 21 October 1977, upon an order directing defendant to show cause why he should not be attached for contempt of the court's prior orders. Plaintiff and defendant both appeared represented by counsel.

The plaintiff produced evidence which tended to show that defendant had failed to pay into the Clerk of Superior Court the $480.29 and $200 as ordered 19 August 1977.

The defendant produced evidence tending to show that his wrecker and automobile repair service grossed between $1200 and $1500 per month, and netted between $800 and $1000. Defendant testified that his debts and other expenses cost as much as an additional $1000 per month. He testified that his wife had helped him meet payments required by earlier court orders, but that he was now unable to raise sufficient funds to make the payments.

At the conclusion of defendant's evidence, the request of defendant's counsel to be allowed to speak in behalf of the defendant was denied.

The trial court, after finding that defendant willfully refused to obey the court order of 19 August 1977, ordered that defendant be confined in the common jail of Vance County for the term of four months or until defendant shall purge himself of the contempt violation by paying the required sums of money into the Clerk of Superior Court. Defendant appeals.

Hight, Faulkner & Hight, by Henry W. Hight, Jr., for plaintiff appellee.

Kermit W. Ellis, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] It is a well-established principle of trial practice that control over the arguments of counsel is largely within the discretion of the presiding judge. *See Rupert v. Rupert*, 15 N.C. App. 730, 190 S.E. 2d 693 (1972), *cert. denied*, 282 N.C. 153, 191 S.E. 2d 759 (1972). Indeed, the power of the trial judge is to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice. "It may still be said that the judge *holds* his court as a driver holds the reins

(Webster), to govern, guide restrain, except where he is himself restrained by law." *State v. Miller*, 75 N.C. 73, 74 (1876). The only manner in which the trial judge is restrained by law with respect to the control over arguments by counsel is found in G.S. 84-14 which applies to *jury trials* in the superior court. This provision would seem to control district court proceedings, when applicable, by virtue of G.S. 7A-193, despite the fact that there is no specific reference to G.S. 84-14 in that section. The implication is clear that the legislature's failure to grant counsel the statutory right to argue to the court in nonjury matters left the authority to refuse to hear arguments within the discretion of the presiding judge.

We have not been cited to nor have we located any precise North Carolina authority to support our conclusion that counsel does not have an absolute right to argue in a civil, nonjury case. The courts in several sister states have, after addressing this precise question, reached varying results. *See* Annot., 38 A.L.R. 2d 1396 (1954). We concur in the reasoning of those cases which stand for the proposition that, in a trial without a jury, argument of counsel is a privilege, not a right, which is subject to the discretion of the presiding judge. *See* Annot., 38 A.L.R. 2d at 1431-1434. In fact, the reasoning followed by the Court in *Dam v. Bond*, 80 Cal. App. 342, 251 P. 818 (1926), parallels the reasoning we have followed in reaching our conclusion. That court reasoned that whereas the statutes providing the right of counsel to argue to the jury referred solely to jury trials, and whereas those statutes relating to nonjury trials were silent with respect to the right to argue to the court, the granting to counsel of the privilege to argue was left within the discretion of the trial judge. Numerous other courts have also held that the opportunity to argue to the *court* is a privilege subject to the discretion of the trial judge. *See generally* Annot., 38 A.L.R. 2d at 1431-1434 (§ 5(h)) (and Later Case Service). *Contra, see generally id.* at 1419 (and Later Case Service).

[2] The defendant next assigns as error the trial court's conclusion that he "did willfully and without just cause violate the same Judgment entered on August 19, 1977." It is defendant's position that the evidence indicates that he is financially unable to carry out the order of the court and therefore he is not in willful disobedience of the order.

The trial court made the following findings of fact:

"9. That the defendant is an able-bodied man, capable of earning a living and in fact has a take-home pay of between $800.00 and $1,000.00 a month."

The court then concluded as a matter of law:

"That the defendant is an able-bodied man, capable of earning a living, who in fact has a take-home pay of between $800 and $1,000 per month, this being sufficient earning capacity with which to have made the payments under the prior order of the Court dated August 19, 1977."

The evidence reproduced in the record is brief and consumes less than three full pages. The only evidence bearing significantly on defendant's ability to pay which is not recited in the trial court's judgment is defendant's testimony that his expenses "cost as much as an additional $1,000.00 per month."

Upon review of an order to enforce payment of alimony, there must be a particular finding, supported by competent evidence, of ability to pay during the period of delinquency. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966); *Gorrell v. Gorrell*, 264 N.C. 403, 141 S.E. 2d 794 (1963). The trial court has made a specific finding of ability to pay and the finding is supported by competent evidence. This assignment of error is overruled.

[3] Finally, plaintiff contends that the trial court exceeded its authority in ordering defendant confined for a term of four months in jail or until he purges himself of the contempt violation. He notes that G.S. 50-13.4(f)(9) directs that contempt proceedings be brought under G.S. 5-8 and 5-9. Furthermore, asserts defendant, G.S. 5-4, which provides for punishment for contempt, limits sanctions to a fine not exceeding $250 or imprisonment not exceeding 30 days, or both.

Defendant's very contention was addressed in a concurring opinion by Judge Brock (now Associate Justice Brock of our Supreme Court) in *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971):

"Committing a husband to jail for an indefinite term, *i.e.*, until he complies with an order for support, is authorized when

there is a present and continuing contempt. A present and continuing contempt exists when the husband presently possesses the means to comply, and wilfully fails or refuses to comply. A finding to this effect by the trial judge is necessary to support confinement for an indefinite term." 10 N.C. App. at 479, 179 S.E. 2d at 197.

After reciting a brief history of the development of the case law with respect to subsequent legislative enactments rewriting Chapter 50 of the General Statutes, he concluded:

"The legislature has clearly provided that punishment for wilful violation of orders for alimony, support and custody shall be *as for contempt* as provided by G.S. 5-8 and G.S. 5-9. These new statutes clearly eliminate the use of G.S. 5-1 in alimony, support, and custody cases, therefore the thirty day limitation on punishment as provided in G.S. 5-4 has no application to such proceedings, whether the contempt is present and continuing, or whether it is a past contempt. Nevertheless, *indefinite* confinement for failure to pay alimony or support is not authorized unless there is the finding of present capability to comply." 10 N.C. App. at 480, 179 S.E. 2d at 197.

The judgment and order of the district court enforcing its prior judgment is

Affirmed.

Judges MARTIN (Harry C.) and CARLTON concur.

GEORGE L. FITZGERALD v. HARRY C. WOLF III D/B/A WOLF ASSOCIATES

No. 7826SC409

(Filed 6 March 1979)

1. Contracts § 31— malicious interference with contract

A third party who induces one party to terminate or fail to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification.

2. Contracts § 35— inducing termination of contract—justification—legitimate business interest

A person is justified in inducing the termination of a contract of a third party if he does so for a reason reasonably related to a legitimate business interest.

3. Contracts § 34— malicious interference with lease—legitimate business purpose—summary judgment for defendant

The trial court properly entered summary judgment for defendant in an action to recover damages for maliciously inducing a realty company to terminate plaintiff's month-to-month lease of office space where defendant presented materials tending to show that he acted for the legitimate purpose of obtaining additional space for his business, plaintiff's contrary contention was not supported by his evidence, there were only latent doubts as to the credibility of defendant's materials, and plaintiff failed to point to specific areas of impeachment or contradictions in defendant's material.

APPEAL by plaintiff from *Johnson, Judge*. Judgment entered 2 February 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 February 1979.

On 8 December 1976, plaintiff brought this action for damages resulting from defendant's malicious interference with plaintiff's contract. The complaint alleged as follows: The plaintiff had leased office space in the Latta Arcade in Charlotte from the F.J.H. Realty Co., (hereinafter referred to as F.J.H.), since 1 June 1956. Defendant also leased space in the Latta Arcade from F.J.H. and during October 1976, willfully and maliciously induced F.J.H. to terminate F.J.H.'s lease contract with plaintiff. In Count II plaintiff alleged that defendant committed unfair trade practices as defined by G.S. 75-1.1 in that defendant threatened to terminate defendant's lease with F.J.H. unless F.J.H. terminated plaintiff's lease. Plaintiff also alleged that defendant misrepresented to F.J.H. that defendant needed additional office space, when, in fact, defendant's actual motive was to force out other tenants and thereby coerce F.J.H. to lower rents or sell the Latta Arcade office building to defendant. Defendant denied plaintiff's allegations and pled that his acts were based on legitimate business reasons and were therefore justified.

In support of plaintiff's claim, plaintiff presented correspondence between defendant and F.J.H. In plaintiff's Exhibit "A", defendant informed F.J.H. that he would not start paying rent on Room 207, since defendant could not vacate Room 112,

without additional space on the second floor. Defendant did not intend to pay for Room 112 as well as Room 207 when Room 207 was unusable without the additional space of plaintiff's offices. Plaintiff's Exhibit "B" is a reply from the trust officer in charge of the estate which owned the building, informing defendant that defendant would be required to pay for Room 207 or it would be rented to someone else.

On 19 October 1977, defendant moved to dismiss plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted, and moved for summary judgment pursuant to G.S. 1A-1, Rule 56 on the grounds that there were no material issues of fact and defendant was entitled to judgment as a matter of law.

The court granted defendant's motion for summary judgment on Count I of plaintiff's complaint and granted judgment on the pleadings as to Count II. In the alternative, the court granted defendant's motion for summary judgment as to Count II of plaintiff's complaint.

George L. Fitzgerald for plaintiff appellant.

Moore and Van Allen by George V. Hanna III and Jeffrey Kurzweil for defendant appellee.

CLARK, Judge.

[1, 2] Under North Carolina law, a third party who induces one party to terminate or fail to renew a contract with another may be held liable for malicious interference with the party's contractual rights if the third party acts without justification. *Spartan Equipment Co. v. Air Placement Equipment Co.*, 263 N.C. 549, 140 S.E. 2d 3 (1965); *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954), *petition for rehearing dismissed* 242 N.C. 123, 86 S.E. 2d 916 (1955). In order to establish the tort of malicious interference with a contract right, the plaintiff must prove:

> " '. . . *First*, that a valid contract existed between the plaintiff and a third person, . . . *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth, that in so doing the outsider acted without justification.*

Fifth, that the outsider's act caused the plaintiff actual damages.'" (Emphasis added.) *Smith v. Ford Motor Co.*, 289 N.C. 71, 84, 221 S.E. 2d 282, 290 (1976), quoting *Childress v. Abeles, supra.*

A person is justified in inducing the termination of a contract of a third party if he does so for a reason reasonably related to a legitimate business interest. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964). In the case *sub judice*, the defendant has attacked the fourth essential element of plaintiff's claim for relief by asserting that his acts were justified. Defendant contends that there is no question of fact as to that issue, and therefore he is entitled to summary judgment as a matter of law.

[3] In support of his motion for summary judgment, defendant presented his own affidavit in which he denied that he or any representative of Wolf Associates made any attempt to interfere with plaintiff's lease with F.J.H. Defendant also presented the affidavit of John H. Wolfe, Secretary-Treasurer of F.J.H. Realty Co., and M. Sydney Alverson, Jr. and Floyd T. Boyce, Vice Presidents of the North Carolina National Bank Trust Department which administers the Estate of F. J. Heath, the majority stockholder of F.J.H. Realty Co. The affiants stated that plaintiff rented space from F.J.H. on a month-to-month basis and that F.J.H. decided to terminate plaintiff's lease because it needed the space for other tenants. At the time F.J.H. notified plaintiff of the termination of the month-to-month tenancy, F.J.H. offered to rent other offices in the Latta Arcade to plaintiff. The decision not to renew plaintiff's lease was based on a determination that the rental of plaintiff's space to defendant was the most economical use of office space. F.J.H. denied that defendant coerced F.J.H. into terminating plaintiff's lease.

In opposing defendant's motion for summary judgment, plaintiff filed his own affidavit stating in conclusory terms that defendant willfully requested F.J.H. to terminate plaintiff's lease. Plaintiff also submitted the affidavit of Arnold P. White in which the affiant stated that he received a notice to vacate his offices in Latta Arcade in 1974, and thereafter defendant occupied said offices.

A motion for summary judgment may be granted only where there is no genuine issue of material fact and the movant is en-

titled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). The test is whether the defendant has presented sufficient materials to justify a directed verdict in his favor had the materials been offered as evidence at trial. *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975).

We must therefore determine whether defendant has presented sufficient materials showing the lack of a genuine issue of fact for trial. In the case *sub judice*, defendant contends, and his materials tend to show, that he acted for the legitimate purpose of obtaining additional space for his business. This issue, however, involves a question of motive and the facts are peculiarly within the defendant's control, which raises an issue of credibility. Ordinarily, summary judgment is not appropriate under such circumstances, since the acceptance of the statements in the affidavit depends on credibility. *Lee v. Shor, supra. See, Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Summary judgment may be granted, however, when (1) there are only latent doubts as to the affiant's credibility, and (2) the opposing party has failed to point to specific areas of impeachment and contradiction and failed to move for a protective order under Rule 56(f). *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976); *Kidd v. Early, supra.*

In the case *sub judice*, plaintiff contends that defendant's actual motive in obtaining plaintiff's office space was to squeeze out other tenants, force the rental rates down and then purchase the building at a reduced price. Plaintiff argues that defendant acted for that purpose rather than for any business need for additional space.

This contention, however, is not supported by plaintiff's own evidence. In plaintiff's Exhibit "A", defendant notified F.J.H. that he would *not* pay for Room 207 since it was unusable without additional space on the second floor; and defendant was unable to vacate Room 112 without the extra space. This is inconsistent with plaintiff's contention that defendant was acting for reasons other than the need for additional space. In addition, F.J.H., a party which plaintiff contends is being victimized by defendant, filed an affidavit in support of defendant's contentions. Therefore, there are only latent doubts as to the credibility of defendant's materials.

Plaintiff's affidavits fail to point out any specific facts showing a genuine issue of material fact and fail to point to specific areas of impeachment or contradiction. Nor did plaintiff move for a protective order pursuant to Rule 56(f).

Since there are only latent doubts as to the credibility of defendant's materials and plaintiff has failed to point to specific areas of impeachment or contradictions in defendant's materials, and has failed to move for a Rule 56(f) protective order, defendant has established the lack of a genuine issue of fact as to one of the essential elements of plaintiff's claim and is entitled to summary judgment.

We have carefully examined plaintiff's other assignment of error, and for the reasons stated above, find it to be without merit.

Affirmed.

Judges VAUGHN and MITCHELL concur.

LOUWANNA W. HALE, ADMINISTRATRIX OF THE ESTATE OF NELSON LUCAS HALE, JR., DECEASED v. DUKE POWER COMPANY, A CORPORATION

No. 7826SC393

(Filed 6 March 1979)

1. **Electricity §§ 5.1, 8— ladder touching uninsulated wires—duty to insulate—contributory negligence—question of fact**

In an action to recover for the death of plaintiff's husband which occurred when an aluminum ladder he was handling came into contact with uninsulated wires maintained by defendant, the trial court erred in granting summary judgment for defendant where there were genuine issues of fact as to whether (1) defendant had a duty to insulate the high voltage wires in such close proximity to a house which would obviously need maintenance, such a paint, and (2) deceased knew or should have known of the presence of the wire located three feet, ten inches from the side of his house.

2. **Electricity § 4— duty required of electricity supplier**

A supplier of electricity owes the highest degree of care because of the very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use.

Hale v. Power Co.

APPEAL by plaintiff from *Ferrell, Judge.* Order entered 5 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1979.

Plaintiff administratrix brings this action to recover for the death of her husband, alleging that defendant's negligence caused his electrocution. On 28 October 1972, Nelson L. Hale, Jr., the decedent, was painting the trim on his house, using an aluminum extension ladder. In maneuvering the ladder Hale brought it into contact with one of defendant's nearby electric lines. Hale was severely injured and remained in intensive care until his death on 16 November.

Plaintiff alleges that defendant was negligent in maintaining two high-voltage (7200 volts each) electrical distribution lines dangerously close to the Hale home; that the lines were uninsulated and were obscured by trees and shrubbery; that the lines were allowed to sag dangerously low; and that defendant violated State regulations regarding the manner in which electrical lines must be strung.

Defendant moved for summary judgment on the grounds that it was not negligent and that plaintiff's intestate was contributorily negligent, presenting a number of affidavits in support of its motion. Defendant's motion was granted and plaintiff appeals.

Nelson M. Casstevens, Jr., for plaintiff appellant.

William I. Ward, W. Edward Poe, Jr., William E. Poe and Irvin W. Hankins III for defendant appellee.

ARNOLD, Judge.

The question to be determined on a motion for summary judgment is whether there exists any genuine issue as to any material fact. G.S. 1A-1, Rule 56(c). Summary judgment for defendant, in a negligence action, is proper where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established, or where it is established that the purported negligence of defendant was not the proximate cause of plaintiff's injury. *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied* 289 N.C. 296, 222 S.E. 2d 695 (1976). In the case at bar the

trial court improperly granted defendant's motion for summary judgment.

[1] There was a genuine issue as to the material facts relevant to the issue of negligence on the part of defendant.

[2] Our courts have repeatedly stated that a supplier of electricity owes the highest degree of care. *See Small v. Southern Public Utilities Co.*, 200 N.C. 719, 158 S.E. 385 (1931), and cases cited therein. This is not because there exists a varying standard of duty for determining negligence, but because of the "very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use." *Turner v. Southern Power Co.*, 154 N.C. 131, 136, 69 S.E. 767, 769 (1910). "The danger is great, and care and watchfulness must be commensurate to it." *Haynes v. The Raleigh Gas Co.*, 114 N.C. 203, 211, 19 S.E. 344, 346 (1894). "The standard is always the rule of the prudent man," so what reasonable care is "varies . . . in the presence of different conditions." *Small v. Southern Public Utilities Co., supra* at 722, 158 S.E. at 386.

[1] We cannot agree with defendant's argument that the "prudent man" rule has been supplanted by the requirements of the National Electrical Safety Code, adopted in 1963 as Rule R8-26 of the North Carolina Utilities Commission. Even assuming that defendant complied with the Code, we cannot say that such compliance would make defendant free of negligence as a matter of law. Taking the evidence for the moment in the light most favorable to the defendant, the record shows that the wires here were 7200 volt distribution lines (a much higher voltage than that of the house service lines, which in this case carried 122 and 240 volts) which passed the east side of the Hale house 3'10" from the side of the house, and 22'7" above the ground, clearances which complied with the National Electrical Safety Code. The distribution line was uninsulated, also in compliance with the Code. The house was Tudor style and had two stucco and wood gables, the lowest 18' and the highest 24'8".

On these facts there is a genuine issue of material fact relating to defendant's duty to insulate the high voltage wires maintained in such close proximity to a house which would obviously need maintenance, such as paint. In *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d 255, 257 (1979),

our Supreme Court noted the rule in this jurisdiction with regard to the duty to insulate wires:

> 'That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go.' (cite omitted)

Moreover, we cannot say that the alleged negligence of defendant could not have been the proximate cause of Hale's injury. As noted in *Williams, supra* at 403, "it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. '[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.' " The factual occurrences of this case do not present such an exceptional case, and it is for a jury to determine whether defendant did all it was required to do under the circumstances.

Addressing the issue of contributory negligence, our courts have upheld summary judgment on the ground of contributory negligence in previous cases of injuries from contact with power lines. *See Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966) (per curiam) and *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied* 292 N.C. 265, 233 S.E. 2d 392 (1977). In these cases, however, the plaintiffs knew of the presence of the power lines, and plaintiff here would distinguish the case *sub judice* on the ground that the deceased had no knowledge of the existence of the power lines. She points to evidence that the deceased rarely went to the east side of the house, where the wires were located; that reeds, bamboo, shrubbery and cedar and deciduous trees grew underneath the power lines, hiding them from view; and that the line was no larger than an ordinary lead pencil.

Defendant, citing the principle that one is charged with knowledge of what he should have known, *Hedrick v. Akers*, 244 N.C. 274, 93 S.E. 2d 160 (1956), argues that the deceased had lived

in the house during the winter, when no foliage would have blocked his view of the wire; that others at the scene of the accident were able to see the wire in spite of the foliage; and that three utility poles were located on the eastern boundary of the property. Mr. Looper, who had sold the house to the Hales, testified that he had seen the wires while he was living in the house.

Clearly there exists a genuine issue as to whether deceased knew or should have known of the presence of the wire. Thus a question is presented for the jury. In addition, our Supreme Court pointed out in *Williams, supra* at 404, that it is not necessarily true "that a person is guilty of contributory negligence as a matter of law if he contacts a known electric wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap." If the granting of summary judgment was based on contributory negligence as a matter of law it was improper.

For reasons stated the judgment allowing defendant's motion for summary judgment is

Reversed.

Judges PARKER and WEBB concur.

VIRGIL STUART AND WIFE, LILLIAN STUART v. RICHARD BRYANT AND WIFE, PATTY ANN BRYANT

No. 7824SC333

(Filed 6 March 1979)

1. **Rules of Civil Procedure § 50.2— directed verdict for party with burden of proof**

In an action by plaintiffs to be declared the owners of certain real estate, the trial court erred in directing a verdict finding record title in plaintiffs since plaintiffs had the burden of proof, and whether they met that burden was a question for the jury.

2. **Adverse Possession § 25.2— boundaries not located on ground—insufficient evidence of adverse possession**

The trial court properly entered judgment n.o.v. in favor of plaintiffs on defendants' claim of adverse possession where the evidence was insufficient to

establish the location on the ground of the boundary lines of the property claimed by defendants.

APPEAL by defendants from *Howell, Judge.* Judgment entered 2 September 1977 in Superior Court, YANCEY County. Heard in the Court of Appeals 19 January 1979.

Plaintiffs bring this action to be declared the owners of certain real estate, to have defendants enjoined from entering upon it, and for damages. Defendants deny plaintiffs' ownership and counterclaim to have title declared in them. The parties stipulate that the disputed parcels are located within a larger tract, the deed of which is their common source of title. At the close of the evidence, the court entered a directed verdict for plaintiffs with respect to record title. The jury then found that the defendants had acquired the property by adverse possession, but the trial court granted plaintiffs' motion for judgment notwithstanding the verdict. Defendants appeal.

Staunton Norris for plaintiff appellees.

Pritchard, Hise & Howell, by Lloyd Hise, Jr., for defendant appellants.

ARNOLD, Judge.

[1] Defendants argue that it was error for the court to direct a verdict finding record title in plaintiffs. They rely on *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), for their position that it is improper to direct a verdict for the party with the burden of proof. In that case, an action of trespass to try title, the court spoke to this question at length, saying that even where the evidence is uncontradicted, a directed verdict in favor of the party having the burden of proof is improper, since the credibility of the witnesses is always for the jury. Instead of a directed verdict, the court may give a peremptory instruction that "if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner." *Id.* at 418, 180 S.E. 2d at 311.

Plaintiffs, while not disputing this analysis, argue that there is no question of credibility here, but only a question of law. However, even if it be true, as plaintiffs contend, that defendants

have failed to establish on the ground the tract to which they claim title, plaintiffs retain the burden of proving their own contentions. "A failure of one of the parties to carry his burden of proof on the issue of title does not, ipso facto, entitle the adverse party to an adjudication that title to the disputed land is in him. He is not relieved of the burden of showing title in himself." *Id.* at 411, 180 S.E. 2d at 307. And the determination of whether the plaintiff has met this burden is for the jury. Based on *Cutts* we must find that the directed verdict on the issue of record title was improperly granted. *Accord Schell v. Rice*, 37 N.C. App. 377, 246 S.E. 2d 61 (1978).

[2] Defendants further contend that the trial court erred in entering judgment notwithstanding the verdict in favor of plaintiffs on defendants' claim of title by adverse possession. We find, however, that the defendants failed to carry their burden of proof, and the trial court was correct.

Among the requirements for establishing title by adverse possession is that the possession must have been under "color of title." G.S. 1-38. Color of title has been defined as a writing which "professes and appears to pass the title, but fails to do so." *Smith v. Proctor*, 139 N.C. 314, 324, 51 S.E. 889, 892 (1905). Defendants offered into evidence several deeds which they contend established their chain of title. Assuming, however, that these deeds convey to defendants the land described in them, we find in the record no evidence that it is the same land which defendants allege that they own by adverse possession.

Deeds offered into evidence by defendants purport to pass title as follows: In 1905 a conveyance from A to B and in 1906 a conveyance from B to C of 60 acres more or less in Yancey County, "on the west side of the Toe River, adjoining the lands of James Lewis on the south, W. Bryant and the Johnston heirs on the west, Baxter Bennett on the north and Toe River on the east," the tract of land formerly owned by G. C. Peterson and Francis Peterson; in 1929 a conveyance from C to D of "all the lands and interests in lands" which C owns in Yancey County; in 1964 a conveyance from D to E and later from E to F of 1.9 acres of the tract,

> BEGINNING at the northeasterly corner of the tract of land conveyed by Holston Corporation to Billie Peterson, by

> deed dated October 6, 1916; thence South 89 degrees 200 feet to the West bank of Toe River; thence up Toe River in a southerly direction 1550 feet to a point; thence South 40 degrees West approximately 290 feet to the southeasterly corner of the tract of land conveyed by Holston Corporation to Billie Peterson by deed dated October 6, 1916; thence with the easterly line of said Billie Peterson tract 1600 feet to the BEGINNING,

and in 1975 a conveyance from F to defendants containing the same description as that in the 1964 deeds. Defendant Richard Bryant testified at trial that "[m]y deed calls for 4 points. I do not know of my own knowledge where these points are located on the ground. . . . I do not know where any of these points are as the result of a survey." He acknowledged that the streams and fence he claimed as his boundaries did not appear in his deed. Dallas Miller, a registered land surveyor, testified for defendants that "[y]ou can't locate anything on the ground from the [defendants'] deed." In order to locate defendant's corners from his deed "I would have to survey the entire 60-acre tract from which both parties' land comes, which I did not do." No other witness for defendants presented any evidence which would tend to locate on the ground the tract which defendants allege they own by adverse possession.

Defendants argue that testimony by Dallas Miller, R.L.S., that he could locate the beginning corner of defendants' description by making certain computations based on various points contained in the trial map offered by plaintiffs into evidence was some evidence to show the location on the ground of their land. However, as plaintiffs correctly argue in support of the judgment notwithstanding the verdict, Mr. Miller's hypothetical testimony did not amount to testimony as to the location of defendants' land on the ground.

" 'Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute. . . . It is error to allow a jury on no evidence . . . to locate the land described in a deed.' " *Skipper v. Yow*, 238 N.C. 659, 662, 78 S.E. 2d 600, 603 (1953). Although the defendants' evidence here might have established all the other elements of adverse possession, the evidence was insufficient to

establish the location on the ground of the boundary lines of the property claimed by defendants. Thus, judgment notwithstanding the verdict on the issue of adverse possession was properly entered.

Affirmed in part and reversed in part and remanded for new trial on the issue of record title.

Judges PARKER and WEBB concur.

EDWARD ANDREW POSTON v. MARY ELIZABETH POSTON

No. 7822DC446

(Filed 6 March 1979)

Divorce and Alimony § 24.9— child support order—insufficient findings

Trial court's child support order was insufficient where it contained no findings to establish the ability of the child's father to meet the needs of the child and contained no findings as to the child's reasonable needs for health, education and maintenance.

APPEAL by defendant from *Martin (Lester P.), Judge.* Order entered 15 February 1978 in District Court, IREDELL County. Heard in the Court of Appeals 5 February 1979.

This civil action was commenced on 4 December 1974, by plaintiff-husband against defendant-wife to obtain custody of the one minor child born of the marriage. Custody was granted to the plaintiff by an order of 23 December 1974.

On 12 June 1975, the defendant filed a motion for a change of custody due to changes in circumstances. Following a hearing on 14 July 1975, the motion was denied.

On 16 August 1977, the defendant filed another motion for change of custody, alleging change in circumstances brought about by defendant's remarriage. A reasonable amount of child support was also sought by the motion. A hearing was held on the motion on 20 September 1977. Evidence at the hearing showed that since her remarriage the defendant no longer was employed but was now a full-time homemaker in a new home and that her

new husband earned approximately $25,000 per year. The plaintiff continued to work in Charlotte, commuting to and from work from the home of his grandparents in Statesville, and making $300 per week in gross pay. In an order dated 4 October 1977, custody was transferred from the plaintiff to the defendant, thereby modifying the order of 23 December 1974. Support for the minor child was to be determined by the parties, or by evidence presented to the court at a future date.

On 29 November 1977, defendant filed a motion requesting child support and counsel fees, alleging that the parties could not reach an agreement regarding child support and that no child support had been paid since the entry of the 4 October 1977 order. Attached to this motion was an affidavit outlining the financial needs of the minor child and alleging that $800 per month was needed to support the child. The parties stipulated that the plaintiff made $300 per week in gross pay. A hearing on the motion was held on 6 December 1977 in Iredell County District Court. The judge found, in an order dated 15 February 1978, that the defendant was entitled to a reasonable amount of child support and the plaintiff had the ability to pay the sum of $25 per week. From this order, defendant appeals.

No brief filed for plaintiff appellee.

Reginald L. Yates, for defendant appellant.

CARLTON, Judge.

Defendant's three assignments of error are all based on the contention that the trial judge made insufficient findings of fact in the 15 February 1978 order. We agree.

The judgment of the trial court found, in part, the following:

III. That after obtaining custody the parties could not agree upon a fair and reasonable amount of child support and that defendant once again filed a motion for support on the 29th day of November, 1977, alleging that she was in need of $800.00 per month as adequate support for the said child.

IV. That the plaintiff is an able-bodied man who is currently employed at Robinson Electric Company, Inc., in Char-

lotte, North Carolina, and is earning approximately $303.00 per week; that plaintiff has travel expenses from his home in Statesville to his place of employment in Charlotte, as well as his living expenses.

V. That the plaintiff negotiated in good faith as to the amount of money he could reasonably pay for the support of his minor child; that he has the ability to provide a reasonable amount of support for the maintenance of said child, he being primarily responsible and the defendant being secondarily responsible for adequate and reasonable support; that the defendant has remarried to one David VerMeulen, who earns a salary in excess of $25,000.00 per year and furnishes an automobile and extensive health insurance coverage for his family; that he provides an expensive and spacious residence in an excellent neighborhood on four acres of land for his family, together with a swimming pool and pasture area in the rear of the house where horses and ponies are kept, and the plaintiff doesn't have these types of luxuries where he resides part of the time with his paternal grandparents and he is not financially capable of paying $800.00 per month for the support of his minor child.

VI. That it is further found by the Court that the sum of $25.00 per week is a reasonable amount for the plaintiff to provide for the support and maintenance of said minor child and that he does not have the financial capabilities to provide the entire amount of support for the child, and especially not able to provide monies for feeding the child's horse and many of the other financial needs as set out by the defendant in her affidavit attached to the motion for support for the minor child.

To support an award of payment for support, the judgment of the trial court should contain findings of fact which sustain the conclusions of law that the support payments ordered are 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." G.S. 50-13.4(c), *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977), *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

In the order appealed from, the court concluded as a matter of law that

> . . . defendant is entitled to a reasonable amount of support from the plaintiff for the use and benefit of the minor child: that said plaintiff has the ability to pay a reasonable amount of child support and the sum of twenty-five ($25.00) dollars per week is a reasonable sum for said plaintiff to pay for the support and maintenance of said minor child.

The factual findings of the trial court do not support its conclusion of law that $25.00 is a reasonable amount of child support. The only finding relevant to what amount the plaintiff could pay in child support is the finding as to the weekly salary of the plaintiff, which had been previously stipulated by the parties. There was no finding about plaintiff's living expenses or net income. There was no finding made as to plaintiff's supplemental sources of income or his estate. An order for child support must be based not only on the needs of the child but also on the ability of the father to meet the needs. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977). Clearly, the trial court's order, in the case at bar, failed to establish the ability of the father to meet the needs of the child. It merely concluded that the father was not able to provide the entire amount of requested support for the child.

The order, furthermore, fails to find as a fact what the actual needs of the minor child were. Evidence was presented itemizing the child's needs in the form of an affidavit by the defendant. However, no factual findings were made a part of the support order. This Court has, on several occasions, addressed this issue and recently, in *Hampton v. Hampton*, 29 N.C. App. 342, 343, 224 S.E. 2d 197, 199 (1976), stated:

> The court's findings also failed to support the award of child support. G.S. 50-13.4(c) requires "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child. . . ." Where the court does not make appropriate findings based on competent evidence as to what are the reasonable needs of the children for health, education, and maintenance, it is error to direct payments for their support. (Citations omitted.) No findings were made in the instant case concerning the needs of the children.

In the case at bar, the trial court's order is barren of any finding about the reasonable needs of the child for health, education, and maintenance as specifically required by G.S. 50-13.4(c).

The requirement for appropriate findings of fact and conclusions of law is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Without such findings and conclusions, it cannot be determined whether the judge correctly found the facts or applied the law thereto. *Montgomery v. Montgomery, supra; Jones v. Murdock*, 20 N.C. App. 746, 203 S.E. 2d 102 (1974).

For the court's failure to make adequate findings to support its order, the order appealed from is vacated and the cause is remanded for further proceedings, findings, and determination.

Vacated and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

WILLIAM T. McCRACKEN v. O. B. SLOAN

No. 7826SC303

(Filed 6 March 1979)

1. **Trial § 29— evidence stipulated—action dismissed—appeal proper**

Where the parties at a pretrial conference stipulated what the evidence most favorable to the plaintiff would be, the court could enter a judgment dismissing the action, and plaintiff could appeal.

2. **Assault and Battery § 3.1— smoking cigar in plaintiff's presence—no assault or battery**

Evidence was insufficient to support plaintiff's claim for assault and battery where it tended to show that defendant smoked cigars in his own office in plaintiff's presence when he knew such smoke was obnoxious to plaintiff, but there was no evidence that plaintiff suffered any physical illness from smelling or inhaling the cigar smoke.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 31 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1979.

This is a lawsuit in which the plaintiff alleges the defendant twice committed an assault and battery upon him by smoking cigars in his presence. At the 16 January 1978 civil term of Superior Court in Mecklenburg County and during a pretrial conference it was stipulated what the evidence most favorable to the plaintiff would be. The record shows this evidence to be as follows: The plaintiff had been a postal employee in the City of Charlotte and the defendant is the postmaster in that city. The plaintiff had a history of being allergic to tobacco smoke. Dr. Herbert O. Seiker, who is in charge of the Division of Pulmonary and Allergic Disease in the Department of Medicine of Duke University, testified by deposition that plaintiff is allergic to tobacco smoke with an allergy of "3 plus on a scale of one to four." Dr. D. V. Chamblee would have testified in regard to plaintiff that "This gentleman has severe respiratory problems when around cigarette smoke." The plaintiff had made complaints and distributed literature within the post office building in regard to the dangers of smoking. He had requested and been denied sick leave for his allergic condition. On 3 April 1975 and 13 May 1975 the plaintiff attended meetings in the office of the defendant at which the plaintiff's application for sick leave was discussed. At both of these meetings, defendant smoked a cigar. One witness would testify that he heard the defendant say at the 13 May 1975 meeting: "Bill, I know you claim to have an allergy to tobacco smoke and you have presented statements from your doctor stating this, but there is no law against smoking, so I'm going to smoke." The court made findings of fact as to what the jury could find from the evidence and concluded "that plaintiff could not prove a sufficient case to carry his cause to the jury." The court ordered the case dismissed.

Blum and Sheely, by Shelley Blum, for plaintiff appellant.

United States Attorney Harold M. Edwards, by Assistant United States Attorney Susan S. Craven, for defendant appellee.

WEBB, Judge.

[1] At the outset, we are faced with the question of the procedure used by the superior court to reach a judgment in this case. The parties at a pretrial conference stipulated what the evidence most favorable to the plaintiff would be. On the basis of

this stipulation, the court dismissed the action and the plaintiff appealed. We hold this is a proper way for the court to enter a judgment from which an appeal may be taken. We rely on *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 127 S.E. 2d 557 (1962); *Wimberly v. Parrish*, 253 N.C. 536, 117 S.E. 2d 472 (1960) and *Rochlin v. Construction Co.*, 234 N.C. 443, 67 S.E. 2d 464 (1951). Those cases state the rule to be: "[W]here a judge intimates an opinion on the law which lies at the foundation of the action, adverse to the plaintiff, or excludes evidence offered by the plaintiff which is material and necessary to make out his case, he may submit to a nonsuit and appeal." *Rochlin, supra*, at 444-45. In *Pickelsimer* and *Rochlin*, the trial judge intimated an opinion that the plaintiffs' complaints did not state causes of action. In *Wimberly*, the court intimated an opinion as to the sufficiency of the evidence. We believe it is precedent for the procedure used by Judge Thornburg in this case.

Although the court below made detailed findings of fact in its order, we are not bound by them. The parties stipulated and made a part of the record what the plaintiff's evidence would tend to show. It is from this stipulation as to what the evidence would be that we must determine whether there is enough evidence to be submitted to the jury to support a claim for assault and battery.

[2] We have found no case with a factual situation which controls this case. North Carolina follows the common law principles in the civil actions of assault and battery. *See* 1 Strong, N.C. Index 3d, Assault and Battery, § 1, p. 463, et seq. and the cases cited therein. *See also* W. Prosser, Handbook of the Law of Torts (4th Ed. 1971), p. 34, et seq. We rely on these cases and this textbook authority for the principles governing this case. It has been said that assault and battery which are two separate common law actions "go together like ham and eggs." The interest in freedom from apprehension of a harmful or offensive contact with the person is protected by the action for assault. The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by the action for battery. It is not necessary that the contact be brought about by a direct application of force. It is enough that the defendant set a force in motion which ultimately produces the result. The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent

to the contact on the part of the plaintiff. At the same time, in a crowded world, a certain amount of personal contact is inevitable and must be accepted. Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an innocuous and generally permitted contact. In this case there is the added factor that the defendant was on notice that the smelling of cigar smoke was personally offensive to the plaintiff who considered it injurious to his health. In examining the plaintiff's claim, we observe that it has been said "it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability." *See* Prosser on Torts, *supra*, at 37.

From a reading of what the plaintiff's evidence would tend to show, we can find no evidence that the plaintiff suffered any physical illness from inhaling the cigar smoke. Each of the doctor's statements says the plaintiff is allergic to tobacco smoke, but neither says that the smoking of the cigars by defendant on 3 April 1975 or 13 May 1975 could have caused a physical illness to plaintiff. There is nothing in the record to show what the plaintiff's own testimony would have been. The statements of the other witnesses do not go to the question of any physical illness to the plaintiff resulting from inhaling cigar smoke. There being no competent evidence that the plaintiff suffered a physical illness from smelling the cigar smoke, we are left with evidence that defendant smoked cigars in his own office when he knew it was obnoxious to a person in the room for him to do so. That person did experience some mental distress as a result of inhaling the cigar smoke. We hold this is not enough evidence to support a claim for assault or battery.

We express no opinion as to what the result would be if there were evidence of some physical injury, but on the facts of this case we cannot hold it is an assault or battery for a person to be subjected either to the apprehension of smelling cigar smoke or the actual inhaling of the smoke. This is an apprehension of a touching and a touching which must be endured in a crowded world.

Affirmed.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF MARILYN VIRGINIA BARTLEY, RESPONDENT

No. 7826DC957

(Filed 6 March 1979)

Insane Persons § 1.2— involuntary commitment—imminent danger to self—insufficient findings

The trial court failed to record sufficient facts to support its conclusion that respondent was imminently dangerous to herself where it found only that respondent was unable to care for herself and had no one to care for her.

Judge MARTIN (Robert M.) dissenting.

APPEAL by respondent from *Beachum, Judge*. Judgment entered 22 August 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 31 January 1979.

On 14 August 1978, a petition for involuntary commitment was filed by Stephen Wayne Bartley to have respondent taken into custody to determine if she should be involuntarily committed to a State mental hospital. On 22 August 1977, a hearing was conducted before Judge Beachum. Dr. Allan Johnstone's reports of 15 August and 21 August 1978 constituted the only evidence presented to the court:

> "[T]he first evaluation, dated August 15, 1978, was made by Dr. Allan M. Johnstone, M.D., of the Mecklenburg Mental Health Hospital. He wrote, as indications of mental illness: 'Patient is very disorganized and rambles about delusional system of manuvers [sic] over (illegible) top of house yesterday—also about Camp Lejeune but doesn't make sense—' As indications of imminent danger to self or others he wrote: 'Unable to care for own basic needs.' On the second evaluation dated August 21, 1978, Dr. Johnstone's indications of mental illness were: 'Far advanced deteriorated schizophrenia. She is garbled and rambling in presenting "word salad". With loose associations e.g. "That's between me and my Ar-

tane (Rx rather than God)". His indications of imminent danger to self or others were: 'She is unable to manage even minimally for self even with normal hygiene.' In both evaluations, Dr. Johnstone recommended Appellant be committed to Broughton State Hospital."

The trial court concluded that respondent is "out of touch with reality," and she "is imminently dangerous to self since she can not [sic] care for self and no one to care for her." The court ordered respondent to be committed to Broughton Hospital for a period not to exceed 90 days. Respondent appealed.

Attorney General Edmisten, by Associate Attorney General Christopher S. Crosby, for the State.

Public Defender Fritz Y. Mercer, Jr., by Assistant Public Defender William D. Acton, Jr., for respondent appellant.

ERWIN, Judge.

The only question presented by this record is whether there was sufficient recorded evidence to support the court's finding that respondent was imminently dangerous to herself.

G.S. 122-58.7(i) provides:

"(i) To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is imminently dangerous to others. The court shall record the facts which support its findings."

This statutory mandate requires as a condition to a valid commitment order that the District Court must find, first, that respondent is mentally ill or inebriate as defined in G.S. 122-36; and second, that respondent is imminently dangerous to herself or others as defined in G.S. 122-58.2.

Respondent does not object to the entry into evidence of the two affidavits of Dr. Johnstone, although he was not present at the proceeding, and respondent was not afforded the right, guaranteed by statute, to cross-examine all witnesses. Respondent simply contends that the court failed to record sufficient facts to

support its finding that she was imminently dangerous to herself. We agree with respondent. The direction to the court to record facts which support its findings is mandatory. *See In re Koyi*, 34 N.C. App. 320, 238 S.E. 2d 153 (1977); *In re Hogan*, 32 N.C. App. 429, 232 S.E. 2d 492 (1977); and *In re Neatherly*, 28 N.C. App. 659, 222 S.E. 2d 486 (1976).

Where, as here, the trial court failed to follow the requirements of the statute, the commitment order entered must be reversed.

The order appealed from is

Reversed.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

It is undeniable that my learned colleagues of the majority are correct in their conclusion that the findings of the trial judge do not precisely comport with the technical niceties of G.S. 122-58.7(i), as set out above in the majority's opinion. It seems to me, however, that something vastly more important than technical nicety and literal compliance with statutory language is at stake here. The affidavits of Dr. Johnstone clearly depict respondent as a mentally ill patient who, because of her delusional state and lack of family or friends to care for her, was unable to provide even minimal care for herself and could not be depended upon to perform even basic alimentary and hygienic functions without externally imposed supervision and regimen. The trial judge obviously based his finding that respondent was "imminently dangerous to self" upon these grounds. It does not seem correct to me to find that, because no sudden violent danger is threatened by respondent to herself, but rather, her death or injury is more likely to occur by slow degrees or by misadventure, she is not "imminently dangerous to herself." We are presented with a fundamental conflict here between two legitimate state interests: (1) that of seeking to preserve the welfare of those citizens who are, for whatever reasons, no longer

able to successfully pierce the clouds of mental darkness and responsibly care for themselves, and, (2) that principle, mandated by both our federal and North Carolina Constitutions, that *no* person should be deprived of liberty by the State save by due process of law, and then, only with the fullest panoply of procedural safeguards to reduce to the least extent possible any incidence of error prejudicial to individual liberty. I do not seek to erode the procedural safeguards and protections afforded by G.S. 122-58.7(i). However, it does seem to me that where competent and uncontroverted evidence appears of record to support the trial judge's findings in matters such as these, even though the findings be less than artfully worded, the courts should be loosed from the technical straitjacket of legal literalism, so as to be able to implement a decision that was made carefully and advisedly, and which is clearly in the best interests of the patient respondent. We have noted the opinion by Judge Britt (now Justice) in the case of *In re Lee*, 35 N.C. App. 655, 242 S.E. 2d 211 (1978) and find its rationale to be applicable to the present case. Here also, sufficient evidence was properly before the court to sustain the findings made. Accordingly, I cannot in conscience join the majority in their opinion and I respectfully dissent.

MR. AND MRS. P. G. BLANTON v. BARBARA TAYLOR BLANTON

No. 784DC438

(Filed 6 March 1979)

1. **Quasi Contracts and Restitution § 3— nonperformance of oral or simple written contract—action in assumpsit**

The action of assumpsit is an action for the recovery of damages for the nonperformance of an oral or simple written contract; this contract may be express or implied and may be for the payment of money.

2. **Quasi Contracts and Restitution § 3— special and general assumpsit**

Ordinarily, only the count of special assumpsit would lie to prove a right of recovery under a written contract whereas in general assumpsit the court, in its equitable powers, will either construct a contract from the facts proved, if sufficient facts are proved (a promise implied in fact), or will impose a contract upon the facts proved where such a contract may be said to exist as a matter of law (a promise implied in law).

3. Quasi Contracts and Restitution § 5— money lent for use in chicken business—defendant not a partner—no promise implied as matter of law

In an action to recover a sum of money allegedly lent by plaintiffs to defendant, who was their former daughter-in-law, for use in a chicken business operated by defendant and her husband, there was no promise implied in the evidence as a matter of law where the evidence did not show that defendant and her former husband were partners in the chicken business, and plaintiffs' contention that any indebtedness incurred for the benefit of the business by one partner would jointly and severally obligate the other partner was therefore inapplicable.

4. Quasi Contracts and Restitution § 5— money lent for use in chicken business—no promise to repay by defendant

In an action to recover a sum of money allegedly lent by plaintiffs to defendant, their former daughter-in-law, for use in a chicken business operated by defendant and her husband, the facts proved would not support the imposition of a contract based upon a promise implied in fact, since there was no evidence of any affirmative undertaking, either oral or written, on the part of defendant to repay the monies supposedly lent to her and her husband, and evidence of silences by defendant, who was physically present at the time some of the transactions were discussed between defendant's husband and the plaintiffs, would not compel a finding of liability based upon acquiescence.

5. Quasi Contracts and Restitution § 5— money lent for use in chicken business—debts of business assumed in separation agreement—no promise to pay by defendant

In an action to recover a sum of money allegedly lent by plaintiffs to defendant, their former daughter-in-law, for use in a chicken business operated by defendant and her former husband, there was no merit to plaintiffs' contention that, because defendant signed a separation agreement in which she agreed to assume the lawful debts of the chicken business, a written contract existed which would require the court to find liability on the part of defendant, since the chicken business was a sole proprietorship, the debts of which would be *in personam* debts of defendant's former husband, and the only debts which defendant would be assuming under the separation agreement would be those encumbrances secured by the physical assets of the chicken business.

Judge ERWIN concurs in the result.

APPEAL by plaintiffs from *Erwin, Judge*. Judgment entered 7 March 1978 in District Court, DUPLIN County. Heard in the Court of Appeals 9 February 1979.

Plaintiffs brought this civil action 12 August 1975, claiming that defendant owed them $3,496.07 for money lent by the plaintiffs to defendant on or about the 18th day of June 1975. Defendant answered, denying the allegations of the complaint and contending that the complaint failed to state a claim upon which

relief could be granted in that no proof of indebtedness had been attached or alluded to in the complaint. At trial, plaintiff, Annie Mae Blanton, testified that she and her husband took out a loan in 1970 in order to help her son and defendant meet certain payments on prior loans involved with their chicken business. Annie Blanton testified that it was her expectation that the children would make the payments on this loan. However, payments were not made by Bobby and Barbara Blanton in 1971 and 1972, plaintiffs making these payments in both of those years. In 1973, Bobby Blanton took $500 out of the chicken business and made a payment with that money. At this time, Bobby Blanton and defendant were experiencing marital difficulties which culminated in a separation and divorce. In 1975, the plaintiffs made the final payment on this loan. Annie Blanton admitted on cross-examination that the defendant had never told her that she would repay this money, and that furthermore, Barbara Blanton did not execute any promissory note involving the loans in 1970 or 1964 and her signature was not on any of the loan forms. Barbara Blanton did not endorse any of the checks involved in the proceeds of these loans.

Mr. Garland King, the former manager of Duplin Production Credit Association, testified that of his own knowledge he knew that the receipts from the 1970 loan to the plaintiffs were applied to a 1966 loan to Bobby and Barbara Blanton and also to a 1964 loan to the plaintiffs, Mr. and Mrs. P. G. Blanton. He further testified on cross-examination that Barbara Blanton never executed any document indicating that she was in any way responsible for the payment of the 1970 debt and he stated that Production Credit Association looked to Mr. and Mrs. P. G. Blanton for satisfaction of this debt.

Robert Amos (Bobby) Blanton, former husband of defendant, testified that he and his wife were jointly engaged in a chicken business and that the 1970 loan was taken out by his parents at his request owing to difficulties that the chicken business was encountering meeting current debt obligations. Robert Blanton also testified that no payments were made on this loan by him or his wife except for a $500 payment in April of 1973 which he made from the proceeds of the chicken business. Robert Blanton also testified that he separated from his wife on 19 April 1973 and

that he has had nothing further to do with the business since that time.

After hearing this evidence, the trial judge found, among other facts: (1) that during the year 1970 Robert Blanton told Mrs. P. G. Blanton that it appeared that he and the defendant would need to borrow some $3,000 to continue paying their bills; (2) that the plaintiffs secured this loan but that at no time did defendant acknowledge the debt or participate in securing the loan; (3) that the defendant never made any promise to pay this debt at any time after 1970 and specifically during those times when the plaintiffs made the payments on this debt; (4) that the complaint charged that the plaintiffs were due $3,496.07 from the defendant for money lent by the plaintiffs to the defendant on 18 June 1975 but no evidence was presented to support a loan being made by the plaintiffs to defendant in this amount on 18 June 1975. Therefore, the trial court concluded that plaintiffs were not entitled to recover the sum of $3,496.07 from defendant, and that plaintiffs' evidence failed to show any contract between plaintiffs and defendant, either oral or written, on or about 18 June 1975 for this amount. A judgment of involuntary dismissal was entered against plaintiffs, from which they appeal, assigning error.

Corbett & Fisler, by Robert Hugh Corbett, for the plaintiffs.

No appearance by defendant appellee.

MARTIN (Robert M.), Judge.

Plaintiffs contend that it was error for the trial judge to enter dismissal against them. They argue that they proved sufficient facts to entitle them to recover the monies they purportedly loaned to defendant, characterizing their action as being one in the nature of the common law count of assumpsit; specifically, plaintiffs sought to prove indebitatus assumpsit, a subcategory of the general assumpsit count, and special assumpsit.

[1, 2] The action of assumpsit is an action for the recovery of damages for the nonperformance of an oral or simple written contract; this contract may be express or implied, and may be for the payment of money. Ordinarily, only the count of special assumpsit would lie to prove a right of recovery under a written contract whereas, in general assumpsit, the court, in its equitable powers,

will either construct a contract from the facts proved, if sufficient facts *are* proved (a promise implied in fact), or will impose a contract upon the facts proved where such a contract may be said to exist as a matter of law (a promise implied in law). At common law, plaintiff would have been required to elect either special or general assumpsit upon which to proceed, the two counts normally not being found to lie on the same set of facts. *See* generally 7 C.J.S. *Assumpsit* §§ 1-9 (1937), 5 Strong's N.C. Index 2d *Money Received* §§ 1-3 (1968). Our present liberal rules of pleading will, however, allow plaintiff to plead both general and special assumpsit without requiring his election of a theory of the case.

In this action, the trial court sat as both judge and jury. Accordingly, the proper scope of our review will be to determine if competent evidence existed to support his findings of fact, and whether he then properly reached his conclusions of law upon those facts. The findings of fact by a trial court in a nonjury 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); *Henderson Co. v. Osteen*, 38 N.C. App. 199, 247 S.E. 2d 636 (1978). Accordingly, we will analyze the evidence presented at trial in the light of plaintiffs' theories of the case to determine if the trial judge did, in fact, err.

[3] First, was any promise implied on the evidence as a matter of law? We think not. Plaintiff contended that, since defendant and her husband were both actively engaged in the operation of the chicken business, defendant and her husband were partners, and that any indebtedness incurred for the benefit of the business by one partner would jointly and severally obligate the other partner. While it is true, from the record, that defendant worked in the chicken business, and her name was on a joint checking account which was used for the business, this evidence, standing alone, is not sufficient to support a finding that defendant and her former husband were partners.

> 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*, 255 N.C. 152, 155-56, 120 S.E. 2d 575, 579 (1961).

No evidence of any "special contract" was adduced to support plaintiffs' allegation of partnership between defendant and her (then current) husband; therefore, the trial judge could properly conclude that there was no partnership. The principles of agency cited by plaintiff accordingly are not applicable and no promise implied in law will be found to lie upon the assumpsit indebitatus count as pleaded.

[4] Second, will the facts proved support the imposition of a contract based upon a promise implied in fact? Again, we think not. No evidence of any affirmative undertaking, either oral or written, on the part of defendant to repay the monies supposedly lent to her and her husband appears of record. The evidence clearly shows that the loans were negotiated between Bobby Blanton and his parents (the plaintiffs in this action) without any participation by defendant at all. Her signature does not appear on any documents or negotiable instruments drawn by reason of the loan transactions. The only evidence by which plaintiffs seek to make defendant liable on this debt consists of testimony of defendant's ex-husband as to certain statements and silences by defendant, who was physically present at the time some of the transactions were discussed between Bobby Blanton and plaintiffs. While these statements are perhaps sufficient to raise inferences that defendant acquiesced in the transactions, they do not compel a finding of liability based upon acquiescence. The inference will permit, but does not compel, the finding based upon it. *See Cogdell v. R.R.*, 132 N.C. 852, 44 S.E. 618 (1903); 2 Stansbury N.C. Evidence (Brandis Rev.) § 215 (1973). The trial judge's conclusions will not, therefore, be disturbed and the assignments of error are overruled.

[5] And last, was there evidence which would require the trial court to render judgment for plaintiffs on the allegations amounting to a count of special assumpsit? We think not. Plaintiffs have vigorously contended that, because defendant signed a separation agreement in which she agreed to assume the lawful debts of the chicken business, a written contract existed which would require the court to find liability on the part of defendant. However, since

the chicken business was a sole proprietorship, not operated in any corporate or partnership form, debts of the business would actually be *in personam* debts of Bobby Blanton, and the only debts which defendant would be assuming under the separation agreement would be those encumbrances secured by the physical assets of the chicken business. As we do not find that the business was a partnership, for the reasons stated above, no liability for this debt may be found to have attached to defendant by reason of the separation agreement. These assignments of error are overruled.

We have carefully considered the remaining assignments of error by plaintiffs and find them to be without merit. Plaintiffs were required to carry the burden of proof on the existence of facts which would warrant the equitable imposition of a contract by the court in general assumpsit, as well as on the existence of a contract to support recovery on special assumpsit. Having failed to meet either burden, plaintiffs are left with a well-pleaded but deficient cause of action on all counts, and the trial judge correctly determined that dismissal would lie against them. The judgment of the trial court is affirmed.

Affirmed.

Judge MITCHELL concurs.

Judge ERWIN concurs in the result.

JAMES F. O'NEILL, GUARDIAN AD LITEM FOR MICHAEL RAYMOND HARRIS, DAVID LEE HARRIS, BEVERLY ANN HARRIS, AND BARBARA LYNN HARRIS, MINORS; VIRGINIA LOUISE HARRIS AND CALVIN J. HARRIS, JR. v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA, WHEAT FIRST SECURITIES, INC. AND JAMES R. SHIELDS

No. 7826SC269

(Filed 6 March 1979)

1. Appeal and Error §§ 6.6, 14— motion to dismiss—interlocutory order—no appeal—time of notice of appeal

An order denying a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief is interlocutory and not appealable. Furthermore, the appellate

court did not acquire jurisdiction over the proposed appeal where notice of appeal from the order was not given within 10 days as required by G.S. 1-279(c) and App. R. 3(c), the time for giving notice of appeal not having been tolled by appellant's motions under Rules 60(b), 52(a) and 52(b) for relief from the order.

2. **Appeal and Error § 6.7— order allowing pleading amendment—no appeal**

An order allowing amendment of a pleading is interlocutory and not appealable.

3. **Appeal and Error § 6.6; Rules of Civil Procedure § 60— motion for relief from order—inapplicability to interlocutory order**

A motion under Rule 60(b) for relief from an order denying a motion to dismiss for failure to state a claim for relief was improper since Rule 60(b) has no application to interlocutory orders and the motion was not based on any of the grounds enumerated in Rule 60(b), and the denial of the motion to dismiss was not made appealable by the improper Rule 60(b) motion or by the court's improvident consideration of the motion.

4. **Appeal and Error § 6.6; Rules of Civil Procedure § 52— order denying motion to dismiss—findings not required**

The trial court was not required to make findings of fact and conclusions of law with respect to an unappealable interlocutory order denying a motion to dismiss for failure to state a claim for relief, and the court's entry of findings and conclusions was gratuitous and surplusage and did not render the interlocutory order appealable. G.S. 1A-1, Rules 52(a) and (b).

5. **Gifts § 1.2; Trover and Conversion § 3— stock held by custodian under Gifts to Minors Act—use as collateral for personal loan—sale by bank**

Plaintiffs stated a claim for relief against defendant bank where they alleged that they were the owners of stock held by a custodian under the N.C. Uniform Gifts to Minors Act, that the bank accepted the stock as security for a personal loan to the custodian, and that the bank thereafter caused the stock to the sold and the proceeds applied to the custodian's debt.

APPEAL by defendant Southern National Bank from Orders of *Griffin, Judge* entered 4 January 1978 and 10 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 11 January 1979.

This is a civil action wherein plaintiffs have alleged that they were the owners of certain stock; that Calvin J. Harris held the stock as custodian under the North Carolina Uniform Gifts to Minors Act; that Calvin J. Harris for his own purposes borrowed $293,300 from the defendant Southern National Bank ("Bank") and deposited the stock as collateral security for the debt without the knowledge and consent of the plaintiffs; that the defendant accepted the stock as security with complete knowledge that the

loan was for Calvin J. Harris' own purposes; that on 28 June 1974, without notice to the plaintiffs, and without their knowledge and consent, the Bank caused the stock to be sold and the proceeds applied against the debt; that the acts of the Bank amounted to a breach of trust, conversion, negligence, and reckless indifference on the part of the defendant. On 22 July 1977, the Bank filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to G.S. § 1A-1, Rule 12(b)(6). On 28 December 1977, plaintiffs, pursuant to Rule 15(a), filed a "motion to amend amended complaint." On 4 January 1978, Judge Kenneth Griffin entered an Order denying the Bank's Rule 12(b)(6) motion to dismiss. On 6 January 1978, the Bank filed a motion pursuant to Rules 60(b), 52(a), and 52(b) "for relief from the 'Order' entered by the Court in this action on January 4, 1978" and for the trial judge "to enter findings of fact and conclusions of law." On 10 January 1978, the trial court entered an Order (1) allowing the plaintiffs to further amend their complaint, (2) denying the Bank's Rule 60(b) motion "for relief from the Order previously entered," and (3) treating the Bank's motion "for findings of fact and conclusions of law" as a "request for such." Judge Griffin entered separate findings of fact and conclusions of law on 10 January 1978 wherein he concluded that "the claims for relief in the Plaintiff's Amended Complaint, as amended, seeking relief from the Defendant Southern National Bank are not barred as a matter of law by North Carolina General Statute § 33-73."

On 16 January 1978, the Bank filed a notice of appeal "from the Orders of the Honorable Kenneth A. Griffin . . . dated January 4, 1978 and January 10, 1978, and from the Findings of Fact and Conclusions of Law of the Honorable Kenneth A. Griffin . . . dated January 10, 1978."

Mraz, Aycock, Casstevens & Davis, by John A. Mraz, for the plaintiff appellees.

Fleming, Robinson & Bradshaw, by Michael A. Almond, for defendant appellant Southern National Bank.

HEDRICK, Judge.

[1] We first consider the Bank's purported appeal based on an exception to the 4 January 1978 Order denying the Bank's Rule 12(b)(6) motion to dismiss plaintiff's complaint for failure to state a

claim upon which relief can be granted. An Order denying a Rule 12(b)(6) motion is interlocutory and clearly not appealable. G.S. § 1-277; *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E. 2d 862 (1971). Furthermore, the record discloses that the defendant did not give notice of appeal from the Order entered 4 January 1978 within ten days as required by G.S. § 1-279(c) and Rule 3(c) of the Rules of Appellate Procedure. The provisions of G.S. § 1-279 are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it. *Teague v. Teague*, 266 N.C. 320, 146 S.E. 2d 87 (1966); *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E. 2d 46 (1976); *Brooks v. Matthews*, 29 N.C. App. 614, 225 S.E. 2d 159 (1976). *See also* Rule 1(b) of the Rules of Appellate Procedure. The time for taking an appeal may not be enlarged by the appellate courts. *Giannitrapani v. Duke University, supra;* Rule 27(c) of the Rules of Appellate Procedure. Nor did the filing by defendant of its motion, hereinafter discussed, on 6 January 1978 "[p]ursuant to [Rules] 60(b), 52(a), and 52(b)" toll the running of time within which to file notice of appeal under G.S. § 1-279(c) or Rule 3(c) of the Rules of Appellate Procedure, since motions pursuant to these rules apply only to final judgments and orders and clearly have no application to interlocutory orders such as the Order entered 4 January 1978 denying the Bank's motion to dismiss. *See Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E. 2d 509 (1976).

[2] We next consider the Bank's purported appeal based on an exception to the portion of Judge Griffin's Order entered 10 January 1978 allowing plaintiffs to amend their complaint. An order allowing amendment of a pleading is interlocutory and not appealable. *Williams v. Denning*, 260 N.C. 539, 133 S.E. 2d 150 (1963); *Order of Masons v. Order of Masons*, 225 N.C. 561, 35 S.E. 2d 613 (1945); *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975).

[3] The Bank next purports to appeal from the denial of its Rule 60(b) motion for relief from the Order entered on 4 January 1978. Rule 60(b) has no application to interlocutory orders; by its express terms it applies only to final judgments and orders. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975); 7 Moore's Federal

Practice, ¶ 60.20 (1978); 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2852 (1973). Since the denial of a Rule 12(b)(6) motion to dismiss is not a final judgment or order, the Bank's motion for relief from the Order entered 4 January 1978, could not, as a matter of law, have been proper under Rule 60(b), and the trial court should not have considered the motion. *Sink v. Easter, supra.*

Furthermore, the Bank did not seek relief from the Order denying its motion to dismiss on any of the grounds enumerated in Rule 60(b), and the motion was also improper for that reason. A motion under Rule 60(b) cannot be a substitute for appellate review, *In re Brown*, 23 N.C. App. 109, 208 S.E. 2d 282 (1974), and the denial of a Rule 12(b)(6) motion is obviously not made appealable by a motion for relief from a final judgment or order under Rule 60(b) which is improperly made by a party to the proceeding and improvidently considered by the trial judge.

[4] Finally, we consider the Bank's purported appeal from the findings of fact and conclusions of law entered by the trial judge. The Bank, pursuant to Rules 52(a) and 52(b) requested that the court make findings and conclusions with respect to its denial of the Bank's motion to dismiss. Rule 52(b) concerns amendments to the findings and conclusions relating to a final judgment, and obviously has no application with respect to interlocutory orders where findings and conclusions are neither made nor required. Rule 52(a)(2) requires the trial judge to make findings and conclusions "on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." The purpose for requiring findings of fact and conclusions of law is to allow meaningful review by the appellate courts. *Jones v. Murdock*, 20 N.C. App. 746, 203 S.E. 2d 102 (1974). Consequently, a trial judge is not required to make findings and conclusions with respect to an interlocutory order that is not appealable, such as is the case with the denial of a Rule 12(b)(6) motion to dismiss. *See* 5A Moore's Federal Practice ¶ 52.08 (1978); 9 Wright & Miller, *Federal Practice & Procedure: Civil* § 2574 (1973). Hence, the trial court's entry of "Findings of Fact and Conclusions of Law" with respect to its denial of the Bank's motion to dismiss was merely gratuitous and surplusage, and does not afford grounds for appellate review of an interlocutory order that is otherwise not appealable. Additionally, the Bank's motion made pursuant to

Rule 52(a) and (b) for the court to make findings and conclusions with respect to the denial of the Rule 12(b)(6) motion was just as improper as the Bank's Rule 60(b) motion and was also improvidently considered and erroneously granted.

[5] The only question argued by the Bank in its brief is that the trial judge erred in denying its Rule 12(b)(6) motion to dismiss. In North Carolina a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim. A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts that could be proved in support of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975). In our opinion, the 4 January 1978 Order denying the Bank's Rule 12(b)(6) motion was proper.

The result is: the appeal from the Order entered 4 January 1978 denying the Bank's Rule 12(b)(6) motion to dismiss and extending the time for defendant to answer is dismissed; the appeal from the 10 January 1978 Order allowing plaintiff to amend its complaint is dismissed; the 10 January 1978 Order denying Bank's Rule 60(b) motion is vacated; and the 10 January 1978 Order making findings and conclusions with respect to the Bank's motion to dismiss is vacated and the cause is remanded to the superior court for further proceedings.

Dismissed in part; vacated in part; and remanded.

Judges VAUGHN and CLARK concur.

IN THE MATTER OF TED HEATH, BY AND THROUGH HIS FATHER, DONALD HEATH, PLAINTIFF v. BOARD OF COMMISSIONERS OF GUILFORD COUNTY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. LLOYD S. FREEMAN, THIRD-PARTY DEFENDANT

No. 7818SC356

(Filed 6 March 1979)

1. **Animals § 4; Indemnity § 3— dog bite—liability of county—county's action against owner—showing required for indemnification**

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog where the board of commissioners sought to recover from the dog owner the amount it had paid to claimant, the trial court properly denied the board's motion for partial summary judgment, since the only fact established by the board was that the third party defendant was the owner of the dog which allegedly inflicted the injuries, but there were material issues of fact remaining as to whether third party defendant's dog was the one which actually inflicted the injuries upon claimant, whether the county had paid the claim, and what amount of damages the county was entitled to recover from the dog owner.

2. **Animals § 4; Rules of Civil Procedure § 14— dog bite—payment for injuries by county—recovery against dog owner—amount determined by jury**

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog where the board of commissioners sought to recover from the dog owner the amount it had paid to claimant, neither G.S. 67-13 nor G.S. 1A-1, Rule 14(a) made the dog owner automatically liable for the amount of damages awarded claimant in the first action, and the dog owner was entitled to have the jury determine the amount of his liability, since the dog owner was dismissed from the first action and therefore was not bound by a judgment entered after he ceased to be a party, and since G.S. 67-13 required, not that the owner pay the county the amount of the claimant's award, but that the county recover no more than the amount paid to claimant.

3. **Evidence § 22.1; Indemnity § 3.2— judgment in earlier proceeding—exclusion of evidence proper**

Where claimant obtained a judgment against defendant board of county commissioners for injuries inflicted by a dog, and the county then sought to recover that amount from the dog owner, the trial court properly granted the dog owner's motion in limine for an order preventing the county and its witnesses from making reference in the jury's presence to the judgment previously entered for claimant against the county, since the judgment and award in the earlier action were irrelevant to the issue of the dog owner's liability to the county.

4. **Trial § 3.1— continuance—denial of motion proper**

The trial court did not err in denying the motion for a continuance made by the county board of commissioners prior to trial since the case was not tried until nearly nine months after it was remanded for further proceedings,

no objection to the calendaring of the case for trial was made by the county, the grounds for the motion were that one of the county's witnesses would be unavailable at trial, and the parties stipulated that his testimony from the earlier trial could be read into the evidence.

APPEAL by defendant, third-party plaintiff, Board of Commissioners from *Crissman, Judge.* Judgment entered 10 January 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 30 January 1979.

This action was originated by plaintiff Ted Heath against the Guilford County Board of Commissioners pursuant to G.S. § 67-13 [repealed effective 1 February 1974] for injuries suffered from a dog bite. The County pursuant to G.S. § 1A-1, Rule 14 as third-party plaintiff, impleaded the owner of the dog, Lloyd S. Freeman. The action against Freeman, however, was dismissed by Judge Crissman prior to the trial of the case, which resulted in a verdict and judgment against the County of $5,000. The North Carolina Supreme Court, in *Heath v. Board of Commissioners*, 292 N.C. 369, 233 S.E. 2d 889 (1977), affirmed the judgment in favor of Heath against the County, but reversed the dismissal of Freeman and remanded for further proceedings. Prior to the second trial, the County, pursuant to Rule 56(d) moved for partial summary judgment. On 3 October 1977, an Order was entered denying this motion. On 19 December 1977, the third-party defendant, pursuant to Rule 16, made a motion in limine for an Order preventing the third-party plaintiff and its witnesses from making reference in the presence of the jury to the judgment previously entered in the case against the County. On 3 January 1978, an Order was entered granting this motion. The following issues were submitted to the jury and answered by it as indicated below:

I. Was Ted Heath injured by a dog on May 6, 1973 in Guilford County, North Carolina?

ANSWER: Yes.

II. If so, did that dog belong to Lloyd Freeman?

ANSWER: Yes.

III. If so, what amount, if any, is the Guilford County Board of Commissioners entitled to recover of Lloyd Freeman?

ANSWER: $620.00.

From a judgment entered on the verdict, the County appealed.

Thomas G. Foster, Jr., Assistant County Attorney, and Miles & Daisy, by William L. Daisy, for third-party plaintiff appellant Board of Commissioners of Guilford County.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler, for third-party defendant appellee Lloyd S. Freeman.

HEDRICK, Judge.

[1] The County first assigns as error the trial court's denial of its motion for partial summary judgment. The County contends that G.S. § 67-13 imposes absolute liability on the dog owner and provides a scheme of indemnification whereby it is entitled to recover from him the amount it paid to the claimant. It also contends that because Freeman was impleaded as a third-party defendant pursuant to Rule 14(a) in the first trial between the claimant and the County and "was, only by error, dismissed [that] he was bound by the jury's verdict in the prior action."

In *Heath v. Board of Commissioners, supra*, the Court held:

> To the limit of monies arising from the tax on dogs, G.S. 67-13 imposed absolute liability on the county for injury and destruction caused by a dog and on the dog owner, who is required to reimburse the county "to the amount [it] paid out" for such damage. *See Board of Commissioners v. George*, 182 N.C. 414, 109 S.E. 77 (1921).

292 N.C. at 373, 233 S.E. 2d at 891-892.

In speaking of the dog owner's liability to the County, the Court stated:

> The purpose of this statute was not to relieve the dog owner of liability or to make the county an insurer for the behavior of dogs with known and solvent owners. The same statute which granted a cause of action in the dog's victim also granted a cause of action in the county against the dog owner. The two are indissoluble parts of an entire plan, the purpose of which was to make dog owners insurers of the good behavior of their animals.

Id. at 377, 233 S.E. 2d at 894.

The issue of the dog owner's liability to the County, however, is a separate question from that of the County's liability to the claimant. In order to establish the dog owner's liability, the County must prove (1) that Freeman is the owner of the dog that inflicted injury on the claimant, and (2) that the County has paid the claim. Again quoting from *Heath:* "[T]he county could not have sued Freeman independently of Heath's suit unless it had first paid his claim. Nor could the county collect from Freeman in this consolidated suit until *both* had been found liable and the county had paid the judgment." (Emphasis added.) *Id.* at 377, 233 S.E. 2d at 893.

In support of its motion for partial summary judgment, the County filed one affidavit, and the only fact established by this affidavit was that Freeman was "the owner of the dog alleged to have inflicted the injuries incurred by the plaintiff in this action." The trial court properly denied the County's motion for partial summary judgment, since there were material issues of fact remaining that required trial, *viz.*, whether Freeman's dog was the one that inflicted injuries on the claimant, whether the County has paid the claim, and what amount of damages the County was entitled to recover from Freeman.

[2] With regard to the issue of damages, the County argues that once the liability of the dog owner to the County is established, then, by virtue of either G.S. § 67-13 or Rule 14(a), he is automatically liable for the amount of damages awarded to the claimant in the first action against the County. In our opinion, the third-party defendant in this case was entitled to have a jury determine not only his liability, but also the amount thereof.

The general rule is that a person who was once a party to an action, but has been dismissed from it, is not bound by a judgment entered therein after he ceased to be a party. *State ex rel. Northwestern Bank v. Fidelity and Casualty Co.*, 268 N.C. 234, 240, 150 S.E. 2d 396, 401 (1966). Rule 14 does not alter this general rule, particularly where the third-party defendant has not had an opportunity to contest the determinations made in the main action. *See* 3 Moore's Federal Practice ¶ 14.13, at 331 (1978). Rule 14(a) permits a defendant to implead "a person not a party to the action who is *or may be* liable to him for *all or part* of the plaintiff's claim against him." (Emphasis added.) It does not follow

that a person who has been impleaded is automatically liable for the entire amount of the judgment in the main action.

Furthermore, the alleged dog owner is not, by virtue of the provisions of G.S. § 67-13, automatically liable for the full amount paid to the claimant. In *Board of County Commissioners v. George, supra*, the North Carolina Supreme Court held:

> [T]he amount awarded the claimant is not an estoppel upon the owner of the dog. The latter's right of trial by jury is not denied . . . The sentence, "He shall reimburse the County to the amount paid out for such injury or destruction," imports, not that the defendant is bound by the freeholder's award, but that the commissioners shall not in any event recover more than the amount paid to the claimant.

182 N.C. at 418, 109 S.E. at 78. Consequently the amount of Freeman's liability, like the liability itself, cannot be determined without him being a party.

[3] The County next assigns as error the trial court's granting of the motion in limine. For the reasons previously discussed, the third-party defendant was not bound by the prior adjudication of the third-party plaintiff's liability, and thus the judgment and award in the earlier action was not relevant to the issue of Freeman's liability to the County, except as a maximum limitation on his liability. The introduction into evidence of the prior judgment would have had an obvious prejudicial effect as to Freeman. The trial judge's action in granting the motion was therefore proper.

[4] Finally, the County contends the trial judge erred by not granting its motion for a continuance made prior to trial. Such motions are addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of a manifest abuse of discretion. *O'Brien v. O'Brien*, 266 N.C. 502, 146 S.E. 2d 500 (1966); *State v. Edwards*, 27 N.C. App. 369, 219 S.E. 2d 249 (1975); *Wood v. Brown*, 25 N.C. App. 241, 212 S.E. 2d 690 (1975). From the record, it appears that the case was not tried until nearly nine months after it was remanded for further proceedings, that no objection to the calendaring of the case for trial was made by the County, that the grounds for the motion were that one of the County's witnesses, Dr. Ingram, would be

unavailable at trial, and that the parties stipulated that his testimony from the earlier trial could be read into the evidence. In light of the above, we cannot say that the trial judge abused his discretion in denying the County's motion.

No error.

Judges VAUGHN and CLARK concur.

GARFIELD DAVIS AND WIFE, LONA MAE DAVIS v. ROY LEE McREE AND WIFE, DEAN C. McREE, FIRST SOUTHERN SAVINGS AND LOAN ASSOCIATION, AND THOMAS J. WILSON, TRUSTEE

No. 7825SC372

(Filed 6 March 1979)

1. **Landlord and Tenant § 13.2; Vendor and Purchaser § 2.3— lease with option to purchase—extension of lease—extension of option**

Where the original lease of property containing an option to purchase extended from 1 February 1971 through 31 January 1974, and the parties later placed on the printed lease a handwritten agreement stating that "The term of this lease shall be from January 31, 1974 through January 31, 1976," the trial court properly determined that the extension applied to the entire lease agreement, including the option to purchase, and not only to the period of occupancy of the leased premises.

2. **Vendor and Purchaser § 1.3— lease with option to purchase—application of rental payments—amount due for purchase**

The trial court property charged that the balance of the purchase price of property under an option to purchase in a lease was the difference between the agreed purchase price and any monthly rental sums paid to the sellers by the purchaser during the entire extended period of the lease where the option stated that "all payments made as rental under this lease shall . . . be applied as a part of the purchase price," and plaintiff sellers presented no evidence that anything other than the plain meaning of this language was intended.

3. **Deeds §§ 7.3, 8; Vendor and Purchaser § 1.4— action to set aside deed—contention that option properly exercised—no affirmative defense—burden of proof**

In an action to set aside a deed on the grounds that it was recorded without plaintiffs' authorization and was not supported by adequate consideration, defendants' contention that they properly exercised an option to purchase the property did not constitute an affirmative defense for which they had the burden of proof, and the trial court did not improperly place the burden of proof on plaintiffs by instructing that plaintiffs had the burden of proving that defendants did not exercise the option to purchase according to its terms.

APPEAL by plaintiffs from *Ferrell, Judge.* Judgment entered 23 November 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 1 February 1979.

Plaintiffs bring this action to have a deed and a deed of trust cancelled on the grounds that they were recorded without plaintiffs' authorization and were not supported by adequate consideration.

In December 1971 plaintiffs and defendant Dean McRee entered into a lease which contained an option to purchase:

> During the term of this Lease, the Lessee shall have the right to purchase the Demised Premises for a purchase price of Twelve Thousand ($12,000.00) Dollars; all payments made as rental under this lease shall, in the event this option is exercised, be applied as a part of the purchase price.

On 13 November 1975 plaintiffs executed a deed to the property to defendants, and that deed and a deed of trust from defendants to First Southern Savings & Loan Association were recorded. When the attorney for First Southern searched the title, he found an outstanding deed of trust to First Federal Savings & Loan. First Southern then computed the outstanding balance on the purchase price in accordance with the option terms, taking into account the outstanding deed of trust, but plaintiffs refused to accept the tendered $4,850. Plaintiffs also testified that in early 1975 the parties had agreed that the purchase price would be raised to $12,650 because of a new roof plaintiffs had put on the building; defendants denied this.

The jury found that defendant had exercised the option, and that the balance of the purchase price was $4,750. Plaintiffs appeal.

Williams, Pannell & Lovekin, by Martin C. Pannell, for plaintiff appellants.

Lefler, Gordon & Waddell, by Lewis E. Waddell, Jr. and John F. Cutchin, for defendant appellees McRee.

Wilson & Lafferty, P.A., by John O. Lafferty, Jr., for defendant appellees Wilson and First Southern Savings & Loan Association.

ARNOLD, Judge.

[1] The original lease extended from 1 February 1971 through 31 January 1974. However, there appears handwritten in two places on the printed lease the statement "The term of this lease shall be from January 31, 1974 through January 31, 1976." This sentence is dated 13 August 1974, and is signed by the parties in the second place where it appears. Before trial the parties stipulated that this handwriting "is a valid and binding agreement upon the parties." The court then asked the plaintiffs whether they wished to offer evidence to "explain the writing or to otherwise indicate what the intent of the parties was with regard to that language." Plaintiffs answered "No," and the court ruled that the lease and all of its contents were in effect through 31 January 1976, and specifically that the option provisions applied during that period. Plaintiffs assign error to that ruling, and argue that the agreement of 13 August 1974 was a new and independent agreement rather than an extension or renewal of the original lease. Plaintiffs' position is that the extension applied only to the period of occupancy, not the entire lease agreement, so that the option was not extended.

A determination of whether the term of the option was extended turns on the intent of the parties. If it is the *lease* which is renewed and continued, the option is extended. If it is merely the *tenancy* which is continued, the option does not extend. *See* 49 Am. Jur. 2d, Landlord & Tenant § 383; 15 A.L.R. 3d 470 § 5. Each case, then, must be decided on its own facts.

On cross-examination by plaintiffs' attorney, defendant testified about the making of the handwritten agreement of 13 August 1974:

> When Mr. Davis came to my shop to renew the lease, I said, 'Mr. Davis, let's have another lease drawn up—your lawyer or whoever.' And he said, 'Why pay a lawyer . . . to do this. We can just bind the agreement, the same terms we both agreed upon in the original lease.' . . . I dated it so that it ran from January 31, 1974 because we were just exercising the same and original lease . . . and tacking on through 1976.

No other testimony concerning the intent of the parties appears in the record. There are, however, other indications of the par-

ties' intent. The handwritten agreement says, "The term of this *lease.*" (Emphasis added.) Plaintiff, Garfield Davis, testified, "I had a conversation with Mr. Charlie Little of First Southern Savings & Loan in which he advised me of how much money was due under the *lease agreement.* . . . I went down there to sign the deed and get the money I felt was due *under the lease.*" (Emphasis added.) In view of the evidence supporting the trial court's ruling, and the fact that the plaintiffs declined at trial to offer any evidence in support of the position they take here, we hold that plaintiffs cannot prevail on this assignment of error.

[2] Plaintiffs next assign error to the court's charge to the jury that "[t]he balance of the purchase price is the difference between the agreed purchase price and any monthly rental sums paid to the plaintiffs by the defendant during the entire period of the lease." Plaintiffs argue that the intent of the parties was that rent for a maximum of twelve months should be applied toward the purchase price. However, the option clearly states that "all payments made as rental under this lease shall . . . be applied as a part of the purchase price," and plaintiffs presented no evidence that anything other than the plain meaning of this language was intended. We have already upheld the trial court's ruling that the entire lease was extended, and we find no error in the charge.

[3] Error is also assigned to the submission of the first issue to the jury as follows:

> The first issue for your consideration reads as follows: "Did the defendant, Dean C. McRee, exercise the option to purchase the property in question according to the terms of the lease?"
>
> Now, Members of the Jury, on this issue, the burden of proof is upon the Plaintiff to satisfy you the jury from the evidence and by its greater weight that the defendant, Dean C. McRee, did not exercise the option to purchase the property in question according to the terms of the lease.

Plaintiffs argue that defendants raised the option as an affirmative defense, thereby shifting the burden of proof regarding the option away from plaintiffs. While we feel it might have been better for the trial court to phrase the issue as raised by plaintiffs, that is, whether the deed was recorded without authoriza-

tion by the plaintiffs, and without sufficient consideration, we do not find that defendants raised an affirmative defense which required them to carry the burden of proof. The plaintiffs' complaint alleged the lack of authorization and consideration for the recording of the deed. Defendants did not admit these matters. "Affirmative defenses . . . admit the matters . . . alleged by the plaintiff but assert other matters which, if true, will defeat plaintiff's right to recover." 6 Strong's N.C. Index 3d, Evidence § 9 at 26. The burden upon plaintiffs to prove their contentions was not shifted simply by the trial court's phrasing of the issue.

Plaintiffs next contend that it was error for the trial court to fail to submit to the jury their requested instructions on the issue of tender. We find that the instructions on tender given by the court were sufficient. Moreover, we note that since tender was not put in issue by the pleadings there was no error in the denial of a requested instruction on the subject. *Moore v. Ins. Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966).

We have considered plaintiffs' other assignments of error and we find that they are also unavailing.

No error.

Judges PARKER and WEBB concur.

T. LAFONTINE ODOM, TRUSTEE; HENRY C. RHYNE, INDIVIDUALLY AND AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF DANIEL P. RHYNE, SR., DECEASED, AND AS BENEFICIARY UNDER SAID INSTRUMENT; WILLIAM M. RHYNE AND DANIEL P. RHYNE, JR., BOTH INDIVIDUALLY AND AS BENEFICIARIES UNDER THE LAST WILL AND TESTAMENT OF DANIEL P. RHYNE, SR. v. LITTLE ROCK & I-85 CORPORATION, A CORPORATION; NCNB MORTGAGE CORPORATION, A CORPORATION; EDWARD W. LARGEN, TRUSTEE; TIM, INC., A CORPORATION, TRUSTEE; S. DEAN HAMRICK, TRUSTEE; SOUTHERN NATIONAL BANK OF NORTH CAROLINA, A CORPORATION; AND DAVID M. MCCONNELL

No. 7826SC293

(Filed 6 March 1979)

1. Vendor and Purchaser § 10— option agreement—no breach by lending bank

A bank which loaned money to the purchaser of property could not be guilty of a breach of the option to purchase agreement since it was not a party to the option.

2. Fraud § 12.1; Mortgages and Deeds of Trust § 2— fraud in securing subordination of deed of trust—insufficient evidence—summary judgment

In an action by plaintiffs to have their purchase money deed of trust declared a first lien with priority over defendant bank's deed of trust, summary judgment was properly entered for defendant bank on the issue of fraud in procuring the subordination of plaintiffs' deed of trust to the bank's deed of trust where the evidence showed that plaintiffs agreed with the purchasers of their land to subordinate their deed of trust to any deed of trust placed on the land for improvements; defendant bank's deed of trust was labeled "Construction Loan" and referred to improvements to be placed on the land when it was actually intended to secure a loan for acquisition of the land; the documents for the bank's loan to the purchasers were available for inspection by plaintiffs and showed that the entire amount of the loan would be dispersed at the closing; plaintiffs attended the loan closing; and plaintiffs could have counteracted any misrepresentations if they had taken the trouble to read the loan documents.

APPEAL by plaintiffs from *H. Martin, Judge.* Judgment entered 31 October 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1979.

Defendant Little Rock & I-85 Corporation (Little Rock) held an option to purchase a tract of land from Daniel P. Rhyne, Sr., testator of the plaintiffs Rhyne. This option provided in part that:

> 3. Seller agrees that it will subordinate its purchase money note and Deed of Trust . . . to the lien or liens of any mortgage or deed of trust to any bank, insurance company, or other lending institution which is placed on said property . . . for improvements made to said property.

On 28 December 1973, two transactions took place. First, under a "Real Estate Loan Commitment" executed 27 December, defendants Little Rock and McConnell borrowed $150,000 from NCNB, executing in return a promissory note, a "Construction Loan Agreement" and a "Deed of Trust (Construction Loan)." The "Deed of Trust (Construction Loan)" was received by defendants Largen and TIM as trustees for NCNB. The majority of the $150,000 ($92,978.48) was used as a downpayment in the second transaction, the closing of the real estate sale under the option. As part of the sale, plaintiffs received a promissory note for $234,981.79 secured by a balance purchase money deed of trust which provided that it was "given as a second deed of trust and subordinate to a deed of trust . . . given by the party of the first part [Little Rock] to NCNB Mortgage Corporation coverning [sic]

all or a portion of the described property. . . . [T]he party of the third part [plaintiffs] [subordinate] this deed of trust to the deed of trust to NCNB Mortgage Corporation (or such other deed of trust as may be placed hereon for improvements). . . ." Language in the promissory note indicated that the deed of trust was "subordinate to deeds of trust given . . . to NCNB Mortgage Corporation or such other lending institution in order to effect improvements to the property." Plaintiff Odom, as trustee for the plaintiffs Rhyne, received the balance purchase money deed of trust.

Little Rock later defaulted in its payment of the purchase price. Plaintiffs, observing that no improvements had been made upon the land, and assuming that no funds had been distributed under the construction loan, requested that NCNB cancel its note and deed of trust. It was at this point that plaintiffs first learned that the entire $150,000 had been paid out to Little Rock at about the time of the closing, and that the major portion of the money had been used as the downpayment on the property. Plaintiffs allege that the fair market value of the property is not enough to pay off both deeds of trust, and they seek by this action to have their deed of trust declared a first lien on the property, alleging fraud and breach of contract by NCNB in procuring the subordination of plaintiff's deed of trust.

Defendants NCNB, Largen and TIM moved for summary judgment, which was granted. Plaintiffs appeal.

Wade and Carmichael, by J. J. Wade, Jr., for plaintiff appellants.

Cansler, Lockhart, Parker & Young, by Sarah Elizabeth Parker, for defendant appellees.

ARNOLD, Judge.

Plaintiffs argue that the trial court erred in granting summary judgment for defendants, as there were material issues of fact as to (1) whether NCNB breached the option agreement upon which the closing was based and (2) whether NCNB defrauded plaintiffs at the closing by falsely representing to them that the loan funds were to be used for improvements on the property. As will appear, we have concluded that summary judgment was correctly entered.

[1] NCNB could not have breached the option agreement, because it was not a party to that contract. The option was entered into by plaintiffs' testator and Little Rock's assignor. NCNB was never made a party to the option between plaintiffs and Little Rock, or any other contract with the plaintiffs. As lender its only dealings were with Little Rock and McConnell. On this point there is no genuine issue of material fact, as is required to avoid summary judgment. G.S. 1A-1, Rule 56(c).

[2] The record reveals that plaintiffs Odom and Henry Rhyne were present at the closing. Neither plaintiffs nor anyone else present at the closing recall specifically what was said, however. The construction loan agreement and deed of trust were available for inspection by plaintiffs. The deed of trust refers throughout to a "Construction Loan Agreement" incorporated into the deed of trust by reference. The loan agreement, in turn, refers to the "Commitment," stating that "in the event there be a conflict between the terms and provisions of this Agreement and the terms and provisions of the Commitment . . . said Commitment shall be deemed to control. . . ." The commitment, although entitled "Real Estate Loan Commitment," says clearly that NCNB "shall disperse the total loan amount at closing" and that "the draw, upon closing, for land acquisition is to be limited to $150,000."

Plaintiff Odom, an attorney, "was not shown, nor did [he] ask to see, any loan documents." Plaintiff Rhyne likewise failed to read the construction loan deed of trust. They were thus unaware of the actual situation when their deed of trust was subordinated to the deed of trust in favor of NCNB.

It appears that all of the possible evidence relevant to plaintiff's contention that NCNB defrauded them by misrepresenting that the loan funds were to be used for improvements was before the trial court. The burden is of course on the party alleging fraud to show that the essential elements exist. *Foster v. Snead*, 235 N.C. 338, 69 S.E. 2d 604 (1952). The essential elements of fraud are:

> (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that

> defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury.

Cofield v. Griffin, 238 N.C. 377, 379, 78 S.E. 2d 131, 133 (1953).

Plaintiffs have made no showing of any representation on the part of NCNB, no showing of any reasonable reliance upon a representation, or any of the remaining elements essential to make out a case of fraud against NCNB. Summary judgment was appropriate.

Moreover, while we might agree with plaintiffs that it was misleading for the deed of trust to be labeled "Construction Loan" and to refer to improvements to be constructed on the land when the deed of trust was actually intended to secure a land acquisition loan, we must recognize that a party is required to exercise some diligence in protecting his own interests.

> 'Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them, and . . . , therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.' (cite omitted)

McLain v. Shenandoah Life Insurance Co., 224 N.C. 837, 840, 32 S.E. 2d 592, 594 (1945). Assuming there were misrepresentations by defendants, they could have been counteracted had the plaintiffs taken the trouble to read the documents involved.

For the reasons given, summary judgment was properly granted.

Affirmed.

Judges PARKER and WEBB concur.

LABON FRANKLIN ADAMS AND WIFE, MARY ANN ADAMS v. ODELL SEVERT AND WIFE, ANNIE MAE SEVERT; HOWARD WYATT, JR. AND WIFE, MAE WYATT

No. 7823DC137

(Filed 6 March 1979)

1. **Easements § 4.1— attempted creation of easement by deed—insufficiency of description**

Language in a deed which attempted to reserve a right-of-way across the land conveyed by claiming "a right of way in perpetuity for a roadway to connect with the County road across the above lands, for the use and benefit of the remaining lands of the grantors" was too ambiguous and uncertain to permit identification and location of the easement and thus was insufficient to create a roadway across the property in question.

2. **Easements § 6.1— possession for 18 years—no easement by prescription**

Trial court properly granted defendants' motion for summary judgment on plaintiffs' claim of title to a roadway by prescription, since plaintiffs' evidence showed possession for only 18 rather than the required 20 years.

3. **Adverse Possession § 25.2— possession under color of title—insufficiency of evidence**

Where plaintiffs' reservation of an easement by deed was ineffective because the description was insufficient to identify and locate it, plaintiffs' claim of adverse possession under color of title was also ineffective.

APPEAL by plaintiffs from *Osborne, Judge.* Judgment entered 30 November 1977 in District Court, WILKES County. Heard in the Court of Appeals 15 November 1978 in Winston-Salem.

Plaintiffs instituted this action against defendants, the Wyatts and the Severts, alleging that they had used a 14 foot wide road connecting their land to the county road until the Wyatts began blocking it and that they are entitled to an easement by virtue of reservations in deeds and by prescription. The Wyatts answered and asserted that the attempted reservation of a right-of-way in the R. G. Adams deed was ineffective, since it was ambiguous and was not included in the granting, habendum, or warranty clauses of the deeds. As a further defense, the Wyatts asserted that Elledge constructed a paved road leading into the center of his five and one-half acre parcel of land before he subdivided it, that plaintiffs had access over this paved road without going across the Wyatts' lot, and that this access satisfied the reserved right-of-way in the deeds.

The Wyatts counterlcaimed against plaintiffs for harassment. The Wyatts moved for summary judgment and submitted an affidavit from E. C. Elledge in which he asserted that before subdividing his five and one-half acre parcel, he laid off a 60 foot wide road leading from the county road into his parcel and "[t]hat there is on the ground, as well as on paper, 14 foot right of way from the lands of Plaintiffs to the 60 foot right of way." Elledge further asserted that when he purchased his five and one-half acre parcel from John Adams in 1967, "there was not on the ground any means of ingress and egress from the public road to the lands of the now Plaintiff." In response, plaintiffs submitted two affidavits, which tend to show that shortly after the September 1959 deeds from R. G. Adams to John Adams and Odell Severt, a 14 foot wide road was "graded off" along the boundary between the John Adams and Odell Severt lands, that this road was used openly, continuously, and adversely as a private road by R. G. Adams and later by plaintiffs, and that this road still exists on the grounds as a graded road with ditches. The affidavits showed that during a prior civil action, the Wyatts offered to give plaintiffs a seven foot wide strip along the edge of their lot if the Severts would do the same; however, this proposal was never carried out, and plaintiffs subsequently dismissed that previous civil action.

The District Court allowed summary judgment for defendants Wyatt and dismissed plaintiffs' action against the Wyatts. Plaintiffs appealed.

Franklin Smith, for plaintiff appellants.

George G. Cunningham, for defendant appellees Howard Wyatt, Jr. and wife, Mae Wyatt.

ERWIN, Judge.

The only question presented for our determination on this record is: "Whether the trial court committed error in granting the defendants Wyatt's motion for summary judgment upon the evidence presented by the defendants Wyatt?"

R. G. Adams and wife conveyed two adjoining parcels of land, one to John Adams and wife and the other to Odell Severt and wife. These two parcels apparently blocked off the remaining

lands of R. G. Adams from a local road, and each of these deeds reserved a right-of-way across the land conveyed which was stated on the deeds as follows: "[A] right of way in perpetuity for a roadway to connect with the County road across the above lands, for the use and benefit of the remaining lands of the grantors." The trial court concluded "that the Plaintiff's [sic] own pleadings and affidavits failed to show that an easement by prescription could have been acquired."

A roadway is an easement constituting an interest in land, and in order to create such easement by deed or reservation contained in a deed, the description thereof must be sufficiently certain to permit the identification and location of the easement with reasonable certainty. *Thompson v. Umberger*, 221 N.C. 178, 19 S.E. 2d 484 (1942), and *Gruber v. Eubank*, 197 N.C. 280, 148 S.E. 246 (1929).

[1] We hold that the language used in the deeds in question is too ambiguous and uncertain to create a roadway across the property in question. The identity of such interest in the land would of necessity rest in conjecture and speculation, which the law does not allow.

Plaintiffs rely on *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973), and *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541 (1953), for upholding the description in their deeds. These cases are distinguishable. In *Hensley, Id.* at 719, 199 S.E. 2d at 4, the deed explicitly stated, "including a right-of-way to a road across said Duncan's lot along said Lankford's Line." Thus, an extrinsic object was specifically referred to in the deed.

In *Borders v. Yarbrough, supra*, a common sewerage line ran to the disposal in the street, and this condition existed before the parties acquired their respective lots. Our Supreme Court held that under these circumstances, the way was sufficiently located. Here the location of the easement is not so certain. The deed gives no beginning point and furnishes no means by which the location of the proposed way may be ascertained. *See Thompson v. Umberger*, 221 N.C. 178, 19 S.E. 2d 484 (1942). The ambiguity is a patent one. Hence, the attempted conveyance or reservation is void for uncertainty. *Thompson v. Umberger, supra.*

[2] Plaintiffs also allege that the trial court erred in allowing summary judgment as to their claim of title by prescription. We

do not agree. A party asserting an easement by prescription has the burden of proving all the elements essential to its acquisition including that his use of the easement was continuous and uninterrupted for twenty years. *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837 (1958), and *Hemphill v. Board of Aldermen*, 212 N.C. 185, 193 S.E. 153 (1937). Plaintiffs' evidence, viewed in the light most favorable to them, shows possession for only eighteen years.

[3] Finally, plaintiffs raise a question of adverse possession under color of title. *See* G.S. 1-38. This claim is also without merit. Color of title is that which gives the semblance or appearance of title, but is not title in fact—that which on its face, professes to pass title, but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). Plaintiffs' attempted reservation of an easement did not constitute "color of title." Plaintiffs' reservation of an easement by deed was ineffective, because the description was insufficient to identify and locate it. *Thompson v. Umberger, supra.* In *Katz v. Daughtrey*, 198 N.C. 393, 394, 151 S.E. 879, 880 (1930), Chief Justice Stacy stated:

> "If the land intended to be conveyed cannot be identified from the description contained in the deed, it follows as a necessary corollary, that as the deed is, for this reason, inoperative, it is equally inoperative as color of title. If the land cannot be identified for one purpose, how can it be for another? *Campbell v. Miller*, 165 N.C., 51, 80 S.E., 974; *Barker v. R. R.*, 125 N.C., 596, 34 S.E., 701; *Dickens v. Barnes*, 79 N.C., 490; *Hinchey v. Nichols*, 72 N.C., 66; *Capps v. Holt*, 58 N.C., 153.
>
> A deed which conveys no title, because the land intended to be conveyed thereby is incapable of identification from the description contained therein, would necessarily be inoperative as color of title. *Fincannon v. Sudderth*, 144 N.C., 587, 57 S.E., 337."

We conclude from the record before us that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

The summary judgment was properly allowed for defendants.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. ROBERT WHITAKER

No. 7819SC949

(Filed 6 March 1979)

1. **Criminal Law § 117.4— receiving stolen goods—testimony by thief—no instruction to scrutinize testimony**

In a prosecution for receiving stolen goods, the actual thief was not an accomplice of defendant, and the court properly refused to instruct the jury that it should scrutinize carefully the testimony of the thief, who was a witness for the State.

2. **Receiving Stolen Goods §§ 4, 5.1— value of stolen goods—owner's testimony—qualification—harmless error**

In a prosecution for receiving stolen guns, defendant was not prejudiced by the owner's testimony that the value of one of the guns was $300.00, and the evidence was sufficient to support submission of the felony count, where an officer testified without objection that defendant had admitted selling the guns in question at a public auction for $350.00.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 30 May 1978 in Superior Court, ROWAN County. Heard in the Court of Appeals on 30 January 1979.

Defendant was charged in a proper indictment with feloniously receiving stolen goods. Upon defendant's plea of not guilty, the State presented evidence tending to show the following:

On 14 September 1976, at about 9:30 a.m., Jeffrey Daniels broke into the home of Eileen Lowder and stole several guns that were in a locked gun cabinet. Between 12:00 and 1:00 p.m. he sold these stolen guns to the defendant, who paid him $100. Daniels told the defendant that the guns were stolen before he sold them to him. At defendant's request, Daniels made out a receipt stating that five guns were sold to Robert Whitaker and signed it using an alias. Defendant took the guns to a public auction where he sold them for $350.

Defendant presented no evidence.

Defendant was found guilty as charged. A judgment was entered imposing a sentence of three years which was suspended and the defendant was placed on probation. Defendant appealed.

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

White and Crumpler, by Harrell Powell, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial judge's refusal to give a requested instruction that the jury should scrutinize the testimony of the State's witness Jeffrey Daniels, who stole the goods in question and sold them to defendant, constitutes prejudicial error entitling him to a new trial. Defendant argues that the only evidence that he knew that the goods were stolen was the uncorroborated testimony of Daniels, who was sufficiently "interested in the event" to require the judge to give the requested instruction. Defendant urges this Court to adopt the rule in effect in several jurisdictions, *see* Annot., "Thief as Accomplice of One Charged with Receiving Stolen Property Within Rule Requiring Corroboration or Cautionary Instruction," 53 A.L.R. 2d 817 (1957), that for purposes of requiring a cautionary instruction, the thief should be considered an accomplice of the alleged receiver of stolen goods. For the reasons stated below, we decline defendant's request.

In North Carolina, if a defendant makes a timely request for a cautionary instruction with respect to the testimony of an accomplice, the failure of the trial judge to give such an instruction is error; however, absent a request, the trial judge is not required to give a cautionary instruction. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975). In determining whether a person is an "accomplice" North Carolina courts have used the following definition:

> [A]n "accomplice" is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider or abettor, or as an accessory before the

> fact. The generally accepted test as to whether a witness is an "accomplice" is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony.

State v. Bailey, 254 N.C. 380, 387, 119 S.E. 2d 165, 171 (1961). *See also State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978); *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977); *State v. White, supra.*

In the present case, the trial judge was not required to give the requested instruction. In North Carolina, a person cannot be guilty of both larceny and receiving the same goods. *State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957); *State v. Myers*, 19 N.C. App. 311, 198 S.E. 2d 438 (1973). Thus, one who steals property and one who receives it afterward from him knowing it to have been stolen, are guilty of separate offenses, and neither is the accomplice of the other. This assignment of error has no merit.

[2] Defendant's remaining contentions are that the trial judge erred in not striking the testimony of one of the State's witnesses as to value of the stolen goods and in not dismissing the felony count on the grounds that there was insufficient evidence as to the value of the stolen items to support a felony conviction. The owner of the stolen guns testified on direct that the value of one of the guns was $300. After the owner had given the answer, defendant objected and moved to strike. The trial judge then held a *voir dire* hearing out of the presence of the jury, in which the owner testified that she based her opinion as to the value of the guns on the purchase price paid by her husband eight to ten years earlier, statements made to her by a pawn shop proprietor, and her own opinion. She further testified that her insurance company had paid her $872 for the stolen guns. At the close of the *voir dire* the trial judge reserved ruling on defendant's motion to strike.

In a prosecution for receiving stolen goods, the owner "who has knowledge of value gained from experience, information and observation, may give his opinion of the value of personal proper-

ty;" however, "the approved procedure requires that he first be qualified to give the evidence." *State v. Muse*, 280 N.C. 31, 38, 185 S.E. 2d 214, 219 (1971) [quoting Stansbury, N. C. Evidence § 128, at 300-301 (2d Ed. 1963)]. We do not decide whether the witness had such experience and knowledge as would qualify her to give opinion evidence concerning the value of the property. Even assuming that the witness was not properly qualified, her testimony could not have been prejudicial error since Captain C. M. Grant of the Rowan County Sheriff's Department testified without objection that defendant had admitted selling the guns in question at a public auction for $350. This evidence was also sufficient to overrule defendant's motion to dismiss the felony count and require its submission to the jury. These assignments of error have no merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

CLAUDE MORRIS CHURCH v. EDWARD POWELL, COMMISSIONER OF MOTOR VEHICLES

No. 7823SC290

(Filed 6 March 1979)

1. Criminal Law § 75.7— statement at service station—no custodial interrogation

Petitioner's statement to an officer that he had been driving a car at the time it wrecked, made at a service station in response to a question by the officer, did not result from custodial interrogation where petitioner was not placed under arrest until petitioner admitted he was driving the car and until after the officer observed what he considered to be petitioner's intoxicated condition, and the *Miranda* warnings were not required.

2. Automobiles § 2.4— refusal to take breathalyzer test—probable cause for arrest for drunk driving

A patrolman had probable cause to believe that petitioner had been driving while under the influence of intoxicants, and petitioner's driver's license

was properly revoked under G.S. 20-16.2 for willfully refusing to submit to a breathalyzer test, where petitioner wrecked his automobile and then went to a nearby service station where he drank three drinks, each of which contained three to four ounces of liquor; petitioner had been drinking heavily the day before the wreck and had a drink at 4:00 p.m. before wrecking his automobile at 7:30 p.m.; and the patrolman saw petitioner at the service station an hour after the wreck and petitioner stated that he was driving the car when it wrecked.

APPEAL by respondent from *Kivett, Judge.* Judgment entered 15 December 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 6 December 1978.

This case arose from a petition for judicial review of a decision of the North Carolina Department of Motor Vehicles revoking petitioner's driver's license for wilfully refusing to submit to a breathalyzer test pursuant to G.S. 20-16.2. At the hearing in Superior Court, petitioner was called as a witness. His testimony is as follows. He had an automobile accident about 7:30 p.m. on 2 January 1976. He had been drinking heavily the day before. He had had a couple of drinks on the day of the wreck, the last one being at 4:00 p.m. After the accident, he went to a nearby service station and drank three drinks. Each drink contained approximately three to four ounces of liquor. About an hour after the accident a highway patrolman approached him at the service station and asked him if he were Morris Church and the owner and operator of the wrecked car. The petitioner told the patrolman that he had been driving at the time of the wreck. The patrolman arrested petitioner on a charge of operating a motor vehicle on a public highway while under the influence of intoxicating liquor. He was taken before a breathalyzer operator and fully advised of his rights. He refused to take a breathalyzer test because he had been drinking after the accident and before the patrolman saw him. He appeared in court on the charge of driving while under the influence and entered a plea of guilty to a charge of reckless driving.

Respondent also offered the testimony of Trooper Sluder which tended to show that petitioner, after being arrested on the charge of driving while under the influence and after being fully advised of his choices, wilfully refused to take the test. Respondent also, without objection by petitioner, introduced as an exhibit an affidavit executed by the arresting officer stating that he

had probable cause to believe that on 2 January 1976, defendant unlawfully operated a motor vehicle on the highway while under the influence of intoxicating liquor. The exhibit also contained the magistrate's finding of probable cause on that charge.

The court entered, among others, the following conclusions:

"1. There is no evidence that Trooper B. L. Byrd had probable cause or reasonable grounds that the petitioner was under the influence of alcohol at the time he had the accident which gave rise to the trooper being present at 8:20 P.M. at the scene of the accident and at the bathroom where the petitioner was at the time the officer asked him if he was operating one of the motor vehicles involved in the accident.

2. There is no evidence that the petitioner was under the influence of alcohol at 7:20 P.M. or at any other time material to this controversy.

3. The petitioner not having been advised of his constitutional rights under the Miranda decision at the time of the one-on-one confrontation of the trooper and the petitioner in the bathroom constituted a violation of the petitioner's constitutional rights under the Miranda decision."

The court then entered an order restraining respondent from suspending petitioner's driving privileges.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for respondent appellant.

No brief was filed for petitioner.

VAUGHN, Judge.

[1] The judgment is not supported by either the evidence, which is uncontradicted, or the applicable law. In the first place, it is not necessary to reach the question of whether the patrolman should have advised petitioner of his *Miranda* rights before asking if his name was Morris Church and whether he was the owner and operator of the wrecked car. In the hearing we are now called upon to review, the testimony that petitioner told the patrolman that he had been driving the car at the time of the wreck not only came without objection, it came voluntarily from the lips of the

petitioner. It was, therefore, perfectly competent on the question of whether the patrolman had probable cause to believe that petitioner was operating the car at the time it was wrecked. Moreover, it is clear that petitioner's statement would not have been subject to exclusion at petitioner's criminal trial for the principal offense. It was only after petitioner admitted that he was driving the car when it wrecked and after the officer observed what he considered to be petitioner's intoxicated condition, that he was placed under arrest. The statement was not elicited as a part of a custodial interrogation, and the *Miranda* warnings were not required. *See, e.g., State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974); *State v. Carlisle*, 25 N.C. App. 23, 212 S.E. 2d 217, *cert. den.*, 287 N.C. 261, 214 S.E. 2d 433 (1975); *State v. Tyndall*, 18 N.C. App. 669, 197 S.E. 2d 598, *cert. den.*, 284 N.C. 124, 199 S.E. 2d 662 (1973).

[2] The court's conclusion that "[t]here is no evidence that the petitioner was under the influence of alcohol at 7:20 P.M. or at any other time material to this controversy," is not only inaccurate, it is to some degree irrelevant. At the revocation hearing, it was not the court's duty to try petitioner for the offense; the only question was whether the patrolman had probable cause to believe that petitioner had been driving while under the influence. Petitioner's own testimony shows the following. He had been drinking heavily on the day before the wreck. He had a drink at 4:00 p.m. and wrecked his automobile at 7:30 p.m. The patrolman saw him less than one hour after he had consumed an additional nine to twelve ounces of liquor, and he then told the patrolman he was driving the car when it wrecked. Surely these circumstances constituted some evidence to support the patrolman's affidavit (introduced without objection) that he had probable cause to believe that petitioner had operated an automobile while under the influence of alcohol.

The judgment from which respondent appealed is vacated, and the case is remanded.

Vacated and remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

JOHNNY EUGENE ADKINS, BY HIS GUARDIAN AD LITEM DENZEL G. ADKINS v. DAVID COLEMAN CARTER

No. 7823SC186

(Filed 6 March 1979)

Automobiles § 69— striking child on bicycle—keeping proper lookout—directed verdict for motorist improper

In an action to recover for injuries sustained by the minor plaintiff when he was struck by defendant motorist, the trial court erred in granting defendant's motion for directed verdict where the evidence would permit but not compel the jury to find that defendant could have seen the child either as he stopped his bicycle near the end of his driveway or as he entered the roadway had defendant maintained a proper lookout.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 15 November 1977 in Superior Court, YADKIN County. Heard in the Court of Appeals 28 November 1978.

Plaintiff instituted this action to recover damages for injuries received when the defendant's truck struck the plaintiff. The evidence at trial tended to show that the plaintiff, age 11, lived with his family on the east side of a rural paved road which runs north and south. On 4 July 1975, plaintiff was going to the Longtown Grocery Store located on the highway south of his home. He headed out the driveway on his bicycle, stopped "pretty close to the road," and looked both ways. When he looked to the left, the road was clear and he could see up to a curve in the road, a distance of two-tenths of a mile. He entered the road, crossed the center line and was heading south when he was struck by defendant's truck which was traveling north.

The highway patrolman who investigated the accident testified that the truck made eighty-five feet of skid marks beginning near the center line and veering left onto the western shoulder. Sixty-five feet of those skid marks were on the western shoulder. The skid marks led up to bloodstains and broken glass which were on the western edge of the southbound lane. The bloodstains were slightly north of the driveway entrance. The truck was twenty feet beyond the bloodstains. The speed limit at the site of the accident was 55 m.p.h. The road is straight for about two-tenths of a mile south from plaintiff's driveway. The paved roadway is eighteen feet wide with shoulders of about six feet on each side.

The plaintiff's father testified that when he arrived at the scene the defendant told him that "he didn't see the boy. He didn't aim to hit him." The plaintiff's father also testified that one could clearly see down the road from the driveway to the curve.

At the close of the plaintiff's evidence, the court granted the defendant's motion for a directed verdict on the grounds that the evidence failed to establish any actionable negligence on the part of the defendant. The court denied defendant's alternative motion for a directed verdict on the basis that the evidence established contributory negligence of the plaintiff as a matter of law. From this judgment, plaintiff appealed.

Moore & Willardson, by Larry S. Moore, John S. Willardson and Robert P. Laney, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by William F. Womble, Jr., and Keith W. Vaughan, for defendant appellant.

VAUGHN, Judge.

Plaintiff contends that the court erred in granting defendant's motion for a directed verdict. Upon defendant's motion for a directed verdict, the evidence must be taken as true and reviewed in the light most favorable to the plaintiff. *Adler v. Lumber Mutual Fire Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971). "When so considered, the motion should be allowed if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff." *Adler v. Lumber Mutual Fire Insurance Co., supra*, at 148. Taking the evidence in the light most favorable to the plaintiff, we believe he presented sufficient evidence to send the case to the jury. We, therefore, reverse.

Motorists are required, by law, to maintain a proper lookout in the direction of travel. *Hamilton v. McCash*, 257 N.C. 611, 127 S.E. 2d 214 (1962). A motorist is deemed to have seen what he could have seen had he been maintaining a proper lookout. *Miller v. Enzor*, 17 N.C. App. 510, 195 S.E. 2d 86, *cert. den.*, 283 N.C. 393, 196 S.E. 2d 276 (1973). His liability, therefore, is determined on the basis of whether, upon knowing of the existing conditions, he could have avoided the accident. *Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38 (1965). Furthermore, " 'the presence of children on or near the traveled portion of a highway whom a driver sees, or

should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.' " *Winters v. Burch*, 284 N.C. 205, 209, 200 S.E. 2d 55, 57 (1973), (*quoting Brinson v. Mabry*, 251 N.C. 435, 438, 111 S.E. 2d 540, 543 (1959)).

As Justice (later Chief Justice) Parker said in *Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 234 (1962),

> "This is a borderline case, but considering the evidence in the light most favorable to plaintiff, it is our opinion that it would permit, but not compel, a jury finding that the . . . defendant was negligent in operating [his truck] without keeping a proper lookout, that such negligence made it impossible for [him] to avoid the collision with the child, when by the exercise of due care [he] could and should have seen the child in time to avoid striking him. . . ."

The evidence would permit but not compel the jury to find that defendant could have seen the child either as he stopped near the end of the driveway or as he entered the roadway. He was then under a duty to proceed with caution to avoid striking the child if the child entered the roadway.

A directed verdict based on contributory negligence of the eleven-year-old child would also have been improper. There is a rebuttable presumption that children between the ages of seven and fourteen are incapable of contributory negligence. Thus, a child within this age bracket may not ordinarily have been, as a matter of law, contributorily negligent. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974).

The judgment is reversed, and the case is remanded.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

NELLIE HASTY, EXECUTRIX OF MARTHA B. TURNER, DECEASED v. NANCY SHARON CARPENTER

No. 7811SC54

(Filed 6 March 1979)

Rules of Civil Procedure § 4— service of process by registered mail—insufficiency of evidence to rebut presumption of service

The trial court erred in holding that defendant had offered evidence sufficient to rebut the presumption that she had been served with process where it was undisputed that defendant received a copy of the summons and order allowing an extension of time to file the complaint at a certain address in Georgia; sixteen days later a copy of the complaint was delivered to the same address and defendant's husband signed a receipt for it; there was no showing that defendant's husband was not a person of reasonable age and discretion; and defendant did not deny that the registered mail was delivered to her address.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 4 October 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 18 October 1978.

The plaintiff instituted this action on 30 October 1975 to set aside a deed. On the same date, the Clerk of Superior Court entered an order extending the time for filing the complaint until 19 November 1975. The defendant was served with the summons, order extending the time to file complaint, and notice of lis pendens by registered mail pursuant to G.S. 1A-1, Rule 4(j)(9)(b). The registered letter was addressed to defendant at Woodland Trailer Park, Lot #55, Leesburg, Georgia. She signed a receipt for it on 6 November 1975. A complaint was filed on 18 November 1975, and the next day a copy of the complaint was mailed to the defendant by registered mail to the same address. On 22 November 1975, Ray Carpenter signed a receipt for this mail. On 29 July 1977, the defendant made a motion to dismiss the action and to expunge from the records the lis pendens on the ground there had not been legal service of process on the defendant. In support of the motion, defendant filed an affidavit in which she said she recalled signing a registered mail receipt on or about 6 November 1975. She denied receiving the registered mail which was delivered on 22 November 1975. She stated further that she was married to Ray Carpenter on 22 November 1975, but was not living with him because of marital difficulties. She did not deny

that she was living at the address to which the registered mail was delivered. On 4 October 1977 the matter came on for hearing and the court found facts consistent with the affidavits of the parties. The court concluded that the affidavit filed by defendant was a sufficient rebuttal of the presumption that the defendant received service of the process. It dismissed the action and expunged the notice of lis pendens from the record.

Love and Ward, by Jimmy W. Love and Hoyle and Hoyle, by J. W. Hoyle, for plaintiff appellant.

James F. Penny, Jr., for defendant appellee.

WEBB, Judge.

The plaintiff chose to commence this action by having the summons issued with an order allowing her twenty days to file the complaint. This is a permitted method under G.S. 1A-1, Rule 3 which provides:

> A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.
>
> A civil action may also be commenced by the issuance of a summons when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.
>
> The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

Rule 3 provides the action shall abate if the complaint is not filed within the period specified in the clerk's order. It does not provide that the action shall abate if the complaint is not served on the defendant. We believe *Braswell v. Railroad*, 233 N.C. 640, 65 S.E. 2d 226 (1951) is controlling. That case was decided before G.S. 1-121 was superseded by Rule 3. G.S. 1-121 provided for the commencement of actions by serving a summons without a complaint as the present Rule 3 now provides. The court in that case held that when the complaint is filed within the prescribed time the action is not subject to be dismissed, but a defendant is not compelled to plead until the complaint is served on him, and no default judgment may be had until the complaint is served. We hold that Rule 3 has not overruled *Braswell*. Although Rule 3 is phrased differently from former G.S. 1-121, the procedure for serving a summons with an order allowing a delay in filing the complaint is very similar under both the rule and the statute. We do not believe the reasoning of *Braswell* is affected by the adoption of the new rule.

This brings us to the question of the service of the complaint. In light of our decision, it is important in order to fix the time when answer or other responsive pleadings to the complaint must be filed. *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 232 S.E. 2d 458, *review denied*, 292 N.C. 641 (1977) involves the service of process pursuant to G.S. 1A-1, Rule 4(j)(9)(b). That case held that for service to be complete it is not necessary that there be personal delivery to the addressee, but that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the receipt on behalf of the addressee. A showing on the face of the record of compliance with the statute raises a rebuttable presumption of valid service. In this case it is undisputed that the defendant received a copy of the summons and order allowing an extension of time to file the complaint at a certain address in Georgia. Sixteen days later a copy of the complaint was delivered to the same address, and her husband signed the receipt for it. There is no showing or contention that he is not a person of reasonable age and discretion. Defendant did not deny that the registered mail was delivered to her address. We hold that on this evidence the court was in error in holding the defendant had offered evidence sufficient to rebut the presumption that

she had been served with process. We order this case be remanded to the Superior Court of Harnett County for the entry of an order consistent with this opinion.

Reversed and remanded.

Judges MORRIS (now Chief Judge) and VAUGHN concur.

IN THE MATTER OF: R. J. CAVER, RESPONDENT

No. 7821DC943

(Filed 6 March 1979)

Insane Persons § 1.2— commitment order—failure to record 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 dangerous to himself or others as required by G.S. 122-58.7(i).

APPEAL by respondent from *Alexander (Abner), Judge.* Order entered 26 July 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 29 January 1979.

On 23 July 1978, Officer Bailey E. Howard, Jr., a member of the Winston-Salem Police Department, signed a petition for involuntary commitment of the respondent, R. J. Caver. In the petition, he alleged that the respondent "is a mentally ill or inebriate person who is imminently dangerous to himself or others", pursuant to G.S. 122-58.1. The petitioner alleged that respondent was "very paranoid" and was seen shooting with a rifle at children riding on bicycles.

The magistrate executed a custody order at 4:00 a.m. on 23 July 1978, directing that the respondent be taken before a physician to be examined to determine if he was mentally ill or an inebriate person and imminently dangerous to himself or others. The order provided that if the physician found respondent mentally ill or an inebriate and imminently dangerous to himself or others, then he should be confined temporarily in an approved medical facility until a hearing could be held in district court. If not so found, he was to be released.

Two physicians subsequently examined the respondent and both diagnosed the respondent as paranoid with a particular fear of police, stating the belief that respondent was mentally ill and imminently dangerous to himself or others and recommending involuntary commitment.

At the 26 July 1978 hearing, evidence was received from the respondent, the petitioner, and respondent's neighbor, Mattie Thomas. The evidence tended to show that on or about the night of 23 July 1978, the respondent fired his rifle at several children as they rode their bikes down the street in front of respondent's home. None of the children was injured. No apparent motive for the shooting was presented. Mattie Thomas, eyewitness to the alleged shooting, testified that she was frightened having the respondent in her neighborhood because of this incident and also because of a previous shooting incident. The petitioner, as the investigating officer, testified that a warrant was issued against the respondent for discharging a firearm within the city. He further testified that respondent's house was extremely filthy, most of the doors had several locks on them, the respondent had a very obvious fear of anyone in uniform, and that there were an inordinate number of butcher knives in the house. No guns were found in the respondent's house. The respondent denied owning a gun or firing at the children.

Upon hearing the oral testimony and upon consideration of the physicians' affidavits, the court found "from clear, cogent and convincing evidence" that the respondent was mentally ill and imminently dangerous to himself or others. Respondent was committed to John Umstead Hospital for observation, care and treatment for a period not to exceed 90 days. From the ruling, respondent appealed to this Court.

Attorney General Edmisten, by Associate Attorney Christopher S. Crosby, for the State.

Larry G. Reavis, for respondent appellant.

CARLTON, Judge.

In his one assignment of error, respondent contends that the trial court erred in signing and entering the commitment order. Respondent alleges that the evidence presented does not support

the order. Counsel for respondent concedes that he is unable to find prejudicial error. He submits the record for review by this Court.

G.S. Section 122-58.1 provides in pertinent part as follows: "*Declaration of policy.*—It is the policy of this State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others; . . ."

G.S. Section 122-58.7(i) provides in pertinent part as follows: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others, ... The court shall record the facts which support its findings."

The court ordered involuntary commitment on the basis of the oral testimony presented at the hearing and the affidavits submitted prior thereto. However, the court failed to properly record these findings in its order of 26 July 1978. The direction to the court to record the facts which support its findings is mandatory. *See In re Crouch*, 28 N.C. App. 354, 221 S.E. 2d 74 (1976). The trial judge in the instant case did not record sufficient facts to support his findings that the respondent was mentally ill and imminently dangerous to himself or others. *See In re Koyi*, 34 N.C. App. 320, 238 S.E. 2d 153 (1977).

Vacated and remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA V. JAMES ROBERT WINFREY

No. 7821SC1042

(Filed 6 March 1979)

Searches and Seizures § 47— validity of warrant—truthfulness of testimony showing probable cause—effect of statute

The statute permitting a defendant to contest the validity of a search warrant and the admissibility of evidence obtained thereunder "by contesting

the truthfulness of the testimony showing probable cause for its issuance," G.S. 15A-978(a), permits a defendant to challenge only whether the affiant acted in good faith in the use of information employed to establish probable cause and not to attack the factual accuracy of the information supplied by an informant to the affiant. Therefore, the trial court in a hearing on a motion to suppress properly excluded questions by defense counsel which were designed to show that the supporting affidavit contained false statements and not to show bad faith on the part of the affiant.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 13 July 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 8 February 1979.

Defendant was charged in separate bills of indictment, proper in form, with felonious possession of marijuana and hashish. Prior to pleading, defendant moved to suppress the evidence on the grounds that it was obtained as a result of an unconstitutional search of his residence, and filed affidavits in support of his motion. A hearing was held on the motion in which defendant attempted to show that the affidavit on which the warrant was based contained false information that was crucial for the probable cause determination. At the end of the hearing, the court concluded "that the officer had probable cause to believe that the informer was telling the truth and that the officer acted in good faith in obtaining the search warrant" and denied defendant's motion to suppress. Defendant pleaded guilty to the charges and received a six to twelve month sentence on the marijuana charge and a three to five year sentence on the hashish charge. Both of these sentences were suspended and defendant was placed on probation for a period of five years. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Morrow, Fraser, and Reavis, by Larry G. Reavis, for defendant appellant.

HEDRICK, Judge.

The record contains eight assignments of error, seven of which defendant has brought forward in three separate arguments in his brief. All of these assignments of error relate to evidentiary rulings by the trial judge at the hearing on defendant's motion to suppress. The affiant, a police officer, testified at

the hearing that he took the informer to the house, gave him ten dollars, and told him to try to buy some marijuana from the occupants of the house; that the informer was gone about five minutes and was out of his sight for approximately three of these five minutes; that the informer was unable to buy any drugs but that he had been able to observe several individuals inside the house smoking marijuana. Using this information, the officer then appeared before a magistrate, obtained the search warrant, executed it and seized the drugs that were the subject of the motion to suppress.

The defendant, by cross-examination of the officer, and by testimony from the occupants of the house, attempted to establish that no strangers or persons who the occupants did not know ever gained entry to the house or could have seen any drugs on the night in question. Objections by the State's attorney to several questions by defense counsel aimed at disclosing this information were sustained by the trial judge.

The essence of defendant's argument on appeal is that the court erred "in not allowing counsel for the defendant to contest the truthfulness of the testimony showing probable cause for the issuance of the search warrant." Defendant argues that he was entitled to introduce the evidence excluded by the trial judge under the authority of G.S. § 15A-978(a), which provides:

> A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

We think that defendant attempts to read too much into this statute, and for the reasons stated below, we affirm the trial court's ruling.

The statute permits a defendant to challenge only whether the affiant acted in good faith in including the information used to establish probable cause; it does not permit a defendant to attack the factual accuracy of the information supplied by an informant

to the affiant. This conclusion is supported by the Official Commentary to G.S. § 15A-978(a), which states in part, "[T]he testimony given in support of probable cause should be subject to challenge on the ground that it was untruthful in the sense that it was not given in good faith, but not on the ground that it was objectively inaccurate due to an honest mistake." This limited reading of the statute is in accord with the recent case of *Franks v. Delaware*, --- U.S. ---, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978), holding:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at ---, 57 L.Ed. 2d at 672, 98 S.Ct. at 2676-77, *accord, State v. Louchheim*, 296 N.C. 314, 320-21, 250 S.E. 2d 630, 635 (1979).

Since all of defendant's questions were directed toward showing that the supporting affidavit contained false statements, and none were designed to disclose any bad faith on the part of the affiant, we hold that the trial judge properly sustained the State's objections. The court's conclusion that the police officer acted in good faith in obtaining the warrant is supported by the evidence adduced at the hearing.

Affirmed.

Judges VAUGHN and CLARK concur.

MARION THORNTON EBRON v. CLIFFORD EBRON

No. 7814DC396

(Filed 6 March 1979)

Divorce and Alimony § 24.5— child support—failure to find changed circumstances—increase improper

The trial court erred in ordering increased child support payments without making findings as to actual past expenditures for the children, the needs of the children, and defendant's present expenses which would show a substantial change of condition affecting the welfare of the children.

APPEAL by defendant from *Pearson, Judge.* Order entered 23 January 1978 in District Court, DURHAM County. Heard in the Court of Appeals 5 February 1979.

Plaintiff, Marion Ebron (also referred to as Marian), sued for absolute divorce, child custody, and child support. Judgment was entered 26 November 1975, granting the divorce, awarding custody to plaintiff, and ordering defendant to pay $125 per month as support for the two children of the parties. At that time defendant had net income of approximately $175 per week, with monthly expenses, including a $135 monthly car payment, in excess of his net earnings.

On 21 October 1977, plaintiff filed motion to require defendant to pay arrearage of $515 child support and one-half of the orthodontist expense of $1250. By amendment, plaintiff requested increase in the child support payments. The trial court entered order 23 January 1978, requiring defendant to pay the arrearage of $515, $650 of the orthodontist's bill, and increasing the child support payments to $60 per week. Defendant appeals.

Arthur Vann, Sr. for plaintiff appellee.

Robert B. Jervis for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant does not argue in his brief that the trial court erred in its order with respect to payment of the arrearage of $515 and the payment of one-half the cost for the orthodontist's services. The order of the trial court as to these payments is affirmed.

Defendant does assign as error and argue in his brief the order for increased child support.

An order for child support may be modified upon motion and a showing of changed circumstances by either party. N.C. Gen. Stat. 50-13.7. The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the child. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). The court must make findings of specific facts as to what actual past expenditures have been to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). The modification of the order must be supported by findings of fact, based upon competent evidence, that there has been a substantial change of circumstances affecting the welfare of the child. *Blackley v. Blackley, supra.* It is not necessary for the trial court to make detailed findings of fact upon all the evidence offered at trial. The order must contain the material findings of fact which resolved the issues raised. In each case the findings of fact must be sufficient to allow an appellate court to determine upon what facts the trial court predicated its judgment. *Morgan v. Morgan*, 20 N.C. App. 641, 202 S.E. 2d 356 (1974).

In the instant case, the trial court made no findings of fact as to the actual past expenditures for the children. The order contains no findings as to the needs of the children. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700 (1963). The trial court found defendant's net income was $335 every two weeks. At the time of the previous order, 26 November 1975, defendant's net income was $350 every two weeks. The court failed to make findings concerning defendant's present expenses.

The court is not warranted in ordering an increase of child support in the absence of findings of fact supported by competent evidence to show a substantial change of condition affecting the welfare of the children. For the failure of the trial court to make such findings, that portion of the order of 23 January 1978 requiring increased child support must be vacated.

The order of 23 January 1978 is affirmed as to the payment of the $515 arrearage and $650 on the orthodontist's bill. The

order is vacated as to the increased child support payments, and remanded.

Affirmed in part, vacated in part, and remanded.

Chief Judge MORRIS and Judge CARLTON concur.

FIRST-CITIZENS BANK & TRUST COMPANY v. JACK PERRY, D/B/A PERRY'S CONSTRUCTION COMPANY

No. 783SC369

(Filed 6 March 1979)

1. **Uniform Commercial Code § 36— bank's action to recover overdraft—timeliness of bank statements to depositor**

Defendant customer's evidence concerning the failure of plaintiff bank to deliver timely bank statements to him did not raise a genuine issue of material fact as to plaintiff's claim to recover the amount of an overdraft of defendant's account.

2. **Uniform Commercial Code § 36— bank's action to recover overdraft—summary judgment**

Summary judgment was properly entered for plaintiff bank in an action to recover the amount of the overdraft of defendant's account where plaintiff's materials tended to show that it paid 181 checks, totalling $86,268.99, drawn by defendant on his account with plaintiff bank, that defendant did not have funds on deposit to pay those checks, and that plaintiff is a holder in due course of the checks and has demanded payment from defendant, and where defendant admitted that he wrote the checks and that the checks were paid by plaintiff to the respective payees or endorsers, and defendant failed to controvert plaintiff's evidence that he did not have sufficient funds on deposit to pay the checks and that he has never paid any of the checks. G.S. 25-4-401(1).

APPEAL by defendant from *Reid, Judge.* Judgment entered 18 January 1978 in Superior Court, CRAVEN County. Heard in the Court of Appeals 31 January 1979.

Plaintiff alleges it paid 181 checks, totalling $86,268.99, drawn by defendant on his account with plaintiff bank; defendant did not have funds on deposit with plaintiff to pay these checks when processed; that plaintiff still owns the checks and has demanded payment from defendant.

Defendant admits signing the checks. Defendant contends plaintiff was negligent in failing to deliver timely bank statements; that he was unable to reconcile his account; that he has been embarrassed and ridiculed because of the condition of his account, and counterclaims for damages.

Upon plaintiff's motion for summary judgment, plaintiff filed an affidavit stating that it purchased the checks in the ordinary course of business, for value, without any notice of any defects and that it is a holder in due course of the unpaid checks.

Defendant filed an affidavit setting out the negligence of plaintiff in failing to deliver timely bank statements to defendant, and his claim for damages.

The court granted plaintiff's motion for summary judgment against defendant, without prejudice to defendant's counterclaim. Defendant appeals.

Ward and Smith, by John A. J. Ward, for plaintiff.

William K. Rhodes, Jr. for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant contends the evidence in his affidavit concerning the failure of plaintiff to deliver timely bank statements to him raises a genuine issue of material fact as to plaintiff's claim. We do not agree.

[2] Defendant admits he wrote the 181 checks in the total amount of $86,268.99; that these checks were drawn on his account with plaintiff bank; that the checks were paid by plaintiff to the respective payees or endorsers. Defendant fails to controvert plaintiff's evidence that defendant did not have sufficient funds on deposit to pay the checks when processed and that defendant has never paid any of the checks, although plaintiff has made demand on him for payment.

"As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft." N.C. Gen. Stat. 25-4-401(1). "It is fundamental that upon proper payment of a draft the drawee may charge the account of the drawer. This is true even though the draft is an overdraft since the draft itself

authorizes the payment for the drawer's account and carries an implied promise to reimburse the drawee." N.C. Gen. Stat. 25-4-401, Official Comment. The general view is that payment of any overdraft by a bank amounts to a loan to the depositor, and the amount may be recovered from the depositor. The action to recover the amount of the overdraft is based upon the implied promise which arises from the drawing of the check and the honoring of it by the bank. 10 Am. Jur. 2d Banks § 655 (1963); *Continental Bank v. Fitting*, 114 Ariz. 98, 559 P. 2d 218 (1977); *State v. Mullin*, 225 N.W. 2d 305 (Iowa 1975).

The trial court found facts in its order granting the summary judgment. This practice is not approved. However, the pleadings and evidence before the court on the motion for summary judgment failed to disclose any genuine issue as to any material fact.

The entry of summary judgment is

Affirmed.

Chief Judge MORRIS and Judge CARLTON concur.

STATE OF NORTH CAROLINA v. MATHIAS BOLLING WINFREY, JR.

No. 7819SC986

(Filed 6 March 1979)

Homicide § 19.1— self-defense not raised—character evidence inadmissible

Evidence of character or reputation is admissible in a homicide prosecution only when defendant relies on self-defense, not accident or misadventure, as his defense.

Judge MITCHELL dissenting.

APPEAL by defendant from *Baley, Judge.* Judgment entered 26 May 1978 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 2 February 1979.

Defendant was charged in a bill of indictment, proper in form, for the offense of murder in the first degree, and was found guilty by a jury of murder in the second degree of one Bill

Janieri. Defendant was sentenced to a term of 60 years in the custody of the State Department of Correction and appeals.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Van Camp, Gill & Crumpler, by James R. Van Camp and Douglas R. Gill, for defendant appellant.

ERWIN, Judge.

Defendant presents the following question for our determination:

> "Whether the Trial Court erred in refusing to admit testimony by the former wife of the victim tending to show that the victim was a dangerous man, and that she had told the Defendant of his reputation and her experiences with him before the victim was killed, which testimony would have corroborated the Defendant's testimony and was relevant to the material issue of the Defendant's purpose in carrying a weapon when going to talk with the victim?"

We answer, "No."

Defendant strongly contends that:

> "[T]he inability of the jury to consider this evidence, showing that the Defendant did have good reason to fear the victim during a meeting to talk and that the Defendant was of a character that he would reach for the Defendant deprived them of the opportunity adequately to consider the credibility of the Defendant's description of the events and to consider circumstances that might affect their verdict."

The record reveals that the issue of self-defense or of aggression was not raised by the evidence or submitted to the jury. Defendant proceeded upon the theory of accident. "He [defendant] wanted to talk to Janieri about Janieri's accusations that Winfrey had set fire to his studio. He had little knowledge of firearms. He did not intend to kill Mr. Janieri; it was an accident." Our Supreme Court held in *State v. Barbour*, 295 N.C. 66, 73, 243 S.E. 2d 380, 384 (1978):

"Evidence of the deceased's violent character, whether known to the defendant or not, is admissible in a homicide case where self-defense is in issue and the State's evidence is wholly circumstantial or the nature of the transaction is in doubt in order to shed light on the question of which party was the first aggressor. *State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913); Stansbury's N. C. Evidence (Brandis Rev., 1973), § 106; McCormick, Handbook of the Law of Evidence (2d ed., 1972), § 193."

This Court held in *State v. Allmond*, 27 N.C. App. 29, 31, 217 S.E. 2d 734, 736 (1975), "as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense."

Defendant urges that the above rule be extended by adding a new exception to permit character and reputation evidence of third parties in a homicide case wherein defendant relies on the defense of an accident or misadventure to excuse him from the homicide. The questions complained of and the answers excluded by the trial court were not material or relevant on the issue of death by reason of an accident. We find no merit in this assignment of error and refuse to extend the rule.

In the trial below, we find no prejudicial error.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL dissents.

Judge MITCHELL dissenting:

I respectfully dissent from the holding of the majority. Given the somewhat unique facts of this case, I would find evidence of the violent character of the deceased and the defendant's knowledge of that character admissible as tending to shed light upon the defendant's reasons for taking a gun with him to the scene of the crime alleged. The excluded evidence would also tend to shed some light however feeble upon the defendant's state of fright, if any, and the likelihood that an accident resulted which was induced by his reactions arising from fear. Any evidence which tends to shed light upon such matters in a criminal case should, in my view, be admitted for consideration by the jury. I would grant the defendant a new trial.

EVELYN SMITH CARMICHAEL v. ENSLEY MARSHALL CARMICHAEL

No. 783DC364

(Filed 6 March 1979)

Divorce and Alimony § 25.9 — child custody — plaintiff's employment — changed conditions — sufficiency of evidence

Evidence of changed conditions was sufficient to support the trial court's order changing custody of the parties' minor child from defendant to plaintiff where such evidence tended to show that, at the time the prior order of custody was entered, plaintiff was working from 11:00 p.m. to 7:00 a.m.; the child needed greater stability and consistency in her life, as she was carted from defendant's home to her paternal grandmother's residence, to school, to plaintiff's residence, back to her paternal grandmother's residence and back to defendant's residence during the course of each day; and, at the time the change of custody order was entered, plaintiff was no longer working from 11:00 p.m. to 7:00 a.m. and had ample time to provide for the care of her minor child.

APPEAL by defendant from *Aycock, Judge.* Order entered 7 December 1977 in District Court, PITT County. Heard in the Court of Appeals 31 January 1979.

The trial court entered judgment on 9 March 1977 granting the plaintiff an absolute divorce from the defendant and awarding custody of the parties' minor child to the defendant. The plaintiff filed a motion in the cause on 24 October 1977 seeking to have that judgment modified so as to order that custody of the child be granted to her. After a hearing on the motion, the trial court found among other things that the plaintiff was no longer working from 11:00 p.m. until 7:00 a.m., as had previously been the case, and that the child's welfare would best be provided for by granting custody of the child to the plaintiff. Based upon these findings, the trial court entered an order granting custody of the child to the plaintiff. From the entry of that order, the defendant appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

James, Hite, Cavendish & Blount, by M. E. Cavendish, for plaintiff appellee.

Lanier & McPherson, by Jeffrey L. Miller, for defendant appellant.

MITCHELL, Judge.

A judgment in a divorce action may contain provisions respecting child custody when that issue has been properly presented to the court. If such judgment does contain provisions respecting child custody, then "from time to time such provisions may be modified upon due notice and hearing and a showing of a substantial change in condition." G.S. 50-11.2. *See also* G.S. 50-13.7. In the present case, the defendant contends that there has been no showing of a substantial change in condition.

At the conclusion of the hearing on this matter, the trial court found that the minor child's normal day began at 6:00 a.m. while she was in the custody of the defendant. The defendant then carried the child to her paternal grandmother's residence where she remained until it was time for her to leave for school. After school, the child would go to the plaintiff's residence where she remained until 6:00 p.m. At that time, the plaintiff would carry the child to her paternal grandmother's residence. Sometime thereafter, the defendant would pick up the child and return her to his home.

The trial court further found that at the time the prior judgment was entered, the plaintiff was employed as a nurse and was working at her place of employment from 11:00 p.m. until 7:00 a.m. The trial court also found that the plaintiff was no longer employed as a nurse, that her new working schedule allowed her ample time to provide for the care of her minor child and that the child needed more stability and consistency in her environment. Based upon these findings, the trial court concluded that there had been a substantial and material change of circumstances and that the best interests and welfare of the child would be promoted by awarding custody to the plaintiff.

As the trial court's findings of fact are supported by competent evidence, they must be considered conclusive on appeal. *In re Bowen*, 7 N.C. App. 236, 172 S.E. 2d 62 (1970). Therefore, the only question remaining for our determination is whether the facts as found by the trial court reveal a substantial change in condition.

A change in condition is substantial if the change would affect the best interests and welfare of the child. *See Rothman v.*

Rothman, 6 N.C. App. 401, 170 S.E. 2d 140 (1969). The plaintiff's change in employment provided her with the opportunity and ability to provide stability and consistency to her child's life. The child was in need of greater stability and consistency in her life. Therefore, the change affected the best interests of the child and was a substantial change in condition sufficient to support a modification of the court's prior provisions for custody of the child.

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 MARCH 1979

BROOKS v. BROOKS No. 7815SC458	Orange (75SP273)	Appeal Dismissed
DENNIS v. COLLINS No. 7811SC412	Harnett (76CVS0318)	Affirmed
IN RE CHAMBERS No. 7822DC241	Iredell (74J199)	Affirmed
IN RE McCAULEY No. 7814DC617	Granville and Durham (78SP106)	Reversed
PAYTON v. TEAGUE No. 7815SC437	Chatham (74CVS749)	Affirmed
STATE v. AUSTIN No. 7820SC1067	Union (78CRS0349)	No Error
STATE v. CAMPBELL No. 7823SC1047	Wilkes (78CRS1355) (78CRS1356)	No Error
STATE v. COMBS No. 7818SC1034	Pasquotank (78CRS810)	No Error
STATE v. COOKE No. 789SC939	Person (77CRS4683)	No Error
STATE v. GRIFFIN No. 7819SC1022	Randolph (77CRS5774)	Dismissed
STATE v. HORNE No. 7816SC975	Robeson (76CR17412)	No Error
STATE v. OXENDINE No. 7816SC909	Robeson (76CR18411) (77CR3734)	No Error
STATE v. PERRY No. 789SC923	Franklin (76CRS5582)	Appeal Dismissed
STATE v. POTTS No. 781SC1056	Chowan (78CRS730) (78CRS731) (78CRS842)	No Error
STATE v. RIDDLE No. 7826SC951	Mecklenburg (78CRS0331) (78CRS0336) (78CRS0338) (78CRS0340) (78CRS0329)	No Error

STATE v. SINCLAIR No. 7814SC994	Durham (78CRS3872)	No Error
STATE v. SUMLIN No. 7819SC1050	Rowan (78CRS3913) (78CRS4250)	No Error
STATE v. THOMPSON No. 7826SC1065	Mecklenburg (78CR2772)	No Error
STATE v. WESTBROOK No. 788SC960	Wayne (78CR3338)	No Error
STATE v. WRIGHT No. 7819SC913	Rowan (77CRS11704)	No Error

RUBY BUIE PARRIS v. GARNER COMMERCIAL DISPOSAL, INC., WILLIAM D. KING, AND AETNA LIFE AND CASUALTY COMPANY, INC.

No. 7819SC416

(Filed 20 March 1979)

1. **Process §§ 13, 15— out-of-state insurance company—service of process on insurance commissioner insufficient—service of process on agent in Connecticut sufficient**

Service of summons upon John Ingram, Commissioner of Insurance, as defendant insurance company's statutory process agent pursuant to G.S. 58-153 or G.S. 58-153.1(a) was ineffective, since defendant was not licensed to do business in this State and since defendant was not involved in suits by or on behalf of insureds or beneficiaries under insurance contracts in this State; however, plaintiff's service of process by serving alias and pluries summons on defendant's statutory agent for service of process in Connecticut was sufficient to apprise defendant that it was the party being sued and therefore was sufficient under G.S. 1A-1, Rule 4(j)(6), if the Court had jurisdiction over defendant.

2. **Process § 13; Constitutional Law § 24.7— out-of-state insurance company—minimum contacts**

Defendant insurance company which was not licensed to do business in this State had sufficient "minimal contacts" with this State to justify the court's assertion of *in personam* jurisdiction over defendant where the evidence tended to show that defendant was listed in telephone directories in various N. C. cities; the directories indicated a toll-free number to call in Hartford, Connecticut in the event of an accident; the directories indicated general agents to contact within various N. C. cities; defendant or its agent had sent a letter to plaintiff's counsel regarding renewal of a term insurance policy; and an insurance policy was mailed to a named person in an envelope bearing defendant's tradename and a note was attached informing her to call defendant for immediate help in the event of an accident.

3. **Constitutional Law § 24.7— out-of-state insurance company—advertisement through independent agency—jurisdiction over insurer**

In an action to recover for damages sustained in an automobile accident where plaintiff sought an injunction directing defendant's out-of-state liability insurance carrier from continuing advertisements in national magazines which, plaintiff alleged, amounted to massive jury tampering, there was no merit to the insurer's contention that assertion of jurisdiction over it was precluded because it placed its advertisements through an independent advertising agency.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 22 March 1978 in Superior Court, ROWAN County. Heard in the Court of Appeals 7 February 1979.

Plaintiff was injured in a two car automobile accident on 15 November 1974. On 21 October 1977, she filed suit against defendant William D. King, the driver of the other vehicle, and Garner Commercial Disposal, Inc., owner of the vehicle. Plaintiff alleged defendant King negligently operated the car he was driving while in the scope of his employment with Garner Commercial Disposal, Inc.

On 18 November 1977, plaintiff amended her complaint and alleged that: Aetna Life and Casualty Company, Inc. has a pecuniary interest in the lawsuit as liability insurance carrier for defendant Garner Commercial Disposal, Inc.; Aetna Life and Casualty Company, Inc. was purposefully engaged in massive jury tampering through advertisements in the print media, Newsweek and Time Magazines; North Carolina laws prohibit all parties from imparting to the jury or prospective jurors the existence of or lack of insurance; and Aetna Life and Casualty Company, Inc. was aware of this prohibition. Plaintiff sought an injunction directing Aetna Life and Casualty Company, Inc. from continuing such advertisements.

The advertisements in question provided:

> " 'When awarding damages in liability cases, the jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves.'
>
> Too bad judges can't read this to a jury.
>
> In a small Florida town, a decorative boulder rests on the median of a road. A man with three drinks in him and no sleep for 18 hours smashes his car headlong into it. *A jury orders the town to pay him $4.7 million in damages.*[1]
>
> A truck without brake lights is hit from behind. For 'psychic damages' to the driver, because his pride was hurt when his wife had to work, *a jury awards $480,000 above and beyond his medical bills and wage losses.*
>
> Then there's the one . . . but *you* can probably provide the next example. Most of us know hair-raising stories of

1. This case is being appealed by the town in addition to the court-awarded damages, two other defendants (the contractor and the county) settled out of court for an additional $1.15 million. This illustrates how extravagant jury-awarded damages set a standard for extravagant *out-of-court* settlements—the real problem, since most liability cases *are* settled out of court.

windfall awards won in a court.[2] Justified claims should be compensated, of course. Aetna's point is that it is time to look hard at what windfall awards are costing.[3]

What can we do? Several things:

We can stop assessing 'liability' where there really *was* no fault—and express our sympathy for victims through other means.

We can ask juries to take into account a victim's *own* responsibility for his losses. And we can urge that awards realistically reflect the actual loss suffered—that they be a fair *compensation*, but not a reward.[4]

Insurers, lawyers, judges—each of us shares some blame for this mess. But it is you, the public, who can best begin to clean it up. Don't underestimate your own influence. Use it, as we are trying to use ours.

Aetna wants insurance to be affordable.

(tradename)

Aetna Life & Casualty.
151 Farmington Avenue.
Hartford, CT 06156"

Plaintiff served process on John Ingram, Commissioner of Insurance, as defendant's statutory process agent. Defendant filed a motion to dismiss on the grounds that it had no contacts sufficient to subject it to the court's jurisdiction and that service of process on John Ingram as its statutory agent was improper. Plaintiff then served process on defendant by alias and pluries summons by delivering it to defendant's statutory process agent in Connecticut.

2. A by-product of such awards has been a quantum leap in the number of all kinds of suits filed. Products liability cases *alone* have increased from 50,000 a year in the 1960's to almost a million a year now.

3. Most awards are paid by insurance, and insurance companies spend millions more defending policyholders against lawsuits. The direct result is rising premiums for automobile and other liability coverages. The *indirect* result is higher prices for goods and services—prices which are boosted to cover the skyrocketing insurance premiums of manufacturers, doctors, hospitals, and others who are targets for windfall awards.

4. For example, it would help if juries were simply required to take into account payments the claimant has already received for medical bills and lost wages. Under the present system, these bills may be paid all over again.

The alias and pluries summons stated:

"Ruby Buie Parris

Against

Garner Commercial Disposal, Inc., William D. King, and Aenta Life and Casualty Company, Inc."

The summons was directed to:

"William Oliver Bailey, President
Aetna Life and Casualty Company
151 Farrington Avenue.
Hartford, Connecticut 06156"

Defendant renewed its motion for dismissal on the foregoing grounds and on the ground that the alias and pluries summons was defective.

At a hearing on the motion to dismiss, defendant offered evidence in an affidavit tending to show that, "Aetna Life and Casualty Company is not licensed to do business in North Carolina." Defendant's further evidence indicated that it had not done business in North Carolina for the past five years; owned no real property in North Carolina; did not maintain a telephone within the State; had not engaged in litigation within the State in the past five years; and the advertisements in question were placed through and controlled by an independent contractor.

Plaintiff's evidence tended to show defendant had telephone listings in Charlotte, Greensboro, Raleigh, Salisbury, and Wilmington; the telephone listings indicated a toll-free number to call in Hartford, Connecticut; defendant had sent a letter to plaintiff's counsel regarding renewal of a term insurance policy; the letter was received in an envelope bearing defendant's tradename; an insurance policy was mailed to one Daphne Weems in an envelope bearing defendant's tradename and informing her to call defendant for immediate help in the event of an accident; and that approximately 800 issues of Time Magazine and 600 issues of Newsweek Magazine are received weekly in Salisbury and delivered to residents of Rowan County.

The trial court granted defendant's motion to dismiss on the grounds that defendant was not amenable to process in North Carolina and that the attempted service of process was void.

Plaintiff appealed.

Burke, Donaldson & Holshouser, by Arthur J. Donaldson, for plaintiff appellant.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant appellee Aetna Life and Casualty Company, Inc.

ERWIN, Judge.

Plaintiff contends that the trial court committed error in dismissing his complaint against defendant Aetna Life and Casualty Company, Inc. We agree with plaintiff.

[1] Assuming *arguendo* that plaintiff's original service of summons on defendant was pursuant to G.S. 58-153 or G.S. 58-153.1, such service would be defective. To serve legal process under G.S. 58-153, an insurance company must be licensed or admitted and authorized to do business in this State. *See* G.S. 58-153.

G.S. 58-153.1(a) allows service of process on insurance companies subject to our courts' jurisdiction in suits by or on behalf of *insured* or *beneficiaries* under insurance contracts. *See* G.S. 58-153.1(a). Since neither circumstance prevails here, service or summons upon John Ingram, Commissioner of Insurance, as defendant's statutory process agent pursuant to G.S. 58-153 or G.S. 58-153.1(a) is ineffective. However, plaintiff's service of process by serving the alias and pluries summons on defendant was an effective service of summons.

G.S. 1A-1, Rule 4(d)(2) allows for the issuance of alias and pluries summons in the same manner as the original summons. Issuance of the original summons is to be in accordance with G.S. 1A-1, Rule 4(b).

G.S. 1A-1, Rule 4(b) provides:

> "(b) *Summons—contents.*—The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the

defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff."

The summons in question provides:

"Ruby Buie Parris

Against

Garner Commercial Disposal, Inc., William D. King, and Aetna Life and Casualty Company, Inc."

The summons was directed to:

"William Oliver Bailey, President
Aetna Life and Casualty Company
151 Farrington Avenue
Hartford, Connecticut 06156"

In *Wiles v. Construction Co.*, 295 N.C. 81, 84, 243 S.E. 2d 756, 758 (1978), our Supreme Court held a similarly directed service of summons a sufficient service of process:

"In the instant case, Welparnel Construction Company, Inc. was properly named as the defendant in the complaint, as well as in the caption of the summons. The sole ground upon which the process here is asserted to be defective is the direction of the summons to the corporation's registered agent rather than to the corporation. While our Rule 4(b) does require that the summons be directed to the defendant, we feel constrained to agree with the statement of Judge John J. Parker in a similar context that 'A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fullfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.' *United States v. A. H. Fischer Lumber Co.*, 162 F. 2d 872, 873 (4th Cir., 1947)."

The Court further noted:

> "[W]e feel that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in the N.C.R. Civ. P. 4(j)(6), is adequate to bring the corporate defendant within the trial court's jurisdiction." (Citations omitted.)

Id. at 85, 243 S.E. 2d at 758 (1978).

The record shows that defendant's statutory agent for service of process in Connecticut was served with a copy of the summons. We hold that service of process was sufficient in this case to apprise defendant that it was the party being sued. Thus, if the court had jurisdiction over the defendant, the service of process was sufficient under G.S. 1A-1, Rule 4(j)(6).

The absence of proof of return on defendant's copy did not affect the validity of the service of process. The sheriff's return showing service was *prima facie* proof of service, *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239 (1957), and *Lumber Co. v. Sewing Machine Corp.*, 233 N.C. 407, 64 S.E. 2d 415 (1951), and placed the burden on the party claiming that service had not in fact been made to repel the *prima facie* case. *Tyndall v. Homes*, 264 N.C. 467, 142 S.E. 2d 21 (1965); 10 Strong's N.C. Index 3d, Process, § 4, p. 395. It is the service of process and not the return of the officer which confers jurisdiction on the court. 10 Strong's N.C. Index 3d, Process, § 4, pp. 395-96.

The resolution of the question of *in personam* jurisdiction involves a two-fold determination: (1) do the statutes of North Carolina permit the courts of the jurisdiction to entertain this action against defendant, and (2) does the exercise of this power by the North Carolina courts violate due process of law. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

The grounds on which a court may assert personal jurisdiction over a person are set forth in G.S. 1-75.4.

G.S. 1-75.4(1)(d) provides:

"§ 1-75.4. *Personal jurisdiction, grounds for generally.* —A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

. . .

d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise."

In the enactment of G.S. 1-75.4(1)(d), our Legislature intended to make available to our courts the full jurisdictional powers permissible under federal due process. *Dillon v. Funding Corp., supra.* Thus, the essential question is: Does the exercise of *in personam* jurisdiction in the present case comport with due process? We answer, "Yes."

Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, that he have certain minimal contacts with it such that the maintenance of the suit does not offend the "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057 (1945); *Dillon v. Funding Corp., supra; Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974).

Application of the minimum contacts rule varies with the quality and nature of defendant's activities, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958); *Chadbourn, Inc. v. Katz, supra; Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978).

[2] The existence of minimal contacts is a question of fact. *Chadbourn, Inc. v. Katz, supra.* Here, the evidence shows: that defend-

ant was listed in telephone directories in various North Carolina cities; that the directories indicated a toll-free number to call in Hartford, Connecticut in the event of an accident; that the directories indicated general agents to contact within various North Carolina cities; that defendant or its agent had sent a letter to plaintiff's counsel regarding renewal of a term insurance policy; and that an insurance policy was mailed to Daphne Weems in an envelope bearing defendant's tradename and a note was attached informing her to call defendant for immediate help in the event of an accident. These contacts are not *"de minimis."* We hold that sufficient "minimal contacts" exist to justify the court's assertion of jurisdiction in the present case. *See Bard v. Steele*, 28 A.D. 2d 193, 283 N.Y.S. 2d 930 (1967).

[3] Defendant contends that assertion of jurisdiction over it is precluded, because it placed its advertisements through an independent advertising agency.

In *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445 (1957), our Supreme Court held that our courts could not assert jurisdiction over the *publisher*, because no "minimal contacts" existed. Since we hold that sufficient contacts existed so as to assert jurisdiction over defendant, we find *Putnam v. Publications*, *supra*, distinguishable. However, we note that the reason courts refuse to uphold the exercise of jurisdiction over nonresident publishers is because of fear of undue burdens imposed upon multi-state publishers of defending suits in distant states when weighed against a need to provide plaintiffs with a convenient forum. Comment, Long Arm Jurisdiction Over Publishers: To Chill a Mocking Word, 67 Colum. L. Rev. 342 (1967). This same rationale is not applicable where foreign corporations launch massive campaigns seeking to influence jury verdicts in our State.

Courts generally exclude evidence of insurance, because it has no probative value on proving the two issues prevalent in every negligence case—negligence and damages. Lyerly, Evidence: Revealing the Existence of Defendants' Liability Insurance to the Jury, 6 Cum. L. Rev. 123 (1975). This is the rule in North Carolina. *Luttrell v. Hardin*, 193 N.C. 266, 136 S.E. 726 (1927); 1 Stansbury's N.C. Evidence (Brandis Rev.), § 88. Prevention of introduction of evidence is for the benefit of defendants

and their insurers. *See* 1 Stansbury's N. C. Evidence (Brandis Rev.), § 88. Thus, all insurers receive the benefit and protection of our laws, directly or indirectly.

Defendant would have us allow it the benefit and protection of our laws; but deny us the right to assert jurisdiction to prevent contravention of our laws. We may properly consider our legitimate interest in protecting our plaintiff residents' rights to have a jury reach a verdict free of outside influence. *See Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978). Traditional notions of fair play and substantial justice are not violated.

The order below is

Reversed and remanded for entry of order consistent with this opinion.

Judges MARTIN (Robert M.) and MITCHELL concur.

NGOC MING THI COURTNEY v. PHILIP GERALD COURTNEY

No. 7812DC403

(Filed 20 March 1979)

1. **Constitutional Law § 26— foreign judgment—collateral attack in N.C.—grounds**

A judgment of another state may be attacked in North Carolina only upon the grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy.

2. **Constitutional Law § 26.6; Judgments § 39— foreign judgment— order to convey N. C. realty—jurisdiction**

A Texas court had jurisdiction in a divorce action to order defendant to convey to plaintiff the title to realty located in North Carolina, since the judgment did not purport to award or vest title to the North Carolina property in the nature of an *in rem* proceeding but operated strictly *in personam* and affected the realty only indirectly. Furthermore, the *in personam* decree affecting non-local realty was not contrary to the laws or policies of either North Carolina or Texas. The Texas judgment was thus entitled to full faith and credit in this State.

3. **Constitutional Law § 26.2; Judgments § 39— foreign judgment—collateral attack—fraud**

A collateral attack on a foreign judgment on the basis of fraud was improper where the fraud alleged was not extrinsic but was merely intrinsic.

4. **Constitutional Law § 26.6; Judgments § 39— invoking jurisdiction of foreign court—estoppel to attack foreign judgment**

Defendant was estopped from collaterally attacking the validity of a Texas judgment ordering him to convey to plaintiff property located in North Carolina where defendant invoked the jurisdiction of the Texas court by filing a petition for divorce in that state in which he asked the court to divide the property accumulated by the parties during their marriage.

5. **Constitutional Law § 26— foreign judgment—full faith and credit—alleged issues not material**

Alleged issues of fact as to misrepresentations by plaintiff to a Texas court, unfairness of the Texas judgment, whether defendant had possession of certain personal property provided for in the judgment, and whether defendant had a fair opportunity to be heard at the Texas hearing were not "material" to a determination as to whether full faith and credit should be accorded to the Texas judgment, since none of those "facts" was related to issues of jurisdiction, fraud or public policy.

6. **Rules of Civil Procedure § 56.2— summary judgment for party with burden of proof**

Summary judgment may be granted for a party having the burden of proof on the basis of that party's own affidavit when (1) there are only "latent" doubts as to the affiant's credibility, (2) the opposing party has not introduced material supporting his opposition and has failed to point up specific areas of impeachment and contradiction and failed to utilize G.S. 1A-1, Rule 56(f), and (3) summary judgment is otherwise appropriate.

APPEAL by defendant from *Guy, Judge.* Judgment entered 4 January 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 5 February 1979.

The plaintiff and the defendant were married in 1969. On 23 August 1976, the defendant, serving on active duty with the United States Army at Fort Bragg, North Carolina, filed a petition in the 79th Judicial District Court of Jim Wells County, Texas. Defendant prayed for a divorce from the plaintiff, a citizen and resident of the State of North Carolina, for custody of the minor child born of the marriage, and for division of marital property. Defendant alleged that the parties accumulated a house and lot in Cumberland County, North Carolina, and three automobiles during the marriage and requested that the court divide the property in an equitable manner. Pursuant to temporary orders of the

79th Judicial District Court of Jim Wells County, Texas, defendant was ordered to pay the plaintiff 1/3 of his net monthly salary of $1,000 as alimony *pendente lite* pending a final decree in the divorce action or until further orders of the court. Both plaintiff and defendant personally appeared and were represented by counsel at the time of the temporary orders.

In accordance with Texas bifurcated divorce procedure, a hearing was held on 27 October 1976, before a jury, to determine the matter of divorce and child custody. On 29 October 1976, the 79th Judicial District Court of Jim Wells County, Texas, entered a judgment granting the parties a divorce and awarding custody of the minor child to plaintiff. Both parties were present for the 27 October 1976 hearing.

On 30 December 1976, a second hearing to determine child support and division of community property was held with the plaintiff and her counsel present. The record does not indicate whether defendant or his counsel received notice.

On 5 January 1977, final judgment was entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment ordered that the defendant transfer, quitclaim, and deed to the plaintiff the Cumberland County, North Carolina lot and house and several items of personal property including a one pound gold chain "presently in the possession of the petitioner" and "1/2 of 8 of the fraction of the number of years of active service until retirement if and when Philip Gerald Courtney retires and receives a retirement benefit."

The plaintiff was ordered to convey certain real property in Jim Wells County, Texas and certain personal property to the defendant.

On 3 February 1977, the plaintiff filed a complaint in Cumberland County District Court alleging that the defendant had failed to pay the plaintiff alimony *pendente lite* as provided by temporary orders of the 79th Judicial District Court of Jim Wells County and also that the defendant had failed to convey any property to the plaintiff pursuant to the final judgment of the 79th Judicial District Court of Jim Wells County, Texas. The plaintiff prayed, *inter alia*, that the Cumberland County District Court extend full faith and credit to the temporary and final

orders of the Texas court and adopt such judgments as its own. The defendant answered the complaint alleging that the 5 January 1977 order directing conveyance of certain North Carolina property was not permissible in that the state courts of Texas have no power or jurisdiction to divide or affect real property located in North Carolina; therefore, that judgment is not entitled to full faith and credit in North Carolina. He further alleged that his salary had been miscalculated for purposes of the temporary order, that no evidence concerning the existence and ownership of the real and personal property described in the final judgment was presented to the Texas court, and that the whereabouts of the one pound gold chain are unknown and have been unknown to the defendant before initiation of this action. The defendant further answered that his retirement benefits were not divisible, that the plaintiff had misrepresented the number of years of marriage resulting in a greater interest in the retirement benefits, and had misrepresented their leasehold interest in Texas realty as a fee ownership. Defendant also alleged that the division of property by the Texas court was inequitable, unfair and contrary to public policy. Defendant counterclaimed and prayed that, should any part of plaintiff's requested relief be granted, full faith and credit be extended to the Texas order and the plaintiff be required to convey certain properties to him pursuant to the Texas order.

On 13 September 1977, the plaintiff moved for summary judgment, her verified pleading serving as an affidavit. In that motion, plaintiff alleged that the defendant had personally invoked the jurisdiction of the Texas court to divide the property accumulated by the parties during marriage. Plaintiff alleged that she had not misrepresented the length of the marriage, that the defendant had acknowledged possession of the gold chain after initiation of Texas proceedings, and that the parties did own the lot in Texas. Further, she alleged that defendant, in his original petition for divorce in Texas, requested the Texas court to make equitable division of their marital properties specifically including the Cumberland County, North Carolina lot.

The motion was heard on 14 November 1977, with both parties present. On 4 January 1978, the Cumberland County District Court granted the plaintiff's motion for summary judgment, finding that the defendant had refused to convey the property to the

plaintiff and that the plaintiff had at all times been ready, willing and able to comply with the judgment. The trial court found that the Texas court had personal jurisdiction over the parties. In its conclusions of law, the court found that the defendant personally invoked the jurisdiction of the Texas court and was now estopped from challenging the jurisdiction of the Texas court to make division of the real property, that the defendant's contention concerning plaintiff's misrepresentations, the equities of property division, the lack of possession of certain items of property, and the misapplication of Texas law are questions of law or fact to be properly determined in the Texas court but that they do not deprive the Texas final judgment of full faith and credit in North Carolina. The trial court concluded that the judgment of the Texas court was entitled to full faith and credit in the courts of North Carolina and ordered the defendant to convey the properties to the plaintiff as provided in the Texas judgment. From this judgment, defendant appealed.

Barrington, Jones, Witcover & Carter, by Jack E. Carter, for plaintiff appellee.

Clark, Shaw, Clark & Bartelt, by Robert H. Bartelt, for defendant appellant.

CARLTON, Judge.

Defendant's primary contention is that the judgment of the Texas court is not entitled, as a matter of law, to full faith and credit in the courts of North Carolina. He argues that the Texas court had no jurisdiction to affect title to realty located in North Carolina, that the judgment is in contravention of the laws and policies of North Carolina and Texas, and that there was fraud in the procurement of the judgment.

Under the provisions of Article IV, § 1 of the United States Constitution it is required that full faith and credit be given to a judgment of a court of another state. *Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E. 2d 549 (1969), *cert. denied* 275 N.C. 501 (1969); *Thomas v. Frosty Morn Meats*, 266 N.C. 523, 146 S.E. 2d 397 (1965).

[1] A judgment of a court of another state, however, may be attacked in North Carolina, but only upon the grounds of lack of

jurisdiction, fraud in the procurement, or as being against public policy. 2 Strong, N.C. Index 3d, Constitutional Law, § 26, p. 247; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951); *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104 (1950). There is a presumption in favor of the validity of the judgment of a court of another state, and therefore the burden to overcome such presumption rests upon the party attacking the judgment. 1 Lee, N.C. Family Law 3d, § 92, p. 353.

It is a well-established principle that a local sovereignty by itself, or its judicial agencies, can alone adjudicate upon and determine the status of land within its borders, including its title and incidents and the mode in which it may be conveyed. *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948); *Davenport v. Gannon*, 123 N.C. 362, 31 S.E. 858 (1898). The absence of jurisdiction of the *res* is responsible for the principle, as a court not having jurisdiction of the *res* cannot affect it by its decree. *McRary v. McRary, supra*; *see also Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909).

[2] The distinction between *in personam* judgments ordering the conveyance of non-local realty and strictly *in rem* actions to partition or divest title in realty was drawn in *McRary*. Justice Barnhill referred to the familiar principle that a court having jurisdiction of the parties may, in a proper case, by a decree *in personam*, require the execution of a conveyance of real property in another state.

In *McRary*, an Ohio divorce decree attempted to vest title to jointly-held North Carolina realty in the plaintiff-wife free from any claim by her husband. The Ohio order provided that the wife "have and possess . . . [the North Carolina] said entire premises . . ." free from any claims of her husband. It further provided that if the defendant did not convey the property within 5 days from the judgment, "this decree shall operate as said conveyance." Our Supreme Court held that such vesting of title was, in fact, a *muniment* of title, and the Ohio judgment, insofar as it attempted to affect title to the *locus* in North Carolina, was a nullity. Being a proceeding strictly *in rem*, the Ohio court was without jurisdiction to convey title to North Carolina realty.

The judgment in *McRary* and the case at bar are distinguishable. In the instant case, the Texas court specifically provided:

It is further ORDERED, ADJUDGED AND DECREED that Philip Gerald Courtney CONVEY, TRANSFER, QUITCLAIM and DEED to Ngoc Ming Thi Courtney the following described properties:

Lot 159, Portion 158, revised lot K & F of KNOWNVOW (sic) Lake Subdivision, Cumberland County, North Carolina . . . . (Emphasis added.)

Unlike the Ohio decree, the Texas judgment here merely ordered the defendant to convey the North Carolina realty. It did not purport to award or vest title consonant with the nature of an *in rem* proceeding, but operated strictly *in personam* and attempted to affect the realty only indirectly.

In personam decrees affecting non-local realty are neither against the laws or policies of this State, nor the laws and policies of the State of Texas. In *McElreath v. McElreath*, 162 Tex. 190, 345 S.W. 2d 722 (1961), the court held that the provisions of an Oklahoma divorce decree dealing with Texas realty were in the nature of an *in personam* decree and did not directly affect title to the Texas land. The court further found that the Oklahoma decree operated as an estoppel in the nature of *res judicata* and that the Oklahoma order created certain equitable rights which were not precluded on public policy grounds in Texas. Other Texas cases clearly recognize the right of the sister states to issue *in personam* judgments directing the parties, properly before the court, to make dispositions of non-local realty. *Milner v. Schaefer*, Texas Civ. App., 1948, 211 S.W. 2d 600; *Greer v. Greer*, Texas Civ. App., 1945, 189 S.W. 2d 164 *reversed on other grounds*, 144 Tex. 528, 191 S.W. 2d 848 (1946). In North Carolina, *Lea v. Dudley*, 20 N.C. App. 702, 202 S.E. 2d 799 (1974) reiterated, citing McRary, *supra*, that any part of a foreign decree which attempted to determine ultimate title to North Carolina realty was void. The operative effect of *in personam* decrees, however, was recognized. Judge Campbell stated:

However, a court of competent jurisdiction in the state of incorporation with all necessary parties properly before it in an action for the dissolution of a corporation generally has the power and authority to render a decree ordering the EXECUTION AND DELIVERY OF A DEED TO PROPERTY IN ANOTHER STATE to the shareholders of the corporation as successors in title to the assets of the corporation. Such an order must be

> considered to be *in personam* in character as the Virginia Court could not have *in rem* jurisdiction over a *res* located in North Carolina. As between the parties to the Virginia litigation, the decree is *res judicata* . . . . *Lea v. Dudley, supra*, at page 704. (Emphasis added.)

In the instant case, the Texas court has not exceeded its jurisdictional powers nor contravened any law or public policy of North Carolina or Texas. Apparently recognizing its limited jurisdiction, it never attempted to vest any muniment of title in North Carolina realty, as did the Ohio court in *McRary*. Therefore, the *in personam* judgment directing the conveyance of North Carolina realty is entitled to full faith and credit in this State.

[3] Defendant next contends that the judgment of the Texas court was subject to collateral attack in the courts of North Carolina because it was procured fraudulently. This contention is also without merit.

It is true that fraud may present a proper basis for a court's refusal to extend full faith and credit to the judgment of a sister state. *Thrasher v. Thrasher, supra, Donnell v. Howell*, 257 N.C. 175, 125 S.E. 2d 448 (1962). In *Donnell*, the plaintiff and defendant stipulated that they perpetrated a fraud upon the Alabama court by making false representations as to the true residence of the plaintiff. The Alabama judgment was not entitled to full faith and credit in this State, as a consequence of this fraud.

In the present case, defendant asserts that triable issues of fact, concerning fraud, exist. He alleges in his answer misrepresentations of fact by the plaintiff, lack of evidence, and non-possession of the gold chain.

To make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that extrinsic fraud be alleged. In *Horne v. Edwards*, 215 N.C. 622, 624, 3 S.E. 2d 1 (1939) Judge Seawell stated the general rule:

> It has been held by much the greater weight of authority in American courts that equity will not interfere in an independent action to relieve against a judgment on the ground of fraud unless the fraud complained of is extrinsic and collateral to the proceeding, and not intrinsic merely—that is,

arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits. (Citations omitted.)

In the case of *Hat Co. Inc. v. Chizik*, 223 N.C. 371, 26 S.E. 2d 871 (1943), the defendant, challenging a foreign judgment, alleged that the plaintiff had made false representations during the course of the trial in the foreign tribunal. Our Supreme Court held that false testimony given at trial is not extrinsic fraud, and thus cannot form the basis of an attack upon a foreign judgment.

Upon a review of the record, it is apparent that the defendant has nowhere alleged extrinsic fraud. For this reason, his collateral attack on the basis of fraud is improper.

[4] Defendant argues that the imposition of collateral estoppel against him was improper. Defendant proceeds, in this argument, on the assumption that the jurisdiction of the Texas court was *in rem* in nature, that the Texas order was not entitled to full faith and credit, and, therefore, not subject to application of the doctrine of collateral estoppel. We do not agree.

In his original petition to the Texas court, the defendant alleged the existence of jointly-held property in North Carolina and asked the Texas court to make an equitable division of the North Carolina realty. The Texas court, having jurisdiction of the parties, entered a judgment ordering the defendant personally to convey title to the North Carolina realty to the plaintiff. The judgment of the Texas court did not attempt to vest title of the property in plaintiff, but operated clearly *in personam* in the form of an order directed personally at the defendant. The decree of the Texas court, is therefore *res judicata* as between the parties.

This Court specifically held in *Thrasher* that full faith and credit bars a collateral attack by either party on jurisdictional grounds in the court of the sister state when the defendant participated in the proceedings and was accorded the full opportunity to contest the jurisdictional issues.

In an annotation at 3 A.L.R. 535 the rule is stated:

> The party at whose instance a judgment is rendered is not entitled, in a collateral proceeding, to contend that the judgment is invalid. Neither want of jurisdiction, defect of

procedure, or any other ground of invalidity can be availed of collaterally, by the party who is responsible for the existence of the judgment.

To allow one who himself has invoked the jurisdiction of a foreign court to escape an unfavorable judgment would be contrary to all notions of fair play and justice.

[5] The defendant finally argues that genuine issues of material fact existed; therefore, the trial court's granting of the plaintiff's motion for summary judgment was error. We do not agree.

In the motion for summary judgment, the plaintiff sought specific performance of the Texas judgment. G.S. 1A-1, Rule 56(c) provides, in substance, that any party to a civil action may move for judgment in his favor on any claim, counterclaim, crossclaim, or declaratory judgment action as to which there is no genuine issue as to any material fact, and as to which the moving party is entitled to judgment as a matter of law. The only grounds upon which the defendant could challenge the plaintiff's right to specific performance of the Texas judgment in North Carolina are lack of jurisdiction, fraud in the procurement, or as being against public policy. *Thrasher v. Thrasher, supra.* However, the defendant alleges as material issues of fact misrepresentations by the plaintiff to the Texas court, unfairness of the Texas judgment, whether the defendant had possession of the gold chain, and whether the defendant had a fair opportunity to be heard at the Texas hearing.

These questions of fact were not properly before the North Carolina court but should have been raised in the Texas court at the hearing or on appeal. In applying the rules set out in *Thrasher*, it is obvious that none of these "facts" was related to the issues of jurisdiction, fraud, or public policy; hence, they were not facts *material* to this action. In considering the motion for summary judgment, the trial court correctly concluded that there were no genuine issues as to any material fact concerning the granting of full faith and credit to the Texas judgment and, therefore, properly determined that specific performance was appropriate.

[6] Summary judgment will not ordinarily be proper for a party with the burden of proof when the motion is supported only by

his own affidavits. However, summary judgment may be granted for a party having the burden of proof, on the basis of that party's own affidavit when (1) there are only "latent" doubts as to the affiant's credibility, (2) the opposing party has not introduced material supporting his opposition and has failed to point up specific areas of impeachment and contradiction and failed to utilize G.S. 1A-1, Rule 56(f), and (3) summary judgment is otherwise appropriate. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Pursuant to the rules established in *Kidd*, and for the reasons stated above, we hold that the trial court properly granted plaintiff's motion for summary judgment extending full faith and credit to the Texas judgment.

The judgment below is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

GENE P. FOWLER, ANNE B. FOWLER AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY v. GENERAL ELECTRIC COMPANY

No. 7810SC380

(Filed 20 March 1979)

1. **Negligence § 5; Sales § 22— strict liability—inapplicability to product design**

The doctrine of strict liability in tort is inapplicable in an action against a manufacturer based on defects in design.

2. **Sales § 6— implied warranty—mechanical device—privity of contract**

Absent privity of contract, no action will lie in North Carolina for breach of implied warranty of a mechanical device.

3. **Sales § 5— icemaker—no express warranty**

The trial court properly entered a directed verdict for defendant manufacturer in an action for breach of express warranty of a refrigerator icemaker where plaintiffs presented no evidence tending to show that any warranties were addressed directly to them.

4. Sales § 22— alleged negligence in product design—instruction on failure to warn consumer

In an action to recover for damages from a fire allegedly caused by the negligence of defendant manufacturer in designing a refrigerator icemaker without an effective automatic thermostat, the trial court erred in instructing the jury on negligence by the manufacturer in failing to warn the user of a product dangerous for the use for which it was intended, since the icemaker was not an inherently dangerous product, and the duty to warn theory does not apply where, as here, there is such a defect in product design that it is dangerous *per se* to use as intended and the only way a consumer can protect himself from injury or damage is to abstain from using it; rather, the trial court should have instructed the jury on the duty of the manufacturer to exercise reasonable care in adopting a design for its icemaker which would make it safe for the use for which it was intended.

APPEAL by plaintiffs from *Herring, Judge.* Judgment entered 20 September 1977, in Superior Court, WAKE County. Heard in the Court of Appeals 1 February 1979.

On 28 December 1971, a fire damaged the home of the plaintiffs Gene P. Fowler and Anne B. Fowler. St. Paul Fire and Marine Insurance Company had insured the Fowler's home against fire damage and reimbursed the Fowlers for damages to their house and belongings caused by the fire in the amount of $61,429.34. Approximately $5,000 worth of items was not compensated for by the insurance.

On 27 December 1974, plaintiffs brought this action against General Electric to recover the total amount of damages sustained in the fire. The complaint alleged that the fire was caused by a defective icemaker in the refrigerator, which was manufactured by defendant. The refrigerator had been purchased for the Fowlers by the builder of their house Lacy Buffaloe. Plaintiffs alleged three theories of recovery: (1) negligence, (2) breach of warranty, express and implied, and (3) strict liability. Defendant, in its answer, denied negligence and asserted as a defense that plaintiffs lacked privity of contract with the defendant.

At trial, plaintiffs presented evidence which tended to show that the house suffered the most extensive damage in the kitchen area where the refrigerator was located. Lindsey Sink, qualified as an expert in refrigeration, icemakers, and the investigation of electrical appliance fires, testified that he examined the refrigerator and icemaker, on behalf of defendant, several days

after the fire. In his opinion, the fire was caused by a defective and unsafe icemaker in the refrigerator. The icemaker was defective in that it did not contain a positive off thermostat but a different type of safety thermostat which reset itself. When the icemaker malfunctioned, the thermostat continued to cycle on and off gradually building up heat until it ignited the wiring, the plastic parts in the icemaker and the plastic tube leading from the icemaker out the rear of the refrigerator next to the wall. According to Sink, the positive off thermostat would cut off all power to the icemaker and prevent a buildup of heat.

On cross-examination, Mr. Fowler admitted that he was not a party to any negotiations between Lacy Buffaloe and defendant.

At the close of plaintiffs' evidence, defendant moved for a directed verdict on the claims of breach of express and implied warranty and strict liability. The court granted defendant's motions and from those orders, plaintiffs appeal.

The defendant presented a report of the fire, submitted to defendant by the plaintiffs' witness, Lindsey Sink, while he was an employee of defendant. In the report, Sink stated that he was unable to determine the cause of the fire and did not think it was caused by a defect in the refrigerator or icemaker. Charles Ferriell, duly qualified as an expert in refrigerators and icemakers, testified that the 1971 components of the refrigerator and icemaker complied with the standards set by the Underwriters Laboratory, which sets safety standards for various products. The icemaker did contained a safety thermostat which functioned only when the icemaker malfunctioned. If the icemaker permanently stalled, the safety thermostat would prevent any ice from being formed.

The court submitted the case to the jury on the issue of negligence, and the jury found for defendant. Plaintiffs appeal from the judgment in favor of defendant.

C. K. Brown, Jr. and Blanchard, Tucker, Twiggs & Denson by Charles F. Blanchard for plaintiff appellants.

Smith, Anderson, Blount & Mitchell by Samuel G. Thompson for defendant appellee.

CLARK, Judge.

To clarify the issues raised on appeal we note that this case involves the liability of the manufacturer for defective product design. There was no privity between plaintiff-consumers and defendant-manufacturer, and there was no express warranty by the manufacturer.

In their complaint the plaintiffs rely on (1) negligence, (2) breach of warranty and (3) strict liability. The trial court directed a verdict for defendant on the issues of strict liability and breach of warranty, and submitted to the jury the issue of negligence, and plaintiffs assign as error these rulings.

1. Strict Liability

[1] North Carolina has not embraced the doctrine of strict liability in tort. In *Wilson v. Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963), the court noted: "A producer is not an insurer. His obligation to those who use his product is tested by the law of negligence." *Id.* at 664, 131 S.E. 2d at 503. *See, Gore v. George J. Ball, Inc.*, 10 N.C. App. 310, 178 S.E. 2d 237, *modified on other grounds*, 279 N.C. 192, 182 S.E. 2d 389 (1971).

Nor have other jurisdictions embraced strict liability against a manufacturer for defects in design. "Admittedly, some courts in recent years have insisted, perhaps foolishly, that manufacturers are being held strictly liable for their design choices independently of whether these choices were unreasonable. The proof required of plaintiffs in those cases, however, is basically the same as would be required in a negligence case. . . . The justification for eliminating strict liability in design cases also rests on the anticipated impact upon claims against manufacturers. For one thing, eliminating further talk of 'strict liability' in cases in which the concept is so clearly inapplicable should help to eliminate some of the confusion in judges' and lawyers' minds regarding a range of issues that recur in design cases." Henderson, *Manufacturers' Liability For Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. Rev. 625, 634-635 (1978).

This assignment of error is overruled.

2. Breach of Warranty

[2] Defendant contends that the directed verdict was properly granted since no action for breach of implied warranty will lie in North Carolina, absent privity of contract. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). In *Byrd v. Star Rubber Co.*, 11 N.C. App. 297, 181 S.E. 2d 227 (1971), the plaintiff brought an action against a tire manufacturer for damages caused when a defective tire exploded. The purchaser of the tire was the plaintiff's employer, and therefore there was no privity of contract between the parties. The court held that there could be no recovery for breach of warranty unless the parties were in privity of contract. The court noted that, although the privity requirement in this State has been somewhat eroded, the Supreme Court of North Carolina has limited the exceptions to the privity requirement to warranties on food, drink, and insecticides in sealed containers. *See, e.g., Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967); and *Terry v. Double Cola Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964). Since the case *sub judice* concerns a defect in a mechanical object, similar to *Byrd v. Star Rubber Co., supra*, it does not fall into the recognized exceptions to the privity requirement. Therefore the rule set forth in *Wyatt v. Equipment Co., supra*, and *Byrd v. Star Rubber Co., supra*, remains the applicable law in this case. The court did not err in directing a verdict in favor of defendant on the issue of breach of implied warranty.

[3] Another exception to the rule that privity of contract is required in actions for breach of warranty is applicable when the manufacturer addresses a warranty directly to the ultimate consumer or user of the product, thereby making an express warranty. *See, Tedder v. Pepsi-Cola Bottling Co.*, 270 N.C. 301, 154 S.E. 2d 337 (1967); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813 (1940). The plaintiffs in the case *sub judice*, however, presented no evidence which tended to show that any warranties were addressed directly to them. Therefore, the court did not err in directing a verdict in favor of defendant on the issue of breach of express warranty.

3. Negligence

[4] The crux of plaintiffs' evidence of defendant's negligence in the design of the icemaker is the testimony of Lindsey Sink, former employee of defendant, that the icemaker was defective in that it did not have a positive off thermostat; that the safety ther-

mostat on the icemaker was not designed to cut off the power permanently; and that in his opinion the cause of the fire was the failure of the safety thermostat to cut off the heater which warms the mold and releases the ice cubes into the storage pan; that the heater dehydrated the water in the icemaker, built up the heat in the mold housing, broke down the wiring insulation, caused the wiring to fuse and arc, burned the housing, and the fire spread from the housing.

The plaintiffs assign as error the instructions of the trial court on the first issue, the negligence of the defendant, contending that there was a failure to apply the law to the evidence as required by G.S. 1A-1, Rule 51, Rules of Civil Procedure.

The instructions to the jury, in pertintent part, on the first issue were as follows:

> "Now, as to this issue, I instruct you, ladies and gentlemen, that a manufacturer of articles such as an icemaker or refrigerator has a duty to the purchasers and users of such article to exercise due care or reasonable care in the manufacture and design and creation or construction of such article as the ordinary, prudent person or manufacturer would have done in the exercise of due care.
>
> * * * *
>
> Now, in order to prevail upon this issue, the plaintiffs must prove—and I am referring to all three of the plaintiffs in this case—by the greater weight of the evidence the following things.
>
> First, that the defendant-manufacturer knew or should have known that the icemaker and refrigerator in question was or was likely to be dangerous for the use for which it was supplied or manufactured and sold.
>
> Second, that the manufacturer should have foreseen that reasonably prudent users of that item would not realize a dangerous condition existed in the unit, if you find such did exist.
>
> Third, that the manufacturer failed to exercise reasonable care to inform the user of the facts which made the product dangerous for use for which it was intended.
>
> And, fourth, that the plaintiffs suffered injury or damage as a proximate result of the negligence of the defendant.

* * * *

I instruct you, finally, ladies and gentlemen, as to the first issue that if you find that the plaintiffs Gene P. Fowler, Anne B. Fowler and St. Paul Fire and Marine Insurance Company have proved by the greater weight of the evidence that the defendant General Electric Company as manufacturer of the icemaker and refrigerator in question knew or should have known that the refrigerator and icemaker was or was likely to be dangerous for the use for which it was manufactured and sold, and that the manufacturer should have foreseen that reasonably prudent users would not realize a dangerous condition in the product and that the manufacturer failed to exercise reasonable care to inform the user of the facts which made that product dangerous for use for which it was intended and that the plaintiffs suffered damage as a proximate result of the negligence of the defendant-manufacturer, General Electric Company, then in such case, it would be your duty to answer this issue 'Yes', in favor of the plaintiffs."

In the first paragraph of the quoted instructions the court correctly instructed, at least partially, on negligence of the manufacturer in the design of his product, and in the succeeding paragraphs shifted to instructions on negligence of the manufacturer in failing to warn the user of a product dangerous for the use for which it was intended, using *verbatim* North Carolina Pattern Jury Instructions for Civil Cases, § 750.21.

The general function of warnings and instructions on use of the product is to supply information to individual consumers that is better provided by the manufacturer than obtained by independent sources. A warning is needed when consumers can take steps on their own behalf when they have notice that possible perils are associated with product use. The duty to warn applies to the labeling of poisons, to latent dangers, to the operation of complicated machinery, and to the special instructions needed for handling and preparation of toxic chemicals or inflammable substances. See Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643, 653 (1978).

In the case *sub judice*, the icemaker was not an inherently dangerous product; the consumer could have taken no steps to protect himself from dangers in the use of the icemaker other than total abstention. The duty to warn theory does not apply to

a situation where there is such a defect in product design that it is dangerous *per se* to use as intended and the only way the consumer can protect himself from injury or damage is to abstain from using it. "The capacity for plaintiffs to invent duty to warn theories far exceeds the capacity of manufacturers to provide warnings to counter them. While some warnings should be given, efforts must be taken to prevent warnings and instructions from taking on a ritualistic purpose, immaterial in their influence on individual behavior but decisive in the way they shape liability." *Epstein, supra*, at 654.

The plaintiffs' case is based on the negligence of the defendant in designing the icemaker without an effective automatic thermostat. See Annot., 76 A.L.R. 2d 91 (1961); Annot., 80 A.L.R. 2d 598, 610 (1961).

In *Corprew v. Geigy Chemical Corp., supra*, the court held that plaintiff-farmer alleged causes of action against defendant-manufacturer of a chemical weed killer (1) for negligence in failing to warn of potential danger in the use of the product and (2) for breach of warranty. Parker, C.J., for the court, comprehensively reviewed the cases involving products liability based on negligence and quoted from Prosser, Law of Torts, 665 (3d Ed. 1964) as follows:

> " 'Since the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable man under the circumstances. His negligence may be found over an area quite as broad as his whole activity in preparing and selling the product. He may be negligent first of all in designing it, so that it becomes unsafe for the intended use. . . .' " 271 N.C. at 491, 157 S.E. 2d at 102-103.

In *Corprew, supra*, North Carolina unequivocally abrogated the rule of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842) that no liability for negligence exists absent privity of contract.

In *Swaney v. Peden Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601 (1963), plaintiff was injured when a steel truss fabricated by defendant collapsed because of a defect in design. Sharp, J., (now Chief Justice) for the Court, stated:

> "The defendant, as the designer and fabricator of the truss which collapsed during erection, was under the duty to exercise reasonable care not only to furnish a framework which would sustain the load it was intended to carry after

erection, but which would also withstand the ordinary stresses to which it would be subjected during erection by methods reasonably to be anticipated. If a negligently designed truss were furnished, a workman on the construction job was within the foreseeable zone of danger and, if it proximately caused him injury, the designer would be liable under the principle which imposes liability upon a manufacturer who puts into the circulation a product which, if not carefully made, is likely to cause injury to those who lawfully use it for its intended purpose. . . ." 259 N.C. at 538, 131 S.E. 2d at 606-607.

The court should have instructed the jury on the duty of the manufacturer to exercise reasonable care in adopting a design for its product which would make it safe for the use for which it is intended. In its final mandate the court should apply the law to the evidence by properly instructing the jury to answer the first issue "yes" if plaintiffs had satisfied the jury by the greater weight of the evidence that the defendant was negligent in designing the safety thermostat in the icemaker, and that such negligence proximately caused the fire that damaged plaintiff's property.

We do not discuss the other assignments of error since they may not recur upon retrial.

The judgment is reversed and the cause remanded for a new trial.

New trial.

Judges VAUGHN and HEDRICK concur.

ELNORA REGINA MOYE, ELNORA MARIE MOYE, SELMA HARDY, CHARITY R. TWINE AND HILTON MOYE v. THE THRIFTY GAS CO., INC., CLARENCE JONES, GLADYS WARLICK AND WILLIAMS ENERGY COMPANY

No. 781SC370

(Filed 20 March 1979)

1. **Gas § 4— explosion of gas heater—negligence action—summary judgment improper**

In an action to recover for personal injuries sustained when gas space heaters sold and installed by defendants exploded, the trial court erred in granting defendants' motions for summary judgment, since plaintiffs and defendants offered directly conflicting affidavits as to whether a space heater valve was in the "on" position before the explosion and whether the installation of the heating system was done in compliance with applicable safety codes, and the parties thereby raised a genuine issue of fact as to negligence.

2. **Evidence § 28.1— affidavit not based on hearsay**

Where plaintiff's expert had personal knowledge of defendants' expert's report and affidavit and limited his testimony to an evaluation of them, his affidavit was not based on hearsay, even though he had no personal knowledge of the explosion giving rise to this action, since his affidavit was not tendered to evaluate the cause of the explosion but for the express purpose of evaluating the professional report of defendants' expert.

3. **Evidence § 28.1; Rules of Civil Procedure § 44— proof of official record—records not properly authenticated**

Affidavit by one of plaintiffs' witnesses which identified records which the Department of Agriculture collected in its investigation of an explosion of a gas heater was improperly admitted since the records were not properly authenticated, but such error was harmless. G.S. 8-34; G.S. 1A-1, Rule 44(a).

4. **Evidence § 1— judicial notice of statute**

Plaintiffs' contention that the trial court committed reversible error in failing to take judicial notice of G.S. 119-49 and the rules promulgated thereunder in granting defendants' motions for summary judgment is without merit since it cannot be concluded that the trial judge did not consider the statute simply because he did not say so in his judgment; moreover, a violation of the statute was not pled by plaintiffs as a specific act of negligence.

APPEAL by plaintiffs from *Wood, Judge.* Judgments entered 21 November 1977 in Superior Court, CHOWAN County. Heard in the Court of Appeals 31 January 1979.

Plaintiffs brought this action to recover for injuries resulting from an explosion which occurred on 20 January 1974 at the

Church of Jesus Christ of Bertie County. They alleged that Thrifty Gas Company "and/or" Williams Energy Company, acting through agents, Jones and Warlick, sold and negligently installed and improperly tested four space heaters in the church. They alleged that Jones installed the heaters on 28 December 1973, and that two of the heaters exploded on 20 January 1974 causing serious personal injuries.

Defendants Thrifty Gas Co., Jones, and Warlick filed a joint answer admitting the sale of the heaters and their installation by Jones, but denying any negligence. They also alleged that plaintiffs were contributorily negligent.

Williams Energy Co. filed an answer admitting that it sold gas to the church, but denying sale or installation of the heaters. It also alleged contributory negligence by plaintiffs and cross-claimed against Thrifty Gas Co. for indemnity or contribution.

Defendant Williams Energy Company, moved for summary judgment pursuant to G.S. 1A-1, Rule 56. It relied primarily on an affidavit by its division manager, T. E. Harlan, which stated that Williams Energy Company was not involved in the manufacture, sale, delivery or installation of gas heaters, nor did it have any ownership, interest or control over Thrifty Gas Company or its employees. It only sold gas to the church on one occasion.

Defendants Thrifty Gas Company, Clarence Jones and Gladys Warlick moved for summary judgment pursuant to G.S. 1A-1, Rule 56. They relied primarily on affidavits from Clarence Jones, an employee of Thrifty Gas Company and trained in the servicing and installation of gas appliances by the National LP Gas Association, and William M. Wallace, II, a consulting engineer in the field of mechanical, electrical and structural engineering.

The affidavit of Clarence Jones alleged that the heaters at the church were installed in a proper manner on 22 October 1973, and met all code requirements, that Elder W. A. Twine was instructed on the operation of the heaters and valves, and that no one at Thrifty Gas Company received any requests for servicing between 28 December 1973 and 20 January 1974.

William Wallace II deposed that in his opinion the primary cause of the explosion in the church was that the manual burner shut-off valve on the space heaters had been left in the open posi-

tion and that propane gas had been discharged into the area, forming an explosive mixture which was then ignited; that nothing done in the installation of the heaters could have caused the explosion; and that the installation had been completed in full accordance with the requirements of safety standards.

Plaintiffs answered the summary judgment motions relying primarily on affidavits from Ronald E. Kirk, a professional engineer, and David Smith, an LP Gas Engineer with the North Carolina Department of Agriculture.

Kirk's affidavit disputed the conclusions of the Wallace affidavit. Kirk alleged that Wallace's conclusion that the valve on one of the space heaters was left in the wide open position was unjustified in that it was entirely scientifically feasible that the valve handle could have been in the "off" position just prior to the explosion. The explosion could have caused the valve to be moved to the "on" or "open" position and that the ensuing fire could have caused the valve handle to be permanently soldered into the "on" position. Jones did not fully comply with the testing standards prescribed by the National Fire Protection Association's standard no. 54, contrary to Wallace's conclusion, as NFPA requires manual shut-off valves to be installed upstream and within six feet of the appliance piping connection and Wallace's report indicated the only shut-off valve was the manual burner valve installed on the heater itself. Furthermore, the gauge used to check for leakage was not that required by standard no. 54, the tubing used was of smaller size than that specified by standard no. 54, and Jones did not follow proper procedure with respect to isolation of pressure source in checking for leakage. It is his opinion that the Wallace report and the affidavit given by Wallace to the court do not conclusively establish as a matter of scientific fact either of the following: (1) that a space heater valve was in the "on" position before the explosion; and, (2) that the installation of the heating system was done in complete compliance with the American National Standards Institute and other recognized codes of safety standards.

David Smith's affidavit identified records which the Department of Agriculture collected in its investigation of the explosion. These records indicated the following: the gas heaters had been used last on 13 January 1974 and that Elder Twine turned the

heaters off after this use. Twine returned to the church on 17 January 1974, but did not turn on the heaters and noted the storage tank to be 70% full on 17 January. Twine and the plaintiffs returned to the church on 20 January 1974 for the purposes of cleaning; they smelled gas and Twine went outside to turn off the gas at the storage tank. He then noticed that the storage tank was between 40% and 50% full, and the explosion occurred when one of the plaintiffs plugged in a vacuum cleaner.

Plaintiffs also requested the court to take judicial notice of G.S. 119-49 at the summary judgment hearing.

The trial court allowed summary judgment for all defendants and plaintiffs appealed.

Moore & Moore, by Milton E. Moore and Malone, Johnson, DeJarmon & Spaulding, by Albert L. Willis and T. Mdodana Ringer, Jr., for plaintiffs appellant.

Haywood, Denny & Miller, by George W. Miller, Jr. and David M. Lomas, for defendant appellees Thrifty Gas Co., Inc., Clarence Jones, and Gladys Warlick.

Teague, Johnson, Patterson, Dilthey & Clay, by Grady S. Patterson, Jr., Robert W. Sumner and Alene Mercer for defendant appellee Williams Energy Company.

CARLTON, Judge.

The primary question for determination is whether the trial court erred in allowing the motions for summary judgment.

G.S. 1A-1, Rule 56(c) provides in part as follows:

> The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

By the clear language of the rule itself, the motion for summary judgment can be granted only 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. *Kiser v. Snyder*, 17 N.C. App. 445, 194 S.E. 2d 638 (1973).

Upon motion for summary judgment the burden is on the moving party to establish the lack of a triable issue of fact. 11 Strong, N. C. Index 3d, Rules of Civil Procedure, § 56.2, p. 354. Where a moving party supports his motion for summary judgment by appropriate means, which are uncontroverted, the trial judge is fully justified in granting relief thereon. However, it is further clear that summary judgment should be granted with caution and only where the movant has established the nonexistence of any genuine issue of fact. That showing must be made in the light most favorable to the party opposing the summary judgment and that party should be accorded all favorable inferences that may be deduced from the showing. The reason for this is that a party should not be deprived of an adequate opportunity fully to develop his case by witnesses in a trial where the issues involved make such procedure the appropriate one. *Rogers v. Peabody Coal Co.*, 342 F. 2d 749 (6th Cir. 1965). The papers of the moving party are carefully scrutinized and those of the opposing party are, on the whole, indulgently regarded. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

While G.S. 1A-1, Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, both state and federal decisions have established the proposition that issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. It is only in exceptional negligence cases that summary judgment is appropriate. Stricter application of the summary judgment motion to negligence cases has evolved because, in those situations, 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. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); 6 Moore's Federal Practice, § 56.17, at 2583 (2d ed. 1971); *Rogers v. Peabody Coal Company, supra*; *Kiser v. Snyder, supra*. The intrinsic procedural difficulty of summary judgment, and the confusion in dealing with the device in negligence actions, is that even though there is no dispute about how an accident occurred, the presence or absence of negligence often remains a question of fact which requires a trial under traditional principles of the law of negligence. 73 Am. Jur. 2d, Summary Judgment, § 6, p. 729.

[1] In applying the foregoing rules to the evidentiary material before us in the case at bar, we conclude that the motion for summary judgment was improperly allowed for the defendants Thrifty Gas Company, Clarence Jones and Gladys Warlick.

These defendants and the plaintiffs offered directly conflicting affidavits. The affidavit of the consulting engineer, Ronald E. Kirk, offered by plaintiffs, concluded as follows:

> Based on the foregoing stated reasons, it is my professional opinion that the Wallace report of the subject explosion, and the affidavit given by Mr. Wallace to the court, which I am personally familiar with, do not conclusively establish as a matter of scientific fact any one of the following:
>
> (1) That a space heater valve was in the "on" position before the explosion; and,
>
> (2) That the installation of the heating system was done in complete compliance with the American National Standards Institute and other recognized codes of safety standards.

In light of the conflicting expert affidavits, it is clear that a genuine issue of fact as to negligence was raised and that the defendants failed to carry the burden of showing that there was a lack of any triable issue of fact and that they were therefore entitled to judgment as a matter of law.

[2] Obviously necessary to our decision above is a finding that the affidavit of Ronald E. Kirk was admissible at the hearing. These defendants argue that it was not properly admissible. We disagree.

G.S. 1A-1, Rule 56(e) provides that affidavits in support of or in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." These defendants argue that the Kirk affidavit is not based on personal knowledge in that it is a critique of the Wallace affidavit and therefore is based on hearsay.

We believe the Kirk affidavit meets the test of G.S. 1A-1, Rule 56(e). The affiant was clearly competent to testify to the matters stated therein. While Kirk had no "personal knowledge"

of the explosion itself, his affidavit was not tendered to evaluate the cause of the explosion but for the express purpose of evaluating the professional report of his counterpart, Mr. Wallace. His affidavit is narrowly drawn to accomplish that purpose. The "personal knowledge" required by the rule refers to personal knowledge of the matter about which the affiant testifies. Here, Kirk had personal knowledge of the Wallace report and affidavit and limited his testimony to an evaluation of them. In that context, we do not consider his affidavit to be based on hearsay.

[3] While it constituted harmless error, we agree with these defendants that the affidavit of David Smith was improperly admitted.

Official writings must be authenticated in some manner in order to be admitted into evidence. 1 Stansbury, N.C. Evidence, § 153 (Brandis Rev. 1973). The authentication procedure for official writings in North Carolina is prescribed by G.S. 8-34 and G.S. 1A-1, Rule 44(a).

G.S. 8-34 provides in part as follows:

> Copies of all official . . . writings, papers, or documents, recorded or filed as records in any court, or public office, . . . shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original.

G.S. 1A-1, Rule 44(a) provides in part as follows:

> An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody.

The affidavit of Mr. Smith does not show on its face that he is the "keeper of such records" as required by G.S. 8-34. It also does not show on its face that he is the "officer having the legal custody of the records" as required by G.S. 1A-1, Rule 44(a). Moreover, it does not have any seal or certificate on its face which indicates that Mr. Smith was the person having official custody of the record.

We also note from the record the stipulation that plaintiffs requested the court to take judicial notice of G.S. 119-49. This statute sets forth the minimum standards to be applied in installing gas appliances and gas piping. In their brief, plaintiffs also note that they submitted a copy of pamphlet no. 54 of the National Fire Protection Association which establishes the safety codes to be complied with in installing gas appliances and gas piping similar to the system installed at the premises in question. G.S. 119-49 specifically incorporates the provisions of this pamphlet by reference.

[4] Plaintiffs argue that the trial court committed reversible error in failing to take judicial notice of the statute and the rules promulgated thereunder in granting the defendants' motion for summary judgment. They base this argument on the fact that there is no indication in the trial court's order that these standards were considered in granting defendants' motion for summary judgment.

This assignment of error is without merit. We cannot conclude that the trial judge did not consider the statute simply because he did not say so in his judgment. Moreover, a violation of the statute was not pled by the plaintiffs as a specific act of negligence. *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785 (1962).

For the reasons stated above, we hold that the motion for summary judgment by the defendants Thrifty Gas Company, Jones, and Warlick was improperly allowed.

With respect to the defendant Williams Energy Company, we agree with the trial court's ruling. From the uncontroverted affidavit of its division manager asserting that it is a business entirely independent from the other defendants and that it only sold gas to plaintiffs on one occasion, it is clear that there is no genuine issue as to any material fact between that defendant and plaintiffs.

Affirmed as to Williams Energy Company.

Reversed as to Thrifty Gas Company, Inc., Clarence Jones and Gladys Warlick.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROBERT DOUGLAS ANDERSON

No. 7823SC988

(Filed 20 March 1979)

1. **Assault and Battery § 15.5— necessity for instruction on self-defense**

The trial court is required to instruct the jury on the question of self-defense when that question is raised by the evidence, even in the absence of a request to do so.

2. **Arrest and Bail § 5.1— use of force by officer**

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties. G.S. 15A-401(d)(1).

3. **Assault and Battery § 15.4— excessive force by officer—right to repel**

When there is evidence tending to show the excessive use of force by a law enforcement officer, the trial court is required to instruct the jury that the force used against the officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force.

4. **Arrest and Bail § 5.1; Assault and Battery § 9— lawful arrest—excessive force—right to defend self**

The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the officer's use of excessive force does not render the arrest illegal.

5. **Assault and Battery § 15.5— assault on law officer—right to instruction on self-defense**

In a prosecution for assault on a police officer in the performance of his duties, defendant was entitled to an instruction on self-defense where defendant presented evidence tending to show that he put his hand on an officer's shoulder when officers forcibly arrested his girl friend and told the officer that his girl friend "ain't done nothing," that officers, without provocation, then attacked defendant, and that defendant was merely protecting himself from the unprovoked attack by the officers.

6. **Arrest and Bail § 6; Assault and Battery § 9— defense of arrestee by bystander**

A bystander who comes to the aid of an arrestee must do so at his own peril and will be excused only when the arrestee would himself be justified in defending himself from the conduct of the arresting officers.

7. **Arrest and Bail § 6.2; Assault and Battery § 15.5— right of bystander to aid arrestee—instruction**

In this prosecution for assault on an officer in the performance of his duties, defendant's evidence presented a question for the jury as to the reasonableness of the officer's conduct in arresting a third person, and defendant was entitled to an instruction that he was justified in interfering with the arrest if the arrestee was herself justified in resisting the arrest.

8. Arrest and Bail § 6; Assault and Battery § 9— excessive force in arrest—defense of arrestee by bystander—amount of force

A bystander is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force.

9. Assault and Battery § 11.3— assault on officer—duty officer was discharging—sufficiency of allegations

A magistrate's order charging an assault on a police officer in violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office without further specifying the particular duty which the officer was discharging or attempting to discharge.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 August 1978 in Superior Court, WILKES County. Heard in the Court of Appeals 6 February 1979.

Defendant was arrested without a warrant and charged in a magistrate's order with assault on a police officer in violation of G.S. 14-33(b)(4). The arrest was precipitated by an incident occurring at approximately 12:30 a.m. on 2 October 1977, at the V.F.W. Hall in North Wilkesboro. The defendant was tried and convicted in the District Court and appealed from that conviction to the Superior Court.

The evidence presented at trial in the Superior Court is in substantial conflict. The State's version is as follows: Sergeant David Pendry was at the V.F.W. Hall on the evening of the incident in question. While he was standing on the front porch of the building, Kay Billings approached him and appeared to have blood running from her nose, and in the corners of her mouth. After a conversation with her, Officer Pendry and Officer Rodney Shumate proceeded to the back of the building and witnessed an argument between Darlene Billings, who was standing outside, and defendant Douglas Anderson who was sitting in the back seat of his car. The officer twice advised Darlene Billings to leave the area or he would arrest her. She replied that "no blue-bellied son-of-a-bitch [was] going to put her in jail." Officer Pendry then placed her under arrest for disorderly conduct. As he approached her, she attempted to strike him. The officer retaliated first by pushing her face to the ground and then by attempting to handcuff her. Shortly thereafter, defendant jumped on the officer's back and tried to strangle him. Officer Shumate tried to pull defendant away from Officer Pendry. Officer Kyle arrived at the

scene and helped restrain defendant. During the affray, Kyle struck defendant three times with his blackjack. Defendant broke loose and attacked Officer Pendry. Kyle and Pendry both restrained defendant and attempted to place handcuffs on him. Darlene Billings jumped on Officer Pendry's back, hit him five times, and helped defendant to break loose again. Defendant was ultimately handcuffed, but continued struggling and attempting to kick Officer Pendry in the "straddle". When he finally did so kick Pendry, the officer knocked him to the ground with his fist. The evidence showed that after the struggle a large portion of defendant's face was covered with blood, and he was taken to the hospital.

The defendant's version of the story follows: Kay Billings denied speaking to Officer Pendry or having blood on her face. As she was leaving the V.F.W. Hall, she followed Pendry and a crowd of people running to the back of the building. She testified that Darlene and defendant were not fighting, and that Darlene did not strike Pendry before he forced her to the ground. "She was screaming and fighting because he had her arm twisted behind her." At that point defendant got out of his car, walked up and put his hand on Pendry's shoulder, and stated, "Hey, man . . . that's my girl friend . . . she ain't done nothing." Pendry jumped up and swung at defendant. Pendry and Shumate then jumped on defendant, handcuffed him, and started beating him. Kay Billings testifed that she then went around the building to where Officer Kyle was parked. She said, "They're behind the building with Doug Anderson, . . . they're going to kill him, . . . please go back there." Officer Kyle got out of his car and "started in on Doug" while Pendry was beating defendant in the face with a radio or walkie-talkie. She tried to pull Pendry off, but she was knocked back across the car. She then testified, "Pendry was holding Doug by the shoulders, beating his head on the steps." Janice Conner, defendant's sister, corroborated some of Kay's testimony.

Darlene Billings testified that when the officer came up to her, defendant had just asked her if she wanted to ride with him or her mother. Pendry then approached her and told her to leave because she was causing trouble. She denied his accusation and turned away to ignore him. At that time, she testified, "Mr. Pendry cursed me and called me a fat bitch." He pushed her to the ground, sat on her, and twisted her arm behind her back. She was

charged and convicted of disorderly conduct as a result of the incident. Defendant testified that he had been beaten in the face and denied that Darlene was causing any trouble, or that they were having an argument.

From judgment entered on the verdict rendered in Superior Court sentencing defendant for a term of 15 to 18 months in the Wilkes County jail, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Joe O. Brewer and Paul W. Freeman for defendant appellant.

MORRIS, Chief Judge.

Defendant's appeal raises issues of the right of an individual to come to the aid of himself or another in defending against an arrest being effected by the alleged excessive use of force. Defendant contends that based upon the evidence presented in this case, he is entitled to an instruction defining his right to self-defense and defense of another. We agree.

[1] It is elementary that the trial court, in its instructions to the jury, is required to declare and explain the law arising on the evidence. *See* G.S. 15A-1232. It, therefore, follows that the trial court is required to instruct the jury on the question of self-defense when that question is raised by the evidence, even in the absence of a request to do so. "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E. 2d 815, 818 (1974); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

[2, 3] An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. G.S. 15A-401(d)(1); *State v. Mensch*, 34 N.C. App. 572, 239 S.E. 2d 297 (1977), *cert. denied*, 294 N.C. 443, 241 S.E. 2d 845 (1978). Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. *Todd v. Creech*, 23 N.C. App. 537, 209 S.E. 2d 293 (1974) (civil assault action against police officer); *State v. Fain*,

229 N.C. 644, 50 S.E. 2d 904 (1948). Nevertheless, when there is evidence tending to show the excessive use of force by a law enforcement officer, the trial court is required to instruct the jury that the force used against the law enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. *State v. Mensch, supra.*

[4] The right to defend oneself from the excessive use of force by a police officer must be carefully distinguished from the well-guarded right to resist an arrest which is unlawful. *See e.g., State v. Jefferies,* 17 N.C. App. 195, 193, S.E. 2d 388 (1972), *cert. denied,* 282 N.C. 673, 194 S.E. 2d 153 (1973) (applying G.S. 14-223, Resisting officers); *State v. Allen,* 14 N.C. App. 485, 188 S.E. 2d 568 (1972) (same). One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Bradley,* 32 N.C. App. 666, 233 S.E. 2d 603 (1977). However, the right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. *State v. Mensch, supra.*

[5] There is evidence in the record to suggest that defendant was merely protecting himself from an unprovoked attacked by Officers Pendry and Shumate. Defendant's version of this episode suggests that defendant merely put his hand on Officer Pendry's shoulder and stated, "Hey, man . . . that's my girl friend . . . she ain't done nothing." According to defendant's witnesses, the unprovoked attack followed. The credibility of the defendant's evidence is for the jury. There is sufficient evidence presented on the record to entitle defendant to an instruction on self-defense.

[6] Defendant further contends that he was entitled to a jury instruction with respect to the law excusing or justifying an assault which is in defense of another person. His position is taken in reliance upon the established rule in this State that an individual has a right to go to the defense of another if he has a well-grounded belief that a felonious assault is about to be committed upon the other person. *See State v. Fields,* 268 N.C. 456, 150 S.E. 2d 852 (1966); *State v. Graves,* 18 N.C. App. 177, 196 S.E. 2d 582 (1973), and cases cited *infra.*

We agree that there can be exceptional circumstances under which our law must recognize the right of a bystander to come to the aid of an arrestee who is the object of the excessive use of force. The perimeters of that right, however, must be carefully defined. That this is necessary is pointed out by the rather typical situation presented by this case. Officers are often placed in the position of having to effectuate an arrest in the midst of a hostile crowd. Very often such a group may be lacking in good judgment and, for several reasons, may be quite intolerant of the intrusion of police officers. The interference of one bystander, no matter how well-intentioned, could trigger deadly retaliation by police officers who are understandably and reasonably concerned for their personal safety. Intervention might also incite the passions of a hostile crowd to initiate violent action against outnumbered police officers. Such volatile situations compel a rule of law that carefully balances the need to protect officers as well as bystanders who may be injured as the result of an escalated confrontation between officers and a hostile crowd, and the desire to prevent serious and unprovoked injury to citizens from overzealous police officers. Because of the possibility of such situations and the possible escalation of violence, it is perhaps best to consider a rule of law that would discourage interference except under the most limited circumstance, and leave the victim arrestee to his remedy in a civil action for damages. *See generally State v. Westlund*, 13 Wash. App. 460, 536 P. 2d 20 (1975).

In recognizing the right of an arrestee to defend himself in the face of the excessive use of force by a law enforcement officer, our Courts followed the traditional case authority recognizing the right of an individual to defend himself from an unlawful assault. *See State v. Polk*, 29 N.C. App. 360, 224 S.E. 2d 272 (1976).

Defendant here urges that, in defining the right, if any, of a third person to interfere in an arrest, we follow the parallel of those cases recognizing the right under certain circumstances to come to the defense of another. It was said in *State v. Clark*, 134 N.C. 698, 47 S.E. 36 (1904), that where the defendant had a well-grounded belief or apprehension that one party was attempting to kill or do great bodily harm to a third person, he had a right to interfere to prevent the act. Similarly, the Court in *State v. Robinson*, 213 N.C. 273, 195 S.E. 924 (1938), held that where there

was sufficient evidence, defendant was entitled to an instruction that if he had a well-grounded belief that a felonious assault was about to be committed on another, he had the right, and it was his duty as a private citizen, to interfere to prevent the supposed crime. *See State v. Fields, supra*; *State v. Hornbuckle*, 265 N.C. 312, 144 S.E. 2d 12 (1965); *State v. Moses*, 17 N.C. App. 115, 193 S.E. 2d 288 (1972); *see also State v. Rutherford*, 8 N.C. 457 (1821). *Compare, State v. Maney*, 194 N.C. 34, 138 S.E. 441 (1927) (defense of family member); *State v. Johnson*, 75 N.C. 174 (1876) (same).

It is our opinion that the privilege to intervene in the context of a supposed felonious assault upon an arrestee by a person known or reasonably believed to be a police officer must be more limited than the traditionally recognized right to come to the defense of a third party. *Compare, People v. Young*, 11 N.Y. 2d 274, 183 N.E. 2d 319 (1962) (officers attempting arrest not identified as police officers). The more limited right is based on the proposition that an officer is presumed to be acting lawfully while in the exercise of his official duties. Therefore, one who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. This is apparently the majority rule with respect to the defense of others in the non-arrest as well as the arrest context. *See People v. Young*, supra; 6A C.J.S., Assault and Battery § 93; *see generally* Anno., Right to Resist Excessive Force Used in Accomplishing Lawful Arrest, 77 A.L.R. 3d 281 (1977). We reject the rule that would allow a bystander coming to the defense of an arrestee to rely upon the reasonable belief that excessive force is being used. We do so for reasons discussed above and for those reasons which prompted the California courts to reject that rule. *People v. Booher*, 18 Cal. App. 3d 331, 95 Cal. Rptr. 857 (1971). We quote:

> "[I]t is argued that the rule of reasonable appearance should not be applied to cases involving interference with arrest by third parties since the impulse of self-preservation is not present and that lack of knowledge and understanding of the facts and law by such person would unduly interfere with the vital public interest surrounding law enforcement. We agree that public policy discourages forceful intervention in arrests by third party bystanders because, among other things, the probabilities are that such intervention would only exacer-

bate the situation." 18 Cal. App. 3d at 335, 95 Cal. Rptr. at 859.

The New York Court in *People v. Young, supra,* adopted a similar rule to apply regardless of whether the intervenor knew or should have known that police officers were involved. Similarly, in the recent case of *State v. Westlund, supra,* the Court held that a bystander acts at his own peril, and if it is subsequently determined that the arrestee was not justified in resisting the arrest, the bystander would similarly not be justified in coming to his aid.

[7, 8] We hold simply that the evidence presented by the defense presents facts which, if believed, might justify defendant in coming to the defense of the arrestee. The reasonableness of the officer's conduct in effectuating the arrest of Darlene Billings is a question for the jury, and defendant is entitled to an instruction that defendant was justified in interfering with the arrest if the arrestee was herself justified in resisting the arrest. *See generally* Anno., 77 A.L.R. 3d 281 (1977). Similarly, the bystander is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force. *Cf. State v. Mensch,* supra; *State v. Polk,* supra.

[9] Defendant cites *State v. Mink,* 18 N.C. App. 346, 196 S.E. 2d 552 (1973), in support of his contention that the magistrate's order charging defendant with violating G.S. 14-33(b)(4) was defective. He argues that he is entitled to have the judgment arrested for failure of the order to specifically allege the duty of office which the public officer was discharging or attempting to discharge. *Mink* has been specifically overruled by this Court in *State v. Waller,* 37 N.C. App. 133, 245 S.E. 2d 808 (1978). It is now recognized that under G.S. 14-34(b)(4) "the particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was 'performing or attempting to perform *any* duty of his office.' *State v. Kirby, supra,* 15 N.C. App. at 488, 190 S.E. 2d at 325." *State v. Waller,* 37 N.C. App. at 136, 245 S.E. 2d at 810-811.

We do not discuss defendant's remaining assignments of error. The alleged errors to which they are directed are not likely to recur upon retrial of this matter. For the failure of the trial

court to instruct the jury with respect to defendant's right of self-defense and defense of another, he must be afforded a

New trial.

Judges MARTIN (Harry C.) and CARLTON concur.

STATE OF NORTH CAROLINA v. ISMAEL VEGA

No. 784SC1003

(Filed 20 March 1979)

1. **Judges § 5— failure of judge to disqualify self—no error**

In a prosecution of defendant for second degree murder and child abuse, the trial court did not err in failing to disqualify himself, though he was the presiding judge at an earlier trial when a mistrial was declared because of the emotional outburst by decedent's mother, since there was no evidence of any prejudice or bias displayed by the presiding judge.

2. **Criminal Law § 34.7; Homicide § 15.2— murder of child—prior mistreatment—evidence admissible**

In a prosecution for second degree murder and child abuse, evidence of child abuse did not prejudice defendant's trial as it related to second degree murder, since evidence of previous acts of physical abuse were competent to show defendant's predisposition to commit the violent act complained of in the indictment, and the evidence of child abuse was competent to show the state of mind necessary to establish malice, an essential element of second degree murder.

3. **Criminal Law § 92.2— second degree murder and child abuse—jurisdiction of court to hear misdemeanor charge**

In a prosecution for second degree murder and child abuse, defendant's contention that the superior court was without jurisdiction to hear the misdemeanor charge of child abuse was without merit since the crimes charged were obviously continuing criminal acts which permit the admission in evidence of each in the trial of the other, and the acts perpetrated by defendant which led to the misdemeanor charge of child abuse were the same acts and transactions which also resulted in the death of the child. G.S. 15A-926.

4. **Homicide § 21.7; Parent and Child § 2.2— abuse and murder of child—sufficiency of evidence**

In a prosecution for murder and child abuse, evidence was sufficient to be submitted to the jury where it tended to show that the deceased child was in good health when placed with defendant's wife; she was thereafter in the care and custody of both defendant and his wife as observed by a number of

witnesses up to and at the time of her death; the injuries of the child observed by physicians were not natural, accidentally caused or self-inflicted; the cause of death was subdural hemorrhage and was due to a blow or blows to the head; and defendant admitted that he had beaten the child more than once.

5. **Homicide § 30.2— voluntary manslaughter submitted as lesser included offense —error favorable to defendant**

In a prosecution for second degree murder and child abuse, the trial court erred in submitting voluntary manslaughter as a possible verdict, since in this case involving the death of a child from the "battered child syndrome" where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood *in loco parentis* with the child, as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter; however, such error was favorable to defendant and not reversible.

APPEAL by defendant from *Small, Judge*. Judgment entered 8 July 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 7 February 1979.

In separate bills of indictment defendant was charged with second degree murder and child abuse. The cases were consolidated for trial.

State's evidence tended to show that on 11 January 1978 Maria Aponte of New York City left her child Maria in the care and supervision of Maritza Vega. Mrs. Vega had asked for the child so she could visit with her when she came to North Carolina to visit her husband Ismael Vega who was in the Marine Corps. Her mother stated that in January 1978 Maria weighed 38 pounds, was 42 inches tall, in perfect health and did not have any bruises on her body.

Paul Reed of the United States Marine Corps testified that he knew the defendant, Ismael Vega, for one month when they both lived at Mann's Trailer Park in Onslow County. Reed further testified that during that period of time a small Puerto Rican girl, identified by photograph as the deceased, was living with the Vegas. Charles Lee Thompson, Jr. of the United States Marine Corps stated that during January of 1978 he lived in Mann's Trailer Park with his wife. During that time the Vegas lived with them and were accompanied by a small Puerto Rican girl. Theresa Ann Foster testified that she lived at Yopp's Trailer Park in Sneads Ferry and that late in January of 1978, Ismael Vega came to her trailer to pick up a set of keys which the previous witness

had left for him. At that time, Mr. Vega was accompanied by a small girl who did not speak English. Don Green, a parts technician with the Marine Corps Exchange, testified that he did the maintenance work at Garland Yopp's Trailer Park, and that on February 10, he visited the trailer occupied by the Vegas to repair a heater. The witness testified that he had a short conversation with the defendant concerning the heater and something was said about the little child being sick with the flu. The witness further testified that the heater in the trailer was a standard oil heater and that the exterior of the furnace did not become hot while the heater was operating. Garland Yopp, the owner of Yopp's Trailer Park, testified that early in February he had the occasion to visit the Vegas' trailer where he noticed a little girl on the couch completely covered up. The next day, the witness testified that the defendant came to his store and told him that the little girl was running a fever and that he wanted to buy some aspirin. The witness asked the defendant if the little girl needed a doctor and the defendant replied he didn't think so.

Ann Seals, a resident at Yopp's Trailer Park, stated that, on February 13, in response to a request from Mrs. Vega, she, Nancy Achuff, Mike Lupkin and Kenneth Griffin went to the Vegas' trailer. When she went into the bedroom she observed a little girl wearing a pair of red shorts. The girl's eyes were rolled back into her head, and one side of her face appeared to have cigarette burns on it. Nancy Achuff testified that she saw the girl in the bedroom, and that the girl had several burns on the left side of her face. She stated that the girl's legs were burned from her feet to her knees and her arms were burned from her knuckles to her elbows. She testified that when Kenneth Griffin attempted to give mouth to mouth resuscitation to the girl, he had to cut and remove her shirt with a knife. After the little girl's shirt was removed, the witness noted that the girl's chest was bruised. David Brown of the United States Marine Corps testified that on the evening of February 13, Ann Seals came to his house crying and said that the little girl was dying in trailer No. 5 and asked him if he would take the girl to the hospital. The witness testified that he carried the girl directly to the Naval Hospital.

Dr. Vern Meyer, a physician and pediatrician employed with the United States Navy, testified that he was on duty in the emergency room of the Naval Hospital on February 13, 1978. At

that time he examined a child brought into the emergency room. The witness stated that when he first saw the child, she had a foul odor, was dirty, unkept and obviously dead. Upon examination, the witness saw the child had abrasions over her body with scar formation on the knees, chest and both hands. He further saw bruises on the chest and pelvic area, scar formation on the left side of the face and hair loss on the back of the head. He noticed bruises on the face around the eye sockets, bruises behind both ears, burns, scratches and bruises of varying age on her back, arms and shins. He further testified that he had examined thousands of children during his professional career, and it was his opinion that the abrasions and burns which he observed on the dead child were not burns and bruises sustained by a normal child during everyday activity. He further stated that there was no indication that medical therapy had ever been instituted for the child. The witness also testified that the injuries sustained by the child were, in his opinion, not accidental in nature, and they could not have been self-inflicted. Dr. Meyer interviewed the defendant, and the defendant told him that he had hit the child in the past and had on several occasions locked her up in a room. The defendant said that he did not know how many times, but that he had beaten the child more than once. After concluding the examination of the dead child and after the conversation with the defendant, Dr. Meyer made a diagnosis of Battered Child Syndrome, or child abuse.

Dr. Walter Gable, a pathologist at Onslow Memorial Hospital, testified that he observed on the dead child the same external bruises, scratches, burns and abrasions first noticed by Dr. Meyer, and he also concurred with Dr. Meyer's diagnosis that the child suffered from Battered Child Syndrome, or child abuse. Dr. Gable further testified that, in his opinion, the injuries sustained by the child could not have been caused accidentally. Dr. Gable also testified that his internal examination of the child's body during the autopsy revealed that the immediate cause of death to the child was blows to the child's head causing hemorrhage and brain swelling.

Also introduced into evidence by the State were the child's bloody clothing hidden in a laundry bag.

The defendant offered no evidence.

The defendant was convicted of voluntary manslaughter and child abuse and from a sentence of imprisonment, the defendant appeals.

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

Frazier & Moore, by Thomasine E. Moore, for the defendant.

MARTIN (Robert M.), Judge.

On appeal, defendant contends that the trial court erred in (1) failing to disqualify himself as he was the presiding judge at an earlier trial when a mistrial was declared; (2) failure to sever the charges, thus allowing the State to introduce collateral facts; (3) denying defendant's motion to sever on the grounds that the court was without jurisdiction to hear misdemeanor charge of child abuse; (4) admitting the introduction of allegedly prejudicial photographs; (5) denying motion for nonsuit; (6) instructing the jury on "acting in concert" in the absence of evidence of conspiracy; and (7) denying motion to set aside verdict, motion for new trial and arrest of judgment. With regard to each of these contentions we find no error.

[1] Defendant contends that since the trial judge at the first trial, when declaring mistrial, ruled that the emotional outburst heard by the jury could either consciously or subconsciously prevent them from rendering a verdict solely on the evidence, then this same finding should also apply to the trial judge. This assignment of error is without merit.

G.S. 15A-1223 states that the judge, upon motion of either the State or the defendant, must disqualify himself from presiding over a criminal trial for any of the following reasons:

1. If the judge is prejudiced against the moving party or in favor of the adverse party; or
2. If the judge is a witness for or against anyone of the parties in the case; or
3. If the judge is closely related to the defendant by blood or marriage; or
4. If for any other reason the judge is unable to perform the duties required of him in an impartial manner.

There is no evidence in the record elicited by defense counsel or any other party of any prejudice or bias displayed by the presiding judge. There is no showing that in the previous trial the judge reacted strongly to the outburst of the decedent's mother, nor is there any showing that the judge displayed "marked personal feeling" toward the accused. *See In re Paul*, 28 N.C. App. 610, 222 S.E. 2d 479 (1976).

The trial judge, answering the charges raised by the defense counsel, stated that he did not know of any reason why he should disqualify himself. Furthermore, we note that the record discloses the motion for disqualification was made the day the trial began and that no good cause was shown for the counsel's failure to file his motion within the time limit set forth in G.S. 15A-1223(d) which requires that the motion to disqualify a judge must be filed no less than five days before the time the case is called for trial.

[2] Defendant contends that the introduction of collateral matters with respect to child abuse prejudiced the defendant's trial as it related to the felony of second degree murder. Defendant contends that the cause of the child's death was a brain hemorrhage and the bruises and burns observed over part of the child's body were not symptoms which caused death and its admission in evidence was prejudicial to defendant. We disagree. In *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949), Chief Justice Stacy, speaking for the Court, stated:

> Proof of the commission of other like offenses is competent to show the *quo animo*, intent, designed, 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. [Citations omitted.] *Id.* at p. 473, 53 S.E. 2d 855.

The victim was a five-year-old child who died as a result of injuries to her head which could have been caused by a beating administered on one or several occasions by the defendant. Previous acts of physical abuse are competent to show defendant's predisposition to commit the violent act complained of in the indictment. Moreover, the evidence of child abuse was competent to show the state of mind necessary to establish malice, an

essential element of second degree murder. *See State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132 (1970).

> Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such facts and declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. [Citations omitted.] *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 366 (1954).

Thus, the acts which tend to show child abuse also tend to show intent and design of the defendant with respect to the death of the child and are competent in evidence.

[3] We disagree with defendant that the court was without jurisdiction to hear the misdemeanor charge of child abuse. G.S. 15A-926 provides that:

> Two or more offenses may be found in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or in a series of acts or tranactions connected together or constituting parts of a single scheme or plan.

The crimes charged were obviously continuing criminal acts which permit the admission in evidence of each in the trial of the other. The acts perpetrated by the defendant which led to the misdemeanor charge of child abuse were the same acts and transactions which also resulted in the death of the child. Therefore, the two offenses were properly joined under G.S. 15A-926.

The defendant's contention that the court erred by allowing into evidence photographs of the deceased is without merit and his assignments of error based thereon are denied.

[4] Defendant contends that the court erred in denying his motion for nonsuit. This assignment of error is without merit and is overruled. The uncontradicted evidence tends to show that the deceased child was in good health when placed with defendant's wife. She was thereafter in the care and custody of both defendant and his wife as observed by a number of witnesses up to and at the time of her death. The injuries observed by the physicians were neither natural or accidently caused or self-inflicted. Accord-

ing to the pathologist, the cause of death was subdural hemorrhage and was due to a blow or blows to the head. A blow by a hand or fist could cause a cerebral hemorrhage. The defendant admitted that he had beaten the child more than once. The evidence for the State, considered in the light most favorable to it, was sufficient to withstand the motion for nonsuit.

The inference that defendant may have acted in concert with another person (*i.e.* his wife) in the act(s) of physical abuse resulting in the death of the deceased sufficiently supported the court's instructions on the principle of acting in concert and was without error.

[5] We are of the opinion that it was error for the trial judge to instruct the jury on voluntary manslaughter and to submit it to the jury for their deliberation. Voluntary manslaughter is usually defined as an intentional killing, done without premeditation or deliberation, and without malice. The element of malice, which is a necessary component of second degree murder, is usually negatived in the voluntary manslaughter context by either heat of passion suddenly aroused upon adequate provocation or by the situation where the defendant has an imperfect right of self-defense. *See, State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). In this case, involving the death of a child from the so-called "battered child" syndrome, where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood *in loco parentis* with the child, we are of the opinion that as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter where the evidence showed that the defendant beat and abused a child unto its death. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *also see, State v. Trott*, 190 N.C. 674, 130 S.E. 627 (1925).

In the present case there is abundant evidence that the child had been beaten viciously, and had been severely burned, these punishments ostensibly being made to "discipline" the child. The evidence would have been ample to support a conviction of second degree murder. There was no evidence before the court adequate in law which would have justified submission of voluntary manslaughter as a lesser included offense. The trial court gave

the jury an opportunity which legally they should not have had, to find defendant guilty of a lesser offense. Having been found guilty of a lesser included offense not raised by the evidence, defendant could not have been prejudiced by its submission. The error was manifestly favorable to the defendant and is not reversible. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

The remaining assignments of error brought forward by defendant are without merit. Accordingly, they are overruled.

In the trial we find no prejudicial error.

No error.

Judges MITCHELL and ERWIN concur.

ROSE D. GARDNER v. JONAS MELVIN GARDNER

No. 788DC395

(Filed 20 March 1979)

1. Divorce and Alimony §§ 18.11, 18.12— alimony pendente lite—dependency—right to relief—means to subsist—findings sufficient

The trial court did not err in determining that plaintiff was entitled to temporary alimony where evidence was sufficient to support the trial court's findings that: (1) plaintiff was a dependent spouse, as her monthly expenses exceeded $2000 while her income was $930 per month, even though plaintiff's net worth was $220,000; (2) plaintiff was *prima facie* entitled to the relief she demanded, as the evidence tended to show that plaintiff had been subjected to indignities which rendered her life intolerable and defendant's acts constituted cruel or barbarous treatment; and (3) plaintiff had insufficient means whereon to subsist during the prosecution of the case and to defray the necessary expense thereof.

2. Divorce and Alimony § 18.13— alimony pendente lite—amount—statutory factors considered

The trial court did not err in its determination of plaintiff's reasonable monthly expenses and in the amount of alimony pendente lite awarded by failing to give due regard to the factors enumerated in G.S. 50-16.5(a), since it was clear from the judgment that all necessary factors relating to the award of alimony pendente lite were considered, including plaintiff's reasonable living expenses as established by her accustomed standard of living and the estate and earnings of each party.

3. Divorce and Alimony § 18.14— alimony pendente lite—award of new automobile

Defendant's contention that the trial court erred in concluding that plaintiff was in need of an automobile for general transportation purposes because of the absence of evidence that the 1968 Chevrolet which plaintiff purchased after the separation was inadequate for her needs was without merit since the trial court did not abuse its discretion in concluding that the ten year old automobile was inappropriate for the wife of a wealthy businessman.

4. Divorce and Alimony § 18.13— alimony from date of separation—lump sum payment

Defendant's contention that the trial court was without authority to order the lump sum payment of money constituting support from the date of the parties' separation until the date of the award is without merit.

APPEAL by defendant from *Nowell, Judge.* Order entered 21 October 1977 in District Court, WAYNE County. Heard in the Court of Appeals 5 February 1979.

Plaintiff, Rose D. Gardner, initiated this action 12 May 1977 seeking divorce from bed and board. The complaint included an application for alimony pendente lite and counsel fees. Defendant, Jonas Melvin Gardner, appealed from the order of the trial court awarding plaintiff (1) $1,250 per month for her maintenance and support pending outcome of the suit, (2) a lump sum payment for her maintenance and support 28 May 1975 through 30 September 1977, (3) the use of a new Buick sedan (defendant to pay taxes, license, and insurance), (4) hospitalization and major medical insurance premiums, (5) dental expense to date and future expenses not to exceed $1,402, and (6) $5,000 additional alimony to cover legal expenses incurred to the date of the hearing.

The evidence at the hearing is briefly summarized except to the extent the record is quoted. Plaintiff and defendant were married 11 August 1957, and separated 28 May 1975. No children were born of the marriage. Plaintiff has not worked since 1973 because of numerous health problems including a sinus condition, a displaced coccyx bone, and repeated psychiatric treatment from 1969 through 1975. In January of 1977, plaintiff required extensive dental care.

Plaintiff testified concerning the incident preceding and apparently initiating her separation from defendant as follows: On 27 May 1975, plaintiff and defendant were alone at their home in Smithfield. Before going to bed that evening, plaintiff went to the

kitchen for a glass of juice. Defendant was in the kitchen having a drink. One empty and one partially filled bottle of liquor were on the kitchen table. Plaintiff took the empty bottle and broke it in the sink, "because its good for sharpening a garbage disposal". She then took the partially filled bottle, emptied it into the sink, and in the process of breaking it, accidentally cut her hand. Defendant protested her actions. While plaintiff was holding her glass of juice, she attempted to let the dog out by a side door. Defendant blocked the door, and plaintiff threw her juice at defendant. She testified that defendant retaliated by slapping her "five, four or five, six" times in the face with his open hand. On cross-examination she denied that she broke the bottle in anger. She broke the second bottle because defendant ". . . was, I think drunk . . ." and she didn't want any liquor around. She denied cutting defendant and stated, "If he did, he did it himself." After the incident, plaintiff called the police and waited for them at a neighbor's house. Later that evening she called the magistrate because she wanted to take out a warrant for defendant's arrest.

Defendant's testimony with respect to the incident on the evening of 27 May 1975, indicated that defendant was awakened in his private downstairs bedroom next to the den by plaintiff who was playing the television on maximum volume. He got out of bed to lower the volume, and then walked to the kitchen for a drink of water. Plaintiff then came into the kitchen for a glass of juice. She took a bottle of liquor off the counter and broke it into the sink. She immediately proceeded to the bar, retrieved a partially full bottle, poured it down the sink, and broke that bottle in the sink. She then charged defendant while she held a jagged part of the bottle in her hand. The bottle cut defendant's arm, and he rushed by plaintiff into the den where he stayed until morning. He heard plaintiff call the police and the magistrate.

Plaintiff's sister testified that she noticed a change in her sister's marital relationship since 1969 and had asked defendant to be more patient. She saw plaintiff's red, swollen face and bruised arms the day following the incident. Plaintiff's nephew, John Daily Wood, also noticed the changed marital relationship in 1969, and during one of plaintiff's psychiatric disturbances suggested to defendant that he would himself take her home to her mother in Georgia if defendant didn't want to take her. Wood testified that

in reply to his offer defendant said that ". . . he did not give a g--d--- what she did."

The parties testified at length concerning their personal and joint assets as well as their individual incomes. To the extent such evidence is necessary for this decision, it will be set out in the opinion below.

From the entry of the judgment ordering defendant to provide the temporary maintenance and support payments noted above, defendant appeals.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., for plaintiff appellee.

Mast, Tew, Nall & Moore, by George B. Mast, and Taylor, Warren, Kerr and Walker, by Lindsay C. Warren, Jr., for defendant appellant.

MORRIS, Chief Judge.

Defendant presents numerous arguments in support of his assignments of error directed primarily to findings of fact and conclusions of law by the trial court. Findings of fact by a trial court, being similar to the verdict of a jury, are conclusive on appeal if supported by competent evidence. The weight of such evidence is solely for the trier of facts. *Rauchfuss v. Rauchfuss*, 33 N.C. App. 108, 234 S.E. 2d 423 (1977). This is especially so in an alimony case. *Beall v. Beall*, 26 N.C. App. 752, 217 S.E. 2d 98 (1975), *aff'd in part and rev'd in part*, 290 N.C. 669, 228 S.E. 2d 407 (1976). The judgment of the trial court will therefore be affirmed if such findings of fact are sufficient under the applicable statute to entitle the dependent spouse to an award of alimony pendente lite. *Blake v. Blake*, 6 N.C. App. 410, 170 S.E. 2d 87 (1969). Whether findings of fact are sufficient to support the award is reviewable on appeal. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972).

Defendant first assigns error to the trial court's denial of his motion to dismiss the action. His contentions and arguments in support of this assignment of error present the same questions raised by assignments of error directed to the findings and conclusions of the trial court discussed below.

Defendant assigns error to the trial court's findings of fact with respect to the defendant's estate. He asserts that the findings were insufficient to enable the court properly to consider all factors necessary to determine whether plaintiff is entitled to temporary alimony. At this point, it suffices to say that the facts found by the trial court were supported by competent evidence. Whether such findings are sufficient to support the trial court's legal conclusions will be discussed *infra.*

[1] Defendant contends that the trial court erred in determining that plaintiff was entitled to temporary alimony. There are three requirements under G.S. 50-16.3 which must be met before plaintiff will be entitled to temporary alimony: (1) She must be a "dependent spouse," G.S. 50-16.1(3); (2) she must be entitled to the relief demanded, G.S. 50-16.2; and (3) she must have insufficient means whereon to subsist during the prosecution of the case and to defray the necessary expense thereof. Defendant assigns error to the trial court's conclusions with respect to each requirement.

A spouse is a "dependent spouse" if she is actually substantially dependent upon the defendant for her maintenance and support, or if she is substantially in need of maintenance and support. G.S. 50-16.1(3); *Manning v. Manning,* 20 N.C. App. 149, 201 S.E. 2d 46 (1973). In determining the need for maintenance and support, the court will give due consideration to plaintiff's accustomed station in life. *See Lemons v. Lemons,* 22 N.C. App. 303, 206 S.E. 2d 327 (1974). The fact that the wife has separate property of her own does not relieve the husband of his duty to maintain for his wife the standard of living to which she has become accustomed. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5 (1968) (applying predecessor statute); *Strother v. Strother,* 29 N.C. App. 223, 223 S.E. 2d 838 (1976). We note that plaintiff introduced, without objection from defendant, a memorandum of her estimated expenses per month which exceeded $2000. Additionally, plaintiff presented competent evidence of her extensive medical expenses and testified that since her separation she had incurred a debt to her mother in the amount of $3,800. Although plaintiff's own evidence indicated that she had a net worth of approximately $220,000, there is further evidence that her monthly net income totals only $930. These figures support the trial court's conclusion that plaintiff is a dependent spouse. It is not necessary for the court to find that the dependent spouse cannot

exist without the aid of the supporting spouse. The purpose of temporary alimony is to enable the dependent spouse to maintain herself according to her accustomed station in life pending the final determination of the issues. *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972). Due regard must also be given to the ability of the supporting spouse to pay. *Id.* We cannot say that the trial court erred in determining that plaintiff is a dependent spouse.

In order for the dependent spouse to be entitled to temporary alimony, the statute also mandates that it must appear that such spouse is *prima facie* entitled to the relief demanded. G.S. 50-16.3(a)(1); *Cabe v. Cabe*, 20 N.C. App. 273, 201 S.E. 2d 203 (1973). There is competent evidence to support findings that for several years prior to the initial hearing in this matter, defendant's love and affection for plaintiff had ceased; that he had expressed his feelings that he no longer cared where she went or what she did; and finally that, in the course of the altercation precipitating the separation, he repeatedly slapped plaintiff, cursed her, and stated he could kill her. Giving due regard to the particular circumstances of this case as required by law (*Presson v. Presson*, 12 N.C. App. 109, 182 S.E. 2d 614 (1971)), we cannot say that the court erred in concluding that plaintiff had been subjected to indignities over a period of time which rendered her life intolerable. Moreover, we cannot say that the court's findings of fact, which are supported by competent evidence, do not provide a basis for the conclusion that defendant's acts constitute cruel or barbarous treatment. Again, in making this conclusion, the trial court was required to consider the status, refinement, and intelligence of the parties involved. *See Traywick v. Traywick*, 28 N.C. App. 291, 221 S.E. 2d 85 (1976); *see generally* 1 Lee, N.C. Family Law § 81.

Finally, the trial court found that plaintiff had insufficient means whereon to subsist during the prosecution of the case and to defray the necessary expense thereof. This finding is essentially equivalent to a finding that plaintiff is substantially in need of support from the supporting spouse. *Sprinkle v. Sprinkle, supra.* We concluded above that there were sufficient findings of fact supported by competent evidence upon which the trial court could find that plaintiff was substantially in need of support. We note that plaintiff has incurred significant legal expense in the pros-

ecution of this and related legal matters. Defendant has not challenged the reasonableness of the legal expenses incurred. The trial court was within its authority in concluding that plaintiff was in need of temporary alimony to provide her with a sufficient subsistence to maintain her accustomed standard of living and also to meet her husband at trial on substantially equal terms.

[2] Defendant contends in separate arguments that the trial court erred in its determination of plaintiff's reasonable monthly expenses and then erred in the amount of alimony pendente lite awarded by failing to give due regard to the factors enumerated by statute. G.S. 50-16.5(a). It is true, as defendant argues, that the purpose of alimony pendente lite is to provide for the reasonable support of the dependent spouse pending the final determination of her rights and not to establish a savings account for her. *See Sguros v. Sguros*, 252 N.C. 408, 114 S.E. 2d 79 (1960); *Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E. 2d 400 (1976). Nevertheless, this does not relieve the supporting spouse of the obligation to maintain her accustomed standard of living. *See Schloss v. Schloss, supra.* It was, therefore, proper to consider plaintiff's reasonable living expenses as established by her accustomed standard of living. The defendant is also correct in noting that G.S. 50-16.3(b) and G.S. 50-16.5(a) require a consideration of the estate and earnings of each party. The amount to be awarded is a question of fairness to the parties, and, so long as the court has properly taken into consideration the factors enumerated by statute, the award will not be disturbed absent an abuse of discretion. *See e.g., Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975) (reviewing award of permanent alimony). It is clear from the judgment of the trial court that all necessary factors relating to the award of alimony pendente lite were considered. Plaintiff's net monthly income, supplemented by the trial court's award of alimony pendente lite, approximates plaintiff's estimated monthly expenses. We find no indication of an abuse of discretion.

[3] Defendant assigns error to the trial court's conclusion that plaintiff was in need of an automobile for general transportation purposes because of the absence of evidence that the 1968 Chevrolet she purchased after the separation was inadequate for her needs. In concluding that the ten-year-old automobile was inappropriate for the wife of a wealthy businessman, the trial court did not abuse its discretion.

[4] Finally, defendant contends that the trial court was without authority to order the lump sum payment of money constituting support from the date of separation until the date of the award. The law is to the contrary. This Court has properly recognized the need to leave the amount and form of alimony pendente lite payments within the discretion of the trial court. Such flexibility is necessary to cope adequately with the myriad factors which must be considered in resolving domestic lawsuits. In our opinion, Judge Campbell accurately stated the law in this State with respect to the time frame covered by alimony pendente lite payments:

> "We think she is entitled to subsistence in keeping with defendant-husband's means and ability and standard of living, not only from the time she instituted her action, but from the time her husband wrongfully separated himself from her." *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E. 2d 428, 430 (1971). *See e.g., Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970) (plaintiff granted lump sum for motel bill incurred from date of separation).

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Judges MARTIN (Harry C.) and CARLTON concur.

STATE OF NORTH CAROLINA v. EDDIE LEE FARRINGTON

No. 7815SC991

(Filed 20 March 1979)

1. Criminal Law § 122.1— additional instruction at jury's request—failure to give additional instructions on other matters

Where the trial court in a felonious assault case gave additional instructions on intent at the jury's request, a juror stated that there was something either in the court's instructions or elsewhere about the effect of the fact that a person was shot while fleeing had on intent to kill, and the court stated that such was not in his instructions but was probably in the argument of the attorneys, the court did not err in failing to give additional instructions that in-

tent to kill may not be presumed from evidence of an assault with a deadly weapon, that jurors should disregard the statements of counsel and take the law from the court, or on the burden of proof, since it is presumed that the trial court originally gave proper instructions on those matters, the full charge not being in the record, and since the court was not required to repeat other portions of the charge which were unnecessary to answer the jury's question.

2. **Criminal Law § 122— additional instructions—necessity for informing parties**

The trial judge did not violate G.S. 15A-1234 by failing to inform the parties of instructions he intended to give when, in response to a question by the jury, he repeated or clarified instructions previously given, since the statute applies only when the judge gives "additional instructions" which add to the previous charge because of omissions therein.

3. **Assault and Battery § 14.4— felonious assault—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant and the victim argued in a pool hall, both went outside and defendant shot the victim in the leg, the victim was hospitalized for a month and incurred medical expenses of $8,000, and the victim had no weapon as contended by defendant.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 8 June 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 February 1979.

The defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury, a violation of G.S. 14-32(a), and entered a plea of not guilty. The jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of not less than 12 years nor more than 15 years, the defendant appealed.

Evidence for the State tended to show that Bobby Lee Smith was a public safety officer for the town of Chapel Hill and on the evening of 29 April 1977 was off duty and at Atwater's game room playing pool. Smith knew both the defendant and Anthony "Tello" Brooks and saw them at the poolroom about 10:20 p.m. Smith overheard an argument, and Brooks left Atwater's. Immediately thereafter, the defendant left the building, and Smith heard two or three gun shots within one half minute of their leaving. Smith immediately went outside and found Brooks lying on his back. Smith saw a wound on the left leg of Brooks and gave him emergency treatment for the wound. Smith did not participate in the investigation of the shooting and did not see a weapon or a knife on the person of Brooks.

Brooks and the defendant had been friends for many years and were in Atwater's to play pool. They bet $1.00 on a game and the defendant won and then demanded $2.00. An argument ensued and the defendant started talking about "busting a cap in his ass". Brooks did not have a weapon on him, and when Smith intervened in the poolroom, Brooks went outside. He was warned that the defendant had a gun after he left the poolroom and saw the defendant inside the door of Atwater's unstrapping a gun from his leg and thereafter ran down an alley. Brooks heard a shot and was knocked to the ground. He testified that the defendant said to him, "I'm going to go on and kill you", but that the defendant ran when they heard sirens. Brooks suffered a severe leg wound, was hospitalized for one month, and wore a body cast approximately three months. Medical expenses were approximately $8,000.

Dave Hill, a detective with the Chapel Hill Police Department, conducted the investigation and testified that no knife was found during a "criss cross search" of the alley.

At the close of the State's evidence, defendant moved to dismiss on the grounds that the State had failed to present sufficient evidence to go to the jury and that there was insufficient evidence of an intent to kill to support a verdict of guilty. The motion was denied.

Evidence for the defendant tended to show that the defendant won the pool game and that Brooks argued and refused to pay him. Officer Smith interrupted the argument and punched Brooks in the back. When defendant left Atwater's, Brooks came at him swinging a knife. Brooks cut the left shoulder of his coat with his knife and on his thigh, and he then drew his gun and fired downward to scare him off. Defendant saw a knife in Brooks' hand and the blade was approximately two to three inches long. Defendant then went over to Brooks and helped him up, but defendant heard sirens and put Brooks down and left the scene. He went home and he had no intent to kill the witness. Defendant testified he threw the gun in some bushes and no longer had it.

Defendant's wife testified that he returned home about 11:00 p.m. that night and that his suit jacket was torn, and his pants leg had a cut in it. His right leg was cut about two inches across. He was bandaged at home, and she did not take him to the hospital.

Defendant renewed his motion to dismiss at the close of all the evidence, and it was denied by the court.

Attorney General Edmisten, by the Assistant Attorney General Sandra M. King for the State.

Levine and Stewart, by Mary C. Tolton, for defendant appellant.

CARLTON, Judge.

[1] Defendant first contends that the trial court erred in not instructing the jury properly in response to a question about intent and in failing to caution the jury against presumptions not arising from the evidence. We find no merit in this contention.

Defendant assigns no error to the court's original charge and did not include the full charge in the record on appeal. However, after the jury began deliberations, and before a verdict was reached, the jury returned to the courtroom and the following exchange took place:

> JUROR: Yes, we would like a more . . . like a review of the specific definition of intent, intent to kill and also . . . .
>
> COURT: The Court will instruct you on what intent means, and you can apply that to the charge that I have given you concerning the word intent or intentional would be applicable in all cases regarding intent.
>
> A person acts intentionally for purposes of this particular crime when it's his intent to cause in case (the) of (the) assault with a deadly weapon with intent to kill, it would be when it's his intent to cause the death of another or if it's in intent to kill, that is referring to the death. When it's causing serious injury, it is the intent to cause some serious injury. Intent is a mental attitude that is probably seldom provable by any direct evidence; and it must be proved by circumstances from which it may be inferred an intent to kill someone may be inferred from the act itself, the nature of the assault, the conduct of the defendant at the time, and any other relevant circumstances at the time. That is about as much as I can give you as far as the intent. It is something as I've said that you cannot prove by direct evidence. It has to

be inferred if you so find it. Do you have any other questions that . . .

JUROR: Just a moment. Does that answer your question? (To another juror) . . .

SECOND JUROR: The question somewhere came along either in your instructions or some of the other about if it were found that some—a person were fleeing and was shot that that had some implications on intent to kill and that was where we were.

COURT: That was not in my instructions. Probably in the argument to you by attorneys, no other questions, you may continue with your deliberations.

Defendant argues that the jury not only appeared to be in doubt as to the specific definition of intent, but also as to the weight to be given the evidence and the arguments of counsel, as well as to the permissible inferences that might arise from the evidence. He argues that the jury appeared to believe that it could presume an intent to kill if it believed that the defendant fired at Brooks as Brooks was running away. Accordingly, he argues that the court should have further instructed the jury that the intent to kill may not be presumed simply from the evidence of an assault with a deadly weapon. He further argues that the trial court should have better clarified the issue with an instruction on the burden of proof and should have told the jurors to disregard the statements of counsel and take the law from the court.

Since the full charge is not included in the record on appeal, we must conclude that it was proper. Indeed, defendant admits in his brief that he made no exception to the charge. We must therefore assume that the trial court had originally given proper instructions with respect to presumption, burden of proof and other matters about which the defendant now complains. When a jury returns into court and requests additional instructions, the court is not required to repeat other portions of the charge unnecessary to answer the particular question. 4 Strong, N. C. Index 3d, Criminal Law, § 122.1, p. 642; *State v. Gantt*, 26 N.C. App. 554, 217 S.E. 2d 3 (1975); *State v. Hargett*, 23 N.C. App. 709, 209 S.E. 2d 541 (1974); *State v. Hamilton*, 23 N.C. App. 311, 208 S.E. 2d 883 (1974).

In *State v. Hargett, supra*, the defendant assigned as error the failure of the trial court to repeat its instructions on self defense when the jury asked for additional instructions on the element of intent. Defendant conceded that the instructions on self defense and intent were correct. He argued, however, that since self defense and intent both relate to the defendant's state of mind, the court should have repeated its instructions on self defense when the jury requested further instructions as to intent. This Court found the trial court's additional instructions to be proper. Judge Hedrick stated, "When the trial judge has complied with a request by the jury for additional instructions on a particular point in the case, it is not incumbent on him to repeat his instructions as to other features of the case already correctly given."

In the case at bar, the trial court's additional instructions on intent were proper. Indeed, defendant offers no argument to the contrary.

Our legislature has codified the long-standing rule which allows the judge to give appropriate additional instructions in response to an inquiry of the jury made in open court after the jury retires for deliberation. G.S. 15A-1234. Subsection (c) of that statute provides as follows:

> (c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

[2] Defendant argues that the trial judge violated this statute in that he did not inform the parties of the instructions he intended to give. We do not believe the legislative intent to be so literal. If the trial judge planned to give "additional instructions" in order to *add to* his previous charge because of omissions therein, then we might agree with defendant that the judge would be required under this statute to inform the parties of the instructions he intended to give. However, in a case such as this, when he is repeating or clarifying instructions previously given in response

to the jury's question, we do not believe these to be "additional instructions" as contemplated under subsection (c). Moreover, in a situation such as this involving an exchange of questions and answers between the court and the jury, it would obviously be cumbersome, impractical and unnecessary for the court to confer with counsel before answering each question put to him by the jury. It is inconceivable to us that the legislature intended to require such a procedure. This assignment of error is overruled.

[3] Defendant's remaining assignment of error is that the trial court improperly denied his motion for dismissal at the close of the evidence. A motion for dismissal in a criminal case requires consideration of the evidence in the light most favorable to the State. The State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the court in ruling upon the motion. 4 Strong, N.C. Index 3d, Criminal Law, § 106, p. 547; *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Applying the stated rules to the facts as disclosed by the record in the case at bar, we find the trial court's decision to be clearly proper, and this assignment of error is overruled.

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

No error.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

PHYLLIS H. SNYDER v. GEORGE K. FREEMAN, JR.; DOUGLAS L. CROOM; JOHN COLUCCI, JR.; JOHN COLUCCI III; WOODROW PRIDGEN; AERONAUTICS, INC.; AND PAUL DaSAN MARTINO

No. 785SC309

(Filed 20 March 1979)

1. **Corporations § 7; Trusts § 13.1— sale of stock—promise to pay loan with proceeds—complaint insufficient to state claim for breach of trust**

Plaintiff's complaint was insufficient to state a valid claim for breach of trust where plaintiff alleged that a contract between two shareholders of a corporation and two outsiders for the sale of 50% of the stock to the outsiders provided for repayment to plaintiff of a loan to the corporation and thereby created a trust for her benefit, but the agreement between the parties was actually an agreement for the issuance of new shares of common stock; in order for a trust to be created in the capital obtained from issuing stock, the corporation itself would have to agree to hold the capital in trust for creditors; the contract in question was entered into by the shareholders in their individual capacities; and the corporation therefore was not bound by the agreement and took the capital obtained from issuance of its stock free of any trust in favor of plaintiff.

2. **Contracts § 14.2— contract for benefit of third party—complaint insufficient to state claim**

Plaintiff's complaint was insufficient to state a valid claim for breach of an agreement made for the benefit of a third party where plaintiff alleged that an agreement for the issuance of new stock to two of the defendants provided that she should be repaid for a loan to the corporation out of proceeds generated by the sale of the new stock, but the agreement in fact provided that the proceeds should be paid directly to the corporation; there was no provision for payment directly to plaintiff; nor was there a provision whereby defendants agreed to become guarantors of the corporate debt; the agreement specifically provided that the corporation would pay the creditors; and plaintiff therefore was not directly benefited by the contract and had no rights against the individual defendants pursuant to the contract.

3. **Limitation of Actions §§ 4.3, 7— accrual of cause of action—questions of fact—summary judgment improper**

In an action to recover the amount of a loan made by plaintiff to a corporation, summary judgment on the ground that the action was barred by the three year statute of limitations was inappropriate since there was a question of fact as to when the breach occurred and the statute of limitations began to run.

APPEAL by plaintiff from *Rouse, Judge.* Order entered 28 November 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 January 1979.

On 3 February 1967, defendants Freeman and Croom, the sole shareholders of General Aviation, Inc., executed an agreement to sell 50% of the stock of the corporation to the defendants Colucci. At that time, plaintiff was employed by General Aviation, Inc. as a bookkeeper and the corporation owed plaintiff $800.00 in accrued salary and $4,602.50 for a loan which plaintiff had previously made to the corporation. The contract provided in pertinent part:

> "3.(c) Out of monies coming in to the corporation from the sale of 6,000 shares of stock to the parties of the second part or their designee, the corporation shall pay salaries accrued to Mrs. Snyder in the amount of approximate $800.00, a note payable for equipment (a Pepsi-Cola drink machine) in the amount of approximately $150.20, the following notes payable to Mrs. Anne T. Freeman in the amount of $1,286.86 plus interest and to Mrs. Phyllis Snyder in the amount of $4,602.50 plus interest; accrued Federal Taxes in the amount of $2,742.06 (It is understood that George K. Freeman, Jr. has already paid said Federal Taxes in said amount and that the check will be made to reimburse him); and the balance of such monies to be paid against outstanding accounts payable as revealed by an audit of the company dated November 30, 1966, done and prepared by Norborne G. Smith, Jr., Certified Public Accountant of Goldsboro, North Carolina."

The contract was signed by the individual defendants in their individual capacities.

Thereafter, the corporation issued 6000 shares of common stock to the defendants Colucci, and the Coluccis paid $10,000.00 to the corporation. Plaintiff never received the monies due her.

On 2 February 1977, plaintiff brought this action to recover the sum of $5,402.50 from the individual shareholders of the corporation, alleging that the 1967 agreement created a trust for her benefit. The complaint alleged that the defendants were trustees of the trust and that they breached the trust by failing to pay her the monies due out of the proceeds of the sale of stock in 1967.

On 8 November 1977, defendants moved for summary judgment. On 28 November 1977, the court entered an order dismissing the complaint pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to

state a claim upon which relief can be granted, and in the alternative, because plaintiff's action was barred by the three-year statute of limitations. G.S. 1-52.

On 6 January 1978, plaintiff voluntarily dismissed the action, with prejudice, as to Woodrow Pridgen and Paul DaSan Martino.

Franklin L. Block for plaintiff appellant.

George K. Freeman, Jr. for George K. Freeman, Jr., defendant appellee; Rountree & Newton by George Rountree III and J. Harold Seagle for defendant appellees.

CLARK, Judge.

The record on appeal does not disclose that the defendants moved for a Rule 12(b)(6) dismissal. The defendants, however, did plead in their answers that the complaint failed to state a claim for relief. This defense can be raised at any time on application by the parties. G.S. 1A-1, Rule 12(d). We assume that the court treated the defendants' motion for summary judgment as an application for a hearing on their Rule 12(b)(6) defense. Since the first alternative holding in the order appealed from dismissed the complaint pursuant to Rule 12(b)(6), it is clear that the court considered only the pleadings in making its determination on that issue.

Plaintiff first contends that the court erred in dismissing the complaint for failure to state a claim for relief because the complaint alleged sufficient facts to entitle plaintiff to recovery for breach of trust or as a third-party beneficiary of the contract between the defendants.

"The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient." *Alltop v. J. C. Penney Co.*, 10 N.C. App. 692, 694, 179 S.E. 2d 885, 887, *cert. denied* 279 N.C. 348, 182 S.E. 2d 580 (1971). A complaint may be dismissed pursuant to Rule 12(b)(6) if there is an absence of law to support the claim of the sort made. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690, *cert. denied* 277 N.C. 251 (1970).

In order to determine whether the court's dismissal of the complaint was proper, we must consider whether or not the com-

plaint states a valid claim for relief for breach of trust or for breach of an agreement made for the benefit of a third party.

[1] The contract upon which plaintiff relies was entered into by two shareholders of the corporation and two outsiders. The agreement provided for the sale of 50% of the stock of the corporation to the Coluccis. The agreement, however, was not an agreement to sell shares already owned by the defendant shareholders, but an agreement for the issuance of 6,000 new shares of common stock in General Aviation, Inc. Thereafter, the corporation issued 6000 shares of stock to the Coluccis in exchange for $10,000.00.

"The assets of a corporation, nothing else appearing, are not held by it in trust. They, like the assets of any other person, may be used by the corporation in the operation of its business." *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 209, 171 S.E. 2d 873, 880 (1970). There is a serious question as to whether the *capital* of a corporation can be held in trust, unless it is held in trust for the benefit of its creditors. *Wilson v. Crab Orchard Development Co., supra.* The issuance of stock is ordinarily a sale for full and fair consideration, and so the corporation is entitled to the monies received outright. Therefore, in order for a trust to be created in the capital obtained from issuing stock, the corporation itself must agree to hold the capital in trust for creditors. In the case *sub judice*, the agreement of 27 December 1967 was entered into by the defendants Freeman and Croom in their individual capacities. Nowhere in the instrument appears a signature signed by any corporate officer in his official capacity. In order for the corporation to be bound by an agreement, it must be a party thereto. *See, Little v. Orange County*, 31 N.C. App. 495, 229 S.E. 2d 823 (1976). "A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting." *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 241 N.C. 473, 478, 85 S.E. 2d 677, 680 (1954). *Duke v. Markham*, 105 N.C. 131, 10 S.E. 1017 (1890). " 'The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men . . . .' Angel & Ames on Corporations, sec. 504." *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 241 N.C. at 478, 85 S.E. 2d at 680; *Tuttle v. Junior Building Corp.*, 228 N.C. 507, 46 S.E. 2d 313 (1948). Since none of the individuals signing the agreement pur-

ported to act for the corporation, the corporation was not bound by the agreement and took the $10,000.00 capital obtained from the issuance of its stock free of any trust in favor of plaintiff. Therefore, there is an absence of law to support a claim for relief on a trust theory.

[2] Plaintiff, however, contends that the complaint alleges a valid claim for relief since plaintiff was a third-party beneficiary of the contract between the individual defendants.

The rule is well settled in North Carolina that where a contract is made for the benefit of a third party, the latter is entitled to maintain an action for its breach. *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955); *Boone v. Boone*, 217 N.C. 722, 9 S.E. 2d 383 (1940). The question of whether a contract is intended for a third party is generally regarded as one of construction of the contract. The intention of the parties is determined by the terms of a contract as a whole, construed in light of the circumstances under which it was made and the purposes that the parties sought to accomplish. The contracting parties must intend to confer a direct benefit upon the third party and intend to confer a right of action upon the third party. *Meyer v. McCarley & Co.*, 288 N.C. 62, 215 S.E. 2d 583 (1975); *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). *See*, 17 Am. Jur. 2d, Contracts, § 304; 17A C.J.S., Contracts, § 519.

In the case *sub judice*, the parties intended to benefit the corporation by providing additional capital so that it could meet its obligations to its creditors. There was no provision in the contract whereby the defendants agreed to pay money directly to plaintiff; the defendants' agreement was to pay the money directly to the *corporation*. Nor is there any provision in the contract whereby the defendants agreed to become guarantors of the corporate debt; on the contrary, the terms of the agreement provided that the *corporation* would pay the creditors. Therefore, the plaintiff is not directly benefited by the contract and has no rights against the individual defendants pursuant to that contract. Plaintiff's sole cause of action was against the corporation on the original debt.

The plaintiff's complaint failed to state a claim for relief on either of the two theories urged by plaintiff, and, therefore, the court did not err in dismissing the complaint.

[3] The court set forth as a second ground for dismissing the complaint the fact that plaintiff's cause of action was barred by the three-year statute of limitations, G.S. 1-52. Since matters outside the pleadings had to be considered in order to resolve the question of whether the cause of action was time-barred, this was not a ruling on a G.S. 1A-1, Rule 12(b)(6) motion, but a ruling on a motion for summary judgment. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The test on a motion for summary judgment is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). Although it is clear that the three-year statute of limitations is applicable, there is a question of fact remaining as to when the breach occurred and the statute of limitations began to run. Therefore, summary judgment on that issue is not appropriate. So much of said order ruling for defendants on the plea of the statute of limitations is vacated.

The order dismissing the complaint pursuant to Rule 12(b)(6) for failure to state a claim for relief is affirmed.

Vacated in part and affirmed in part.

Judges VAUGHN and HEDRICK concur.

JOHN JUNIOR WHITE, JAMES DONALD WHITE, VIRGINIA GREEN, LILLIE W. PATE, PETITIONERS v. MILDRED FUTRELL LACKEY, AND MARGARET FUTRELL DeLOATCHE, RESPONDENTS

No. 786SC267

(Filed 20 March 1979)

1. Wills § 33— rule in Shelley's Case

In order for the rule in Shelley's Case to apply, it is generally said that (1) there must be an estate of freehold in the ancestor; (2) the ancestor must acquire that estate in the same instrument containing the limitation to his heirs; (3) the words "heirs" or "heirs of the body" must be used in the technical sense

meaning an indefinite succession of persons, from generation to generation; (4) the two interests must be either both legal or both equitable; and (5) the limitation to the heirs must be a remainder in fee or in tail.

2. Wills § 33.1 — inapplicability of rule in Shelley's Case

Where testator devised land to his granddaughter "during her natural life and at her death to the lawful heirs or heirs of her body," and provided in another item of the will that in the event the granddaughter died leaving no lawful heir or heirs of her body, the land should go to testator's daughter for life and at her death to her children, the rule in Shelley's Case did not apply to give the granddaughter a fee tail converted into a fee simple by G.S. 41-1 since the testator's daughter would be a lawful heir of testator's granddaughter, who could not die without lawful heirs in the general sense as long as the daughter lived; in the gift over, the estate was taken out of the first line of descent and placed back into the same line in a restricted manner by giving it to some but not all of those who presumptively would have shared in the estate as the heirs in general of the first taker; and it appears, therefore, that the testator did not use the term "lawful heirs or heirs of her body" in the technical sense but rather intended the term to mean the issue of the granddaughter.

APPEAL by petitioners from *Martin (Perry), Judge.* Judgment entered 7 November 1977 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 11 January 1979.

Petitioners instituted this action on 26 March 1975 claiming ownership of land devised in the will of R. J. Ricks, probated in 1922 in Northampton County.

In Item Two of the will the testator devised the property in question:

"to my granddaughter, Jesse Naomi Warren, during her natural life and at her death to the lawful heir or heirs of her body."

In Item Four of his will, the testator states:

"In the event that my granddaughter Jesse Naomi Warren dies leaving no lawful heir or heirs of her body, then, in that event, I devise the land described in Item Two of this will to my daughter Mary G. Vick during her natural life and at her death to her children."

On 23 June 1931, the granddaughter, Jesse Naomi Warren, and her husband conveyed the property to L. M. Futrell, in fee simple. In his will, L. M. Futrell left the property to his daugh-

ters, Mildred Futrell Lackey and Margaret Futrell DeLoatch, the respondents, in fee simple. On 29 June 1970, Mildred Futrell Lackey and her husband conveyed their interest in the property to Margaret Futrell DeLoatch and her husband.

Jesse Naomi Warren died on 16 December 1974 and was survived by four children, the petitioners herein, who contend that they took the land under the will of R. J. Ricks, subject only to their mother's life estate. The facts are not disputed. The trial judge concluded that the rule in Shelley's Case applied to the devise in question and, therefore, that the respondents were lawfully seized of the property. The court entered summary judgment in favor of respondents, and petitioners appealed.

Duke and Brown, by J. Thomas Brown, Jr., and Donald M. Wright, for petitioner appellants.

Revelle, Burleson and Lee, by L. Frank Burleson, Jr.; Gillam, Gillam and Smith, by M. B. Gillam, Jr., Sarah Starr Gillam and Lloyd C. Smith, Jr., for respondent appellees.

VAUGHN, Judge.

If the rule in Shelley's Case applies to the devise, Jesse Naomi Warren was vested with a fee tail estate converted to a fee simple estate by operation of G.S. 41-1, and the judgment should be affirmed. The rule in Shelley's Case is as follows:

> " 'When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.' " *Jones v. Whichard*, 163 N.C. 241, 243, 79 S.E. 503, 504-05 (1913).

If the persons who take under the second devise take the same estate they would take as heirs of the ancestor, the rule in Shelley's Case will apply. *Welch v. Gibson*, 193 N.C. 684, 138 S.E. 25 (1927).

The rule in Shelley's Case takes its name from an early English case, *Wolfe v. Shelley*, 1 Co. 93b, 76 Eng. Rep. 206 (C.B. 1581), although it was the common law of England prior to that time. Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. Rev. 49 (1941). The original objective of the rule was to

> "secure the feudal owners of lands against the loss of wardships and other 'rake offs' upon which the feudal lords lived at a time when land was the principal wealth and the foundation of dignity and influence. The rule is a highly technical one, for it contradicts the plain expression of the intent of the grantor or devisor . . . . It has led to much litigation, but the feudal lords needed such protection against the loss of those feudal incidents which would have been ousted if the heir of the grantee or devisee had taken as purchaser and not as successor." *Cohoon v. Upton*, 174 N.C. 88, 91-92, 93 S.E. 446, 448 (1917) (Clark, C.J., concurring).

Although feudal tenures were abolished in the seventeenth century, the rule in Shelley's Case continued in England and was brought to this country. *Cohoon v. Upton, supra.*

> "The rule at this time serves an excellent but an entirely different purpose in this State, in that it prevents the tying up of real estate by making possible its transfer one generation earlier, and also subjecting it to the payment of the debts of the first taker. It is doubtless for this reason that the rule has never been repealed in North Carolina." *Cohoon v. Upton, supra*, at 92, 93 S.E. at 448 (Clark, C.J. concurring), *quoted in Walker v. Butner*, 187 N.C. 535, 122 S.E. 301 (1924).

[1] In order for the rule in Shelley's Case to apply, it is generally said that (1) there must be an estate of freehold in the ancestor; (2) the ancestor must acquire that estate in the same instrument containing the limitation to his heirs; (3) the words "heirs" or "heirs of the body" must be used in the technical sense meaning an indefinite succession of persons, from generation to generation; (4) the two interests must be either both legal or both equitable; and (5) the limitation to the heirs must be a remainder in fee or in tail. *Benton v. Baucom*, 192 N.C. 630, 135 S.E. 629 (1926); *Hampton v. Griggs*, 184 N.C. 13, 113 S.E. 501 (1922).

The rule in Shelley's Case is a rule of law and not a rule of construction. *Hampton v. Griggs, supra.* Generally, the intent of the testator would not be relevant. Nevertheless,

> " '[t]he true question of intent would turn not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body.' The first question, then, to be decided is whether the words 'heirs' or 'heirs of the body' are used in their technical sense; and this is a preliminary question to be determined, in the first instance, under the ordinary principles of construction without regard to the rule in *Shelley's case.*" (Citation omitted.) *Hampton v. Griggs, supra,* at 16, 113 S.E. at 502.

The question presented to this Court, therefore, is what did the testator mean when he used the term "lawful heir or heirs of her body."

An ulterior limitation which provides for a substitute devise in the event the ancestor dies without leaving heirs can be one indication of the testator's intent.

> "When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first lines of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other indicia, it has been held sufficient to show that the words 'heirs' or 'heirs of the body' were not used in their technical sense." *Welch v. Gibson, supra,* at 691, 138 S.E. at 28.

This rule has been applied in a variety of cases. For instance, in *Edwards v. Faulkner,* 215 N.C. 586, 2 S.E. 2d 703 (1939), testatrix devised her property "to my nephew W. C. Edwards for his life time, and to his heirs if he dies without heirs, my property goes to my Bro. R. C. Edwards, and after his death to my nephews children H. T. Edwards, and R. L. Edwards." W. C. Edwards was the son of R. C. Edwards and the brother of R. L. Edwards. The

Court held that the rule in Shelley's Case did not apply because R. C. Edwards would be a potential heir of the first taker. The estate, therefore, would be taken out of the first line of descent and put back in a limited manner. Thus, the case fell within the rule set out in *Welch.*

In *Bird v. Gilliam,* 121 N.C. 326, 28 S.E. 489 (1897), the devise was "to my daughter, Mary, during her natural life, and give the same to the heirs of her body, but if my daughter, Mary, should not have no lawful heirs of her body, the said land at her death shall go back to my son." The Court held that the intent of the testator in using the words "heirs of her body" was shown by the phrase "but if my daughter, Mary, should not have no lawful heirs of her body" to mean issue. Thus the rule in Shelley's Case did not apply. *See also McRorie v. Creswell,* 273 N.C. 615, 160 S.E. 2d 681 (1968).

Again, in *Tynch v. Briggs,* 230 N.C. 603, 54 S.E. 2d 918 (1949), the testator devised land to his son "for the period of his natural life in remainder to his lawful heirs and in the event [my son] should die without lawful heirs then in remainder to my daughter." Since the daughter would be a lawful heir of the son, the son could not die without heirs in the general sense so long as his sister lived. Thus the Court held that the term "heirs" did not mean heirs in the general sense but rather a specific group of persons and, therefore, the rule in Shelley's Case did not apply. *See also Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15 (1912).

In *Clayton v. Burch,* 239 N.C. 386, 80 S.E. 2d 29 (1954), testator devised land to a grandson, J. W. Clayton, for his lifetime, "thence to his Body ars if he has Eney and if not then [to] . . . my Grand Sound Silus Daynel Clayton if he a living but if J. W. Clayton Shold hav a body hir it shall go to them down to the Tenth Jenerration . . . and if Ether one of my grand-Sons Shold Die [and] my grand Soun Stanley be living and thay Shold not leave a Body heir he Shal hav thair Share." The Court held that the term "Body heir" was used to describe certain persons and not in the general sense. Again, therefore, the rule in Shelley's Case was not applied.

[2] We conclude that these holdings control the decision in the present case. The testator's daughter, Mary Vick, would be a lawful heir of the testator's granddaughter, Jesse Naomi Warren

who, therefore, could not die without lawful heirs in the general sense as long as Mary Vick lived. Thus, in the gift over, the estate was taken out of the first line of descent from Jesse Naomi Warren and placed back into the same line in a restricted manner by giving it to some but not to all of those who presumptively would have shared in the estate as the heirs in general of the first taker, Jesse Naomi Warren. It appears, therefore, that R. J. Ricks did not use the term "lawful heir or heirs of her body" in the technical sense but rather intended the term to mean the issue of Jesse Naomi Warren. The rule in Shelley's Case, consequently, does not apply.

Cases holding that the rule applies are distinguishable. For example, in *Morrisett v. Stevens*, 136 N.C. 160, 48 S.E. 661 (1904), the devise was to testator's brother for life and then to his heirs, but if he died without heirs of his body, then to Bettie Stevens. There was no indication that Bettie Stevens was related to the brother and, therefore, she would not be his heir. Again, in *Benton v. Baucom, supra*, the devise was to the testator's stepdaughter with the gift over to the testator's three children, who would not have been heirs of the stepdaughter.

In *Tyson v. Sinclair*, 138 N.C. 23, 50 S.E. 450 (1905), testator devised his land to his grandson "during the term of his natural life, then to the lawful heirs of his body in fee simple; on failing of such lawful heirs of his body, then to his right heirs in fee." The rule in Shelley's Case was applied to give the grandson a fee simple. The Court reasoned that the ulterior limitation was not to a restricted group, which would be included in the remainder to the "heirs of his body," (for example, "his next of kin") but rather was to a larger group which included the class named in the remainder. The limitation over, therefore, carried the estate as it would have gone by inheritance.

Ray v. Ray, 270 N.C. 715, 155 S.E. 2d 185 (1967), may also be distinguished. The testatrix devised the residue of her estate to her daughter for life, and at her death to the heirs of her body, if any; but if her daughter should predecease the testatrix without leaving heirs of her body, then the residue was to go to certain collateral relatives. The Court applied the rule in Shelley's Case and, therefore, the daughter took a fee tail estate converted to a fee simple estate by G.S. 41-1. The Court held that the rule of con-

struction enunciated in such cases as *Welch v. Gibson, surpa*, did not apply because there was no limitation over in the event the daughter should die without heirs *after* the death of the testatrix. The devise to the collateral relatives was a substitutional gift if the daughter predeceased the testatrix. Since the daughter survived, the devise to the collateral relatives was inoperative, and the rule in Shelley's Case applied.

We conclude that the judge erred when he entered summary judgment in favor of respondents. That judgment is vacated. Petitioners took the land in fee simple, subject only to the life estate of their mother. The case is remanded for proceedings not inconsistent with this determination.

Vacated and remanded.

Judges HEDRICK and CLARK concur.

BETTY L. TALBERT, ADMINISTRATRIX OF THE ESTATE OF OLLIE JUNIOR CHOPLIN, DECEASED v. GEORGE DWIGHT CHOPLIN

No. 7810SC334

(Filed 20 March 1979)

Automobiles § 66.1— identity of driver—plaintiff's reliance on complaint—summary judgment

In a wrongful death action where plaintiff alleged that her intestate was killed while a passenger in a car driven by defendant, the trial court properly entered summary judgment for defendant where defendant offered in support of his motion his own sworn statements that he was not the driver of the vehicle when the fatal accident occurred, and plaintiff rested upon the mere allegation to the contrary in her complaint; moreover, plaintiff could not have her verified complaint treated as an affidavit since it failed to show affirmatively that plaintiff was competent to testify concerning the identity of the driver.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 9 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 19 January 1979.

This wrongful death action was commenced 15 July 1977 when the plaintiff administratrix filed a verified complaint alleg-

ing that her intestate, Ollie Junior Choplin, was killed on 23 May 1976 while a passenger in a car driven by the defendant and that the death was proximately caused by negligence of the defendant. The car was owned by Deborah Talbert Choplin, the wife of plaintiff's intestate. Plaintiff alleged that defendant, while under the influence of intoxicating liquor, drove the car at a high rate of speed off of the road, throwing her intestate from the vehicle and killing him.

The defendant filed answer denying the material allegations in plaintiff's complaint and alleging contributory negligence on the part of plaintiff's intestate in continuing to ride in the automobile with defendant without protest when he knew, or in the exercise of due care should have known, that the manner in which the automobile was being operated would likely cause him injury. Defendant also alleged that at the time of the accident plaintiff's intestate was married and living with the owner of the car, Deborah Talbert Choplin, that the car was a family purpose automobile, and that plaintiff's intestate was an occupant in his wife's family purpose automobile and had the right to exercise control and discretion over its operation. In his answer defendant did not admit that he was driving the car at the time of the accident.

In verified answers to plaintiff's interrogatories, defendant described the events leading up to the fatal accident as follows:

> On the morning of May 22, 1976, Ollie Junior Choplin came to my house requesting that I fix a headlight and brakes on the car. Thereafter, I went to my mother's house where I started working on the car. After fixing the car, Ollie and I went and tried out the car and we were together until the accident occurred. We drove around that day and then went to Pierce's Service station where we had a beer. We then left Pierce's Service station and went to Raleigh to an ABC store where we bought the bottle of liquor. We then left Raleigh and headed back to Pierce's Service station. On the way back from Raleigh, we stopped and had a drink. We then arrived at Pierce's Service about 10:00 or 10:30 that evening where we met our wives at the service station. When we arrived at Pierce's, we stayed for a while and then left and went to the 401 Tavern for a fan belt. After leaving

the 401 Tavern, we went out Highway 401 to Rolesville, took a left and went out Rural Paved Road 2051 where we stopped to go to the bathroom and to take a drink. We got back into the car with Ollie Junior Choplin driving—shortly thereafter we had the accident.

* * *

I never had a conversation with Deborah Talbert Choplin as such. Deborah Talbert Choplin can only converse through sign language. She never gave me express permission to drive the car. When Ollie and I left my mother's house after fixing the car at about noon on May 22, 1976, I believe Ollie Junior Choplin told his wife that we are going to go try the car out to test the brakes. Later when we met our wives at Pierce's Service station that evening, Ollie Junior Choplin and Deborah said something to each other in sign language about us going off in the car.

* * *

I operated the 1965 Pontiac automobile upon leaving my mother's house about noon on May 22, 1976. I operated the car that afternoon just driving around and drove it to Pierce's Service station. Ollie Junior Choplin drove the car the back way to Raleigh to avoid Highway Patrolman on our trip to the liquor store. I drove the car back from Raleigh to Pierce's Service station where we met our wives. I drove the car then from Pierce's Service station to the 401 Tavern. I drove the car from the 401 Tavern until we stopped on Rural Paved Road 2051 to go to the bathroom and to take another drink. Ollie Junior Choplin then drove the car until we had the accident. From the time I left my mother's house at noon on May 22, 1976 until the accident occurred, Ollie Junior Choplin and I were the occupants in this car.

* * *

At the time of the accident, neither Ollie Junior Choplin or I were drunk but I would admit that we were both under the influence of intoxicating beverages.

* * *

I was not driving the car at the time of the accident. After Ollie and I stopped on Rural Paved Road 2051 to go to the bathroom and to have another drink, Ollie then started driving the car. At the time of the accident, Ollie was driving at about 70 miles an hour when he came to a sharp curve whereupon the car started sliding and we had the accident. The next thing I remember was being in the hospital.

* * *

I had known for some time that Ollie did not have an operator's license. I do not know for sure but I believe he had had his license revoked for approximately a year or maybe more. He actually served time after being convicted of driving without a license.

On 11 January 1978 defendant filed a motion for summary judgment, supporting his motion by his sworn answers to plaintiff's interrogatories. Plaintiff did not file any additional material in opposition to the motion. The court granted defendant's motion, and plaintiff appealed.

DeMent, Redwine & Askew by Russell W. DeMent, Jr., for plaintiff appellant.

Ronald C. Dilthey for defendant appellee.

PARKER, Judge.

"The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 422 (1979). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as

to establish his right to judgment as a matter of law." 2 McIntosh, N.C. Practice and Procedure, § 1660.5 (2nd ed. Phillips Supp. 1970).

"In ruling on a motion for summary judgment, the Court does not resolve issues of fact but goes beyond the pleadings to determine whether there is a genuine issue of material fact. The moving party has the burden of establishing the absence of any triable issue, and the Court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence. This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974).

Applying these principles in the present case, defendant, as the party moving for summary judgment, had the burden of establishing the lack of any genuine issue of material fact and that he was entitled to judgment as a matter of law. To meet this burden he presented proof in the form of his own sworn statements that he was not the driver of the car in which plaintiff's intestate was riding when the fatal accident occurred. This evidence was sufficient, if considered alone, to compel a verdict in defendant's favor establishing his right to judgment as a matter of law. Plaintiff was thereby forced to produce a forecast of the evidence which she had available for presentation at trial to support her claim. She produced none. Instead, she relied solely upon the allegations in her verified complaint and upon what she contends are weaknesses in defendant's statements which undermined his credibility. This was not sufficient. G.S. 1A-1, Rule 56(e) provides as follows:

> (e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the af-

fiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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.

Defendant, having supported his motion for summary judgment by his own sworn statements that he was not the driver, a matter concerning which he was competent to testify, G.S. 8-51, as amended effective 1 July 1977 by Ch. 74, Sec. 2, 1977 Session Laws, plaintiff could not rest upon the mere allegation to the contrary in her complaint. Although the complaint was verified by Betty L. Talbert and in this respect might be considered as an affidavit, it failed to show affirmatively that the affiant was competent to testify concerning the identity of the driver. Unless she was present when the accident occurred, which is not alleged in the complaint, it is manifest that she was not competent to testify as to who was driving. The verified complaint, therefore, failed to meet the requirements for an affidavit to be considered under Rule 56(e). We are thus left with a record which shows that defendant is prepared to present at trial competent sworn testimony to show that he was not the driver while plaintiff, who at trial would have the burden of proof, can present nothing to show that he was. The mere fact that the jury might not believe the defendant hardly furnishes proof for the plaintiff. It is true that the identity of the driver of an automobile at the time of an accident may be established by circumstantial evidence. *Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968); *King v. Bonardi*, 267 N.C. 221, 148 S.E. 2d 32 (1966); *Drumwright v. Wood*, 266 N.C. 198, 146 S.E. 2d 1 (1966); *Yates v. Chappell*, 263 N.C. 461, 139 S.E. 2d 728 (1965); Annot., 32 A.L.R. 2d 988 (1953). However, if in the present case the circumstances at the scene of the accident, such as the positions in which defendant's body and that of plaintiff's intestate

were found after the wreck, or any other circumstances exist to furnish a logical basis for a finding that defendant was the driver, plaintiff has failed to come forward with anything to indicate that she has or can ever obtain competent evidence to show them. The record does not disclose any attempt by plaintiff to utilize Rule 56(f) to oppose defendant's motion. On this record, therefore, defendant's motion for summary judgment was properly allowed.

Affirmed.

Judges ARNOLD and WEBB concur.

GWEN WEBB GALLOWAY v. FRANKIE GALLOWAY

No. 7810DC381

(Filed 20 March 1979)

1. **Divorce and Alimony § 18— husband as supporting spouse—presumption—rebutting evidence**

The presumption that the husband is the supporting spouse, and thus by definition that the wife is the dependent spouse, controls until evidence has been presented tending to show that the wife is not in fact a dependent spouse, and the husband has not borne his burden in such cases until he has offered evidence tending to show that his wife is neither substantially dependent upon him for her maintenance and support nor substantially in need of maintenance and support by him. G.S. 50-16.1(3).

2. **Divorce and Alimony § 18.11— wife not dependent spouse—insufficiency of findings**

Finding by the trial court that plaintiff wife had been gainfully employed prior to her marriage to the defendant and was "able-bodied, intelligent and capable to find employment" was not sufficient to support the trial court's conclusion that plaintiff was not a dependent spouse within the meaning of G.S. 50-16.1(3), as it did not include a finding that the plaintiff had a reasonable opportunity to but did not adequately support herself.

APPEAL by plaintiff from *Parker (John Hill), Judge.* Order entered 2 February 1978 in District Court, WAKE County. Heard in the Court of Appeals 2 February 1979.

The plaintiff instituted this action against the defendant for alimony pendente lite, permanent alimony and attorney's fees by

the filing of a complaint on 21 November 1977. During the hearing before the trial court on these matters, the plaintiff presented evidence tending to show that she and the defendant were married to each other on 17 August 1973. During the latter part of 1975, the parties separated and lived apart for approximately one year. They reunited in December of 1976 and moved their residence to Raleigh. Prior to that time, the plaintiff had been working part-time in her parents' motel in Wilson. Despite her husband's objections, the plaintiff continued to work at the motel in Wilson after the couple had moved to Raleigh. She normally worked at the motel from 9:00 a.m. until 3:00 p.m., but about twice every three weeks she was required to stay at the motel overnight. The plaintiff's weekly salary during this period ranged from $60 to $90 depending upon whether she worked on weekends.

On 27 October 1977 the plaintiff left a message for her husband informing him that she was planning to spend the night at the motel in Wilson. The defendant called the plaintiff at about 6:00 p.m. and told her that he wanted her to come to Raleigh and take all of her belongings out of the house they were occupying. The next day, the plaintiff complied with the defendant's request.

The plaintiff's evidence further tended to show that she then moved to her parents' motel in Wilson. She helped with the work at the motel when she was needed but was not paid a regular salary and did not want a regular salary. In addition to room and board, however, the plaintiff's mother occasionally gave her money for car payments when she needed such money and gave her "some spending money." The plaintiff testified that she did not have any regular source of income and that the defendant had not provided any support for her since their separation. In addition, evidence was introduced tending to show that the defendant had a gross income of less than $13,200 per year and a net income of approximately $8,400 per year.

The defendant introduced evidence tending to show that he objected to the plaintiff working at the motel during their marriage and asked her to quit working there. He testified that she often failed to return from the motel until 6:00 p.m. or 7:00 p.m. and would at times return as late as 9:00 p.m. In addition, he testified that she spent the night at the motel from three to five times a month during this period.

At the conclusion of the hearing on these matters, the trial court found among other things that the defendant had ordered the plaintiff out of their home on 27 October 1977 and had provided no support for the plaintiff since that time. The trial court also found that the plaintiff was gainfully employed prior to the marriage and living in her own apartment and was, at the time of the hearing, "able-bodied, intelligent and capable to find employment." The trial court further found that the plaintiff had, at the time of the hearing, no salary other than room, board and spending money as provided by her parents and that the defendant had a net income of approximately $8,400 per year. Based upon its findings, the trial court concluded that the defendant abandoned the plaintiff on 27 October 1977. The Court also concluded that the plaintiff was not substantially dependent upon the defendant for her maintenance and support or in substantial need of maintenance and support and was not, therefore, a dependent spouse within the intent and meaning of the General Statutes of North Carolina. From the entry of judgment reflecting these findings and conclusions by the trial court, the plaintiff appealed.

William A. Smith, Jr., for plaintiff appellant.

Birzon & Henry, P. A., by Nora B. Henry, for defendant appellee.

MITCHELL, Judge.

Only a dependent spouse is entitled to alimony or alimony pendente lite. G.S. 50-16.2 and 16.3. A dependent spouse is by definition married to a supporting spouse since a dependent spouse always has a spouse "upon whom [he or she] is actually substantially dependent or from whom [he or she] is substantially in need of maintenance and support." G.S. 50-16.1(3) and (4). Conversely, a supporting spouse is by definition married to a dependent spouse. Therefore, a determination that one spouse is a supporting spouse is a determination that the other is a dependent spouse and vice versa.

A dependent spouse is "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." G.S. 50-16.1(3). A wife is actually substantially dependent upon her husband for

her maintenance and support or in substantial need of support by him if she is incapable of adequately providing for herself or is capable of adquately providing for herself but does not have a reasonable opportunity to do so. *Cf. Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912 (1960) (*capacity* of supporting husband to earn rather than actual earnings considered in determining amount of alimony); *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971) (same).

Once it is established, however, that the defendant is the plaintiff's husband and that he is capable of supporting her, the defendant is presumed to be the supporting spouse. G.S. 50-16.1(4) provides in part that, "A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife." This sentence of the statute establishes a presumption that a male spouse is the supporting spouse and, conversely, that the female is the dependent spouse. *Rayle v. Rayle*, 20 N.C. App. 594, 202 S.E. 2d 286 (1974). The defendant did not seek during the hearing before the trial court, nor has he sought before this Court, to challenge this presumption on the ground that it constitutes unconstitutionally gender based discrimination. Therefore, we are not required to express an opinion here with regard to the very substantial constitutional questions which would arise should this portion of the statute be challenged on constitutional grounds. 1 Strong's North Carolina Index 3d, Appeal and Error § 3.

[1] The presumption that the husband is the supporting spouse, and thus by definition that the wife is the dependent spouse, controls until evidence has been presented tending to show that the wife is not in fact a dependent spouse. *Rayle v. Rayle*, 20 N.C. App. 594, 202 S.E. 2d 286 (1974). *See* 2 Stansbury's N. C. Evidence § 215 (Brandis Rev. 1973). *See also Davis v. Indemnity Co.*, 227 N.C. 80, 40 S.E. 2d 609 (1946). The husband has not borne his burden in such cases until he has offered evidence tending to show that his wife is neither substantially dependent upon him for her maintenance and support nor substantially in need of maintenance and support by him. G.S. 50-16.1(3). Such evidence may be presented in the form of evidence tending to show that the wife is in fact adequately supporting herself or is capable of adequately supporting herself and has a reasonable opportunity to do so but has not sought to support herself. *Cf. Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912 (1960) (*capacity* of supporting

husband to earn rather than actual earnings considered in determining amount of alimony); *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971) (same).

[2] The trial court in the present case found that the plaintiff wife had been gainfully employed prior to her marriage to the defendant and was "able-bodied, intelligent and capable to find employment." This finding was not sufficient, however, to support the trial court's conclusion that the plaintiff was not a dependent spouse within the meaning of G.S. 50-16.1(3), as it did not include a finding that the plaintiff had a reasonable opportunity to but did not adequately support herself.

Additionally, the evidence presented would not have supported such a finding. Evidence of a reasonable opportunity by the wife to adequately support herself might have been shown by introducing evidence, if any existed, that the plaintiff did not make reasonable efforts to obtain employment for which she was suited and which was available, that she had refused employment opportunities that were available to her, or that she had been employed in a manner which would have adequately supported her but terminated such employment in order to establish her status as a dependent spouse. As the defendant failed to offer sufficient evidence to overcome the presumption that the plaintiff was a dependent spouse, the trial court erred in concluding in the order appealed from that the plaintiff was not a dependent spouse.

We additionally note that the order appealed from was entered more than one year ago and that some change in the conditions of the parties is likely. Further, the record on appeal does not reflect any evidence with regard to the reasonable value of attorney's fees sought by the plaintiff.

For the reasons previously stated, the order of the trial court from which the plaintiff has appealed will be vacated and the cause remanded to the trial court for a new hearing with regard to the plaintiff's application for alimony pendente lite and counsel fees and for such other actions as accord with applicable law and the present status of the parties.

Vacated and remanded.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES MICHAEL GROGAN

No. 7815SC868

(Filed 20 March 1979)

1. **Criminal Law § 101.4— allowing exhibits in jury room**

Upon request by the jury, the trial judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence if all parties to the action consent, but the trial judge does not have authority to permit the jury to take exhibits or other materials which have not been received in evidence to the jury room under any circumstances. G.S. 15A-1233.

2. **Criminal Law § 114.5— photographs not in evidence—refusal to allow in jury room—misstatement of law in explanation—expression of opinion**

The trial judge's incorrect statement of law that he could not allow the jury to take to the jury room photographs which had not been received into evidence because defendant did not consent constituted a prejudicial expression of opinion on the evidence in violation of G.S. 15A-1222 and 1232, since the judge's statement may have led the jury reasonably to conclude that he felt the photographs were important evidence which the jury should see and which he would allow them to see but for the defendant's act in withholding consent.

3. **Searches and Seizures § 43— denial of motion to suppress—appeal after conviction**

When the General Assembly granted the right to appeal orders finally denying motions to suppress "upon an appeal from a judgment of conviction" in G.S. 15A-979, it impliedly prohibited appeals from such orders at any other time, and an order denying defendant's motion to suppress prior to his first trial which ended in a mistrial could be brought forward as a part of defendant's appeal from a judgment of conviction at his retrial.

4. **Searches and Seizures § 44— motion to suppress—necessity for written findings and conclusions**

A pretrial order denying defendant's motion to suppress evidence is vacated and the cause is remanded for a new hearing where the trial court failed to make written findings of fact and conclusions of law as required by G.S. 15A-977(d) and (f), and the appellate court is unable to say that introduction of the evidence sought to be suppressed was harmless to defendant.

APPEAL by defendant from *Bailey, Judge,* and *Farmer, Judge.* Judgment entered 20 April 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 January 1979.

The defendant was indicted for two counts of felonious breaking or entering and two counts of felonious larceny. Upon his

pleas of not guilty, the jury returned verdicts of guilty as charged on each count in the bills of indictment. The defendant was sentenced to consecutive ten-year terms of imprisonment on each count or a total period of imprisonment of forty years. The defendant appealed.

Prior to the first trial of these cases, the defendant moved pursuant to G.S. 15A-977 to suppress certain physical evidence as being the fruit of an unconstitutional search and seizure. Judge Farmer conducted a hearing on this motion at which both the State and the defendant were given the opportunity to be heard and to present evidence. At the conclusion of that hearing, Judge Farmer denied the defendant's motion to suppress.

These cases against the defendant were consolidated for trial and tried as a single action during both the first and second trials. The first trial resulted in a mistrial. The second trial of this action was conducted before Judge Bailey and a jury. During the course of the second trial, the State offered evidence tending to show that the defendant and one Brad Wilson broke into two homes in Orange County with the intent to commit larceny and that they committed larceny in each of the homes. The defendant presented no evidence.

Other facts pertinent to this appeal are hereinafter set forth.

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

J. Kirk Osborn for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error remarks made by Judge Bailey in the presence of the jury during the second trial of this action. After the jury had commenced its deliberations, it requested that certain photographs be sent to the jury room. Only one, the photograph of an automobile, had been introduced into evidence. The defendant consented to this photograph being sent to the jury room but did not consent to the remaining photographs being sent there for the jury's consideration. Judge Bailey then had the jury returned to the courtroom and stated:

> Ladies and gentlemen of the jury, you have requested that the photographs be permitted to be taken to the jury room. The photograph of the automobile was formerly offered in evidence and there's no objection, and I will send that one. The other photographs taken purportedly by Mr. Wilson were not formerly offered in evidence, and I cannot send them without consent of both parties; and the defendant does not consent. So I can't permit you to take those three photographs with you to the jury room.

[1] Upon a request by the jury to examine materials admitted into evidence, the trial judge in the exercise of his discretion, after notice to the prosecutor and defendant, may permit the jury to examine such materials in the courtroom. G.S. 15A-1233(a). Here, however, the jury requested that they be permitted to take to the jury room photographs which had not been received in evidence as well as photographs which had been received. Upon such a request by the jury, the trial judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence if all parties to the action consent. G.S. 15A-1233(b). The controlling statute does not grant the trial judge authority to permit the jury to take exhibits or other materials which have not been received in evidence to the jury room under any circumstances. G.S. 15A-1233. Therefore, the trial judge's statement to the jury that he could not allow them to take the photographs which had not been received in evidence into the jury room because the defendant did not consent was an incorrect statement of the law.

The trial judge's view of the applicable law, which we have found incorrect, was in itself in no way harmful to the defendant. It led to a correct ruling that the jury could not take the photographs which had not been received in evidence into the jury room. In undertaking to state his reason for that ruling, however, we find that the trial judge committed error prejudicial to the defendant.

[2] A trial judge is prohibited from expressing any opinion which is calculated to prejudice either of the parties at any time during the trial. G.S. 15A-1222 and 1232; *State v. Guffey*, 39 N.C. App. 359, 250 S.E. 2d 96 (1979); *State v. Whitted*, 38 N.C. App. 603, 248 S.E. 2d 442 (1978). *See State v. Frazier*, 278 N.C. 458, 180

S.E. 2d 128 (1971) (construing former G.S. 1-180). The slightest intimation from the trial judge as to the weight or credibility to be given evidentiary matters will always have great weight with the jury, and great care must be exercised to insure that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. *State v. Wollard,* 227 N.C. 645, 44 S.E. 2d 29 (1947) (former G.S. 1-180). 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, we find that the trial judge's explanation of his ruling excluding the photographs in question may have led the jury reasonably to conclude that he felt the photographs were important evidence which the jury should see and which he would allow them to see but for defendant's act in withholding consent. The probable effect upon the jury determines whether the conduct or language of the judge amounts to an expression of opinion which will entitle the defendant to a new trial. *See State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973) (former G.S. 1-180). When considered in light of its probable effect upon the jury, we find that the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of G.S. 15A-1222 and 1232 which will require a new trial.

The defendant also contends that Judge Bailey erred in denying his motion for a rehearing upon his pretrial motion to suppress which had been previously denied. Our disposition of this case makes it unnecessary for us to discuss this contention other than to note that nothing alleged by the defendant in his motion for rehearing and supporting affidavits required Judge Bailey to rehear the motion which had previously been finally denied.

[3] The defendant additionally assigns as error Judge Farmer's denial of his pretrial motion to suppress certain evidence. During oral arguments, the State contended that Judge Farmer's order prior to the first trial of this action was not properly before this Court on appeal, as the defendant's appeal was taken from the final judgment of conviction entered by Judge Bailey at the end of the second trial. Although the defendant moved for a rehearing of his pretrial motion to suppress during the second trial of this action and that motion was denied, we find that Judge Farmer's

order denying the motion to suppress prior to the first trial was an order "finally denying a motion to suppress evidence" which could be brought forward as a part of an appeal from the later judgment of conviction. G.S. 15A-979(b).

Unlike an order granting a motion to suppress evidence in a criminal case, which is appealable prior to trial, an order denying a defendant's motion to suppress may be reviewed only after a judgment of conviction. In subsection (c) of G.S. 15A-979, the General Assembly specifically made orders of the superior court granting motions to suppress evidence appealable to the appellate division "prior to trial" if certain statutory prerequisites are present. In subsection (b) of that statute, on the other hand, the General Assembly chose to make orders finally denying a motion to suppress evidence reviewable "upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." The maxim *expressio unius est exclusio alterius* applies. Therefore, when the General Assembly granted the right to appeal orders finally denying motions to suppress "upon an appeal from a judgment of conviction," it impliedly prohibited appeals from such orders at any other time. *See In re Taxi Co.*, 237 N.C. 373, 75 S.E. 2d 156 (1953). *See also* Black's Law Dictionary 692 (4th ed. revised 1968). For this reason, it was only after the entry of the judgment of conviction by Judge Bailey in this action that the defendant could appeal from Judge Farmer's pretrial order denying his motion to suppress. After the entry of the judgment of conviction by Judge Bailey, the defendant's appeal from "the rulings and judgment of the Court" was sufficient to bring forward Judge Farmer's order for review by this Court as a part of this appeal. We find the defendant's appeal from Judge Farmer's order denying his motion to suppress to be an appeal of an order finally denying a motion to suppress evidence properly presented upon an appeal from a judgment of conviction.

[4] The defendant contends that the denial of his pretrial motion to suppress was erroneous as the judge made no findings of fact and failed to set forth in the record written findings of fact and conclusions of law. The judge is the finder of fact at the hearing on a motion to suppress evidence and must make written findings of fact and conclusions of law. G.S. 15A-977(d) and (f); *State v. Montgomery*, 33 N.C. App. 225, 234 S.E. 2d 434 (1977). The record before us on appeal indicates that no such written findings and

conclusions were made. Additionally, we are unable to say that the introduction of the evidence sought to be suppressed, which was comprised of certain items stolen during the two break-ins charged, was harmless to the defendant. Therefore, the pretrial order denying the defendant's motion to suppress is vacated and the issue remanded to the trial court to the end that a new hearing on the motion may be held prior to a new trial.

For error committed at trial as previously discused herein, we order a

New trial.

Judges MARTIN (Robert M.) and ERWIN concur.

HARRY FRANCIS PORTER, T/A "INFO" BY PORTER v. NORTH CAROLINA DEPARTMENT OF INSURANCE AND RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA

No. 7810SC387

(Filed 20 March 1979)

1. **Administrative Law § 2— collection agencies—regulation of Department of Insurance—agency rule**

A regulation of the Department of Insurance prohibiting the holder of a permit to operate a collection agency from furnishing legal advice or services or instituting judicial proceedings on behalf of other persons was a "rule" within the meaning of the Administrative Procedure Act, G.S. 150A-10.

2. **Administrative Law § 2— exhaustion of administrative remedies**

The exhaustion of available administrative remedies is a prerequisite to judicial review, and when the legislature has established an effective administrative remedy, it is exclusive.

3. **Administrative Law § 2; Declaratory Judgment § 3— failure to exhaust administrative remedies—declaratory judgment not available**

Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where plaintiff failed to exhaust available administrative remedies by petitioning the Department of Insurance for amendment or repeal of the regulation under G.S. 150A-16 or seeking a declaratory ruling from the Department of Insurance as to the validity and ap-

plicability of the regulation under G.S. 150A-17, and then by seeking judicial review of an adverse Department of Insurance decision under G.S. 150A-43 *et seq.*

APPEAL by defendant from *McLelland, Judge.* Judgment entered 15 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1979.

Plaintiff, Harry Francis Porter, who operates a "collection agency" licensed by the North Carolina Department of Insurance under G.S. 66-41 *et seq.*, on 2 December 1977 initiated this action for declaratory judgment pursuant to G.S. 1-253, 1-256 and 1-260 to determine: (1) whether he is required to be licensed by the Department of Insurance, (2) whether his conduct violates regulation 11 N.C.A.C. 13.0221(m) issued by that department, (3) whether it was within the department's statutory authority to issue such a regulation, and finally (4) whether the statute was constitutional. This controversy arose when the Department of Insurance sent a letter to plaintiff informing him that its staff attorneys had determined that he was in violation of its regulation found in the North Carolina Administrative Code, 11 N.C.A.C. 13.0221. In pertinent part, that regulation provides as follows:

"A Permit Holder is prohibited from . . .

(m) Furnishing legal advice or performing legal services or representing that it is competent to do so; or instituting judicial proceedings on behalf of other persons."

Defendant's letter advised plaintiff as follows:

"Our attorneys have reviewed the power of attorney given to you by your clients. It is their opinion that such a power of attorney would not grant any authority to the collection agency to swear out a criminal warrant on behalf of a creditor . . .

You are advised to immediately cease the swearing of warrants on behalf of your clients . . ."

Plaintiff alleges and the trial court found that on 12 October 1977, George F. Bason, Chief District Judge for the Tenth Judicial District, in response to the defendant's action issued an order to all magistrates to cease issuing warrants upon the application of collection agencies. He contends that Judge Bason's order has

caused plaintiff to suffer irreparable injury and has essentially put him out of business. As a result, plaintiff, on 21 October 1977, initiated an action similar to the one presently before this Court by which he challenged the defendant's authority and sought a preliminary injunction against the defendant. At the 27 October 1977 hearing on the motion for a preliminary injunction, the defendant delivered a letter to plaintiff withdrawing the 7 October 1977 letter because it had been brought to their attention that the administrative regulation was not properly filed and in effect on 7 October 1977. (The rule was subsequently properly filed 26 October 1977.) As a result of defendant's having withdrawn the letter, plaintiff immediately took a voluntary nonsuit in that action, but re-instituted his challenge to the defendant's authority on 2 December 1977, when Judge Bason declined to withdraw his directive because the Department of Insurance had not withdrawn its prior interpretation of the law, despite the fact that the 7 October 1977 letter advising plaintiff that he was in violation of the rule had been withdrawn. Judge Bason indicated by affidavit that if a judge of the superior court should construe the regulation so as not to prohibit plaintiff's practices, or should find the regulation invalid, he would rescind his order to the magistrates.

This action was tried at a nonjury session of the Wake County Superior Court. After finding facts substantially as stated above, the trial court concluded *inter alia* that (1) plaintiff lacks an administrative remedy, (2) that plaintiff has alleged a justiciable controversy, and (3) that defendant is without statutory authority to issue 11 N.C.A.C. 13.0221(m). The court decreed that the regulation was "void and of no effect". Defendant appeals. Plaintiff cross-appeals.

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

Paul Stam, Jr., for plaintiff appellee.

MORRIS, Chief Judge.

Plaintiff initiated his challenge to the validity of the rule promulgated by the Department of Insurance by filing suit for declaratory judgment in the Superior Court of Wake County. The Department of Insurance contends that the plaintiff was not en-

titled to seek relief in the superior court by declaratory judgment because *inter alia* plaintiff failed to exhaust his available administrative remedies as provided in the North Carolina Administrative Procedure Act, G.S. 150A-1 *et seq.*

The Department of Insurance issued the rule in controversy pursuant to its alleged statutory authority as provided in G.S. 66-46, which simply provides:

> "The Commissioner shall have the right to make any rules or regulations necessary to enforce the provisions of this Article and may approve schedules of fees and methods of collecting the same, or make any other rule or regulation necessary to secure the proper conduct of the business referred to in this Article [regulating the collection of accounts]."

[1] The rule enacted by the defendant is a "rule" within the meaning of the Administrative Procedure Act, G.S. 150A-10 which provides in pertinent part:

> A " 'rule' means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency."

[2, 3] It is fundamental that a prerequisite to judicial review is generally the exhaustion of available administrative remedies. *Greyhound Corp. v. Utilities Com.*, 229 N.C. 31, 47 S.E. 2d 473 (1948). Similarly, the settled law in this State provides that when the legislature has established an effective administrative remedy, it is exclusive. *Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979); *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 174 S.E. 2d 292 (1970). The defendant is correct in its position that plaintiff has failed to follow and exhaust the available administrative procedures provided as a means of challenging the applicability and validity of administrative rules. Plaintiff has two available avenues of administrative review of the Commission's action. First, G.S. 150A-16 establishes an administrative procedure entitling plaintiff to seek relief by petitioning the commission for an amendment or repeal of the rule. If he is unsuccessful at that stage of the proceedings, plaintiff would then be entitled to seek judicial review under G.S. 150A-43 *et seq.* Second, plain-

tiff may seek a declaratory ruling under G.S. 150A-17 which would provide the agency with an opportunity to reconsider the validity of the rule or its applicability to the plaintiff. That ruling of the Commission is then entitled to judicial review under G.S. 150A-43 *et seq.* Plaintiff, however, seeks to bypass these statutory procedures and obtain relief directly in the superior court by way of a declaratory judgment.

As was noted in our recent decision in *High Rock Lake Ass'n. v. Environmental Management Commission*, 39 N.C. App. 699, 252 S.E. 2d 109, (1979), the Administrative Procedure Act does not preclude entirely the possibility of judicial review by use of the declaratory judgment. G.S. 150A-43 provides in part:

> "Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article."

However, the administrative action in question would clearly be subject to judicial review if plaintiff had followed the appropriate procedures. Thus, G.S. 150A-43 is not authority for allowing plaintiff to bypass the Administrative Procedure Act.

We note that the trial court never determined whether plaintiff was in violation of the rule in question and recognized that the defendant had not considered its applicability since the first letter was withdrawn. Nevertheless, the trial court decreed that the Department of Insurance was without authority to issue the rule because, in the words of the court, "11 NCAC 13.0221(13) is not necessary to enforce the provisions of Article 9, Chapter 64, North Carolina General Statutes, and . . . defendant is without statutory authority to prescribe it." The foregoing is an indication of the problems faced when courts interfere in administrative matters before the agency has been afforded an opportunity to reach a concrete decision. *See High Rock Lake Ass'n v. Environmental Management Commission, supra.* Had plaintiff availed himself of the appropriate procedures for the administrative review of rules, the defendant may have been persuaded that plaintiff's conduct was not proscribed by the rule, or he may have been successful in persuading defendant to amend or repeal its own rule. By enacting the provisions for administrative reivew of rules, the legislature wisely determined that the agency itself

should have the first opportunity to review the propriety and applicability of its own rules. So long as the statutory procedures provide an effective means of review of the agency action, the courts will require parties to exhaust their administrative remedies. *See Lloyd v. Babb, supra; see generally* 2 Cooper, State Administrative Law 579 (1965). The trial court had no jurisdiction to determine the matters before it. Therefore, the judgment of the trial court is

Reversed.

Judges MARTIN (Harry C.) and CARLTON concur.

STATE OF NORTH CAROLINA v. TIMOTHY EMORY

No. 7814SC928

(Filed 20 March 1979)

1. **Homicide § 19.1— *acts and threats of violence after shooting*—no evidence of deceased's character**

The trial court in a murder case did not err in excluding evidence of acts and threats of violence against defendant and his family after the shooting of the deceased as evidence of the character of the deceased as a violent and dangerous fighting man, since such evidence was not relevant to establish the character of deceased, as he clearly could not have perpetrated the acts or threats in question.

2. **Homicide § 19.1— suspicious males in defendant's neighborhood—no evidence of deceased's character**

The trial court in a murder case properly excluded testimony by an officer that he stopped two suspicious looking males in the vicinity of defendant's home one or one and one-half hours after the shooting incident giving rise to the crime charged, that the men admitted being present at the crime scene, and that the officer found a fully loaded shotgun and rifle in the men's car, since the victim was not in the automobile when it was stopped; no evidence was introduced to indicate that he was in any way connected with the actions of the two men stopped by the officer; and such evidence did not reflect upon the character of deceased or tend to establish that defendant shot deceased in self-defense.

3. **Homicide § 21.9— manslaughter—sufficiency of evidence**

Evidence was sufficient to show that the crime of voluntary manslaughter was committed and that defendant was the perpetrator of that crime.

APPEAL by defendant from *Martin (John C.), Judge*. Judgment entered 27 February 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 January 1979.

The defendant was indicted for the second degree murder of one Johnny Carlton. Upon his plea of not guilty, the jury returned a verdict of guilty of voluntary manslaughter. From judgment sentencing him to imprisonment for a term of six years as a committed youthful offender, the defendant appealed.

The State's evidence tended to show that during the evening of 2 September 1976 the defendant was playing pool in an amusement center located on Ellis Road in Durham County and owned by Rex Herndon. At approximately 11:30 p.m. on that date, the defendant became involved in an altercation with one Tommy Williams. When Herndon attempted to separate the two men, others joined in creating a general affray. Order was soon restored and the defendant left the amusement center.

Approximately two and a half hours later, the defendant was seen standing beside his car which was parked in the parking lot of a tavern on Angier Avenue in Durham County. The defendant was holding a .22 caliber rifle at that time. One John Bonamo walked up to the defendant who then shot Bonamo in the knee. Johnny Carlton was then seen standing in the parking lot reaching into his back pocket. The defendant began shooting his rifle in several directions at that time. After the shooting stopped, it was determined that four people including Johnny Carlton had been shot. Carlton was then taken to a hospital where he later died.

A bullet was recovered from the body of Johnny Carlton. It was examined by an agent of the State Bureau of Investigation and found to be a .22 caliber bullet. The bullet was so damaged, however, that no determination could be made as to whether it had been fired from the defendant's rifle.

The State also presented evidence that a .38 caliber derringer was found at the scene of the shooting. The victim's wife testified that the derringer belonged to her husband. The two-shot derringer contained one live round of ammunition and one spent shell at the time it was found.

The defendant presented evidence tending to show that Tommy Williams made threats against the defendant and his family at the time of the altercation in the amusement center. The defendant returned to his home after the fight and told his father what

had happened. His father suggested that the defendant should find the people who had been involved and resolve the controversy. The defendant then got his .22 rifle and went to find the people who had participated in the affray. The defendant's father and mother followed him in another car. When they arrived at the tavern, they found several people standing in the parking lot. John Bonamo approached the defendant and said, "You ain't learned your lesson yet, have you, buddy? I got one for you now." Bonamo pulled a gun on the defendant who then shot Bonamo in the leg. Someone to the right of the defendant shot at him and the defendant returned the fire. Others started to shoot at the defendant and he returned their fire. The defendant testified that during this incident the victim, Johnny Carlton, shot at him several times. The defendant further testified that Carlton was about to shoot him at the time he shot Carlton. After shooting Carlton, the defendant ran to his father's car and they drove away as the shooting continued.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Arthur Vann for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the exclusion of evidence relating to certain events occurring after the shooting which resulted in the death of Johnny Carlton. As his defense was based upon the theory of self-defense, the defendant contends that this evidence was admissible as tending to show the character of the deceased as a violent and dangerous fighting man. We do not agree.

During the direct examination of the defendant, he attempted to introduce evidence that a bomb exploded in his car on 17 January 1977 and other evidence tending to show acts or threatened acts of violence against him or his family after the shooting of the deceased. The trial court conducted a voir dire hearing and specifically ruled that evidence tending to show threats or acts of violence against the defendant or his family occurring after the death of the deceased victim in this case were excluded as irrelevant. We find that the trial court ruled correctly in this regard.

The defendant apparently offered evidence tending to show acts and threats of violence against him and his family as evidence of the character of the deceased as a violent and dangerous fighting man. Such evidence is not relevant unless an issue of self-defense or some similar justification is to be resolved by the jury. Where, as here, self-defense is an issue, the violent character of the *deceased* may be relevant if known to the accused *at the time of the crime charged* or if, whether known to him or not, it throws light upon the question of which party was the actual aggressor. 1 Stansbury's N.C. Evidence § 106, p. 330 (Brandis rev. 1973). In the present case, however, the defendant sought to introduce evidence of violent acts and threats of violence occurring after the shooting of the deceased which resulted in his death. Such evidence was not relevant to establish the character of the *deceased* as he clearly could not have perpetrated the acts or threats in question. Additionally, no evidence was introduced tending to show any connection between the deceased and the individuals making the alleged threats and committing the alleged acts of violence. Evidence of the alleged acts and threats was, therefore, properly excluded and the assignment of error is overruled.

[2] The defendant next contends that the trial court erred in excluding the testimony of H. S. Turnage, a City of Durham Public Safety Officer. Officer Turnage testified on voir dire that he was driving his patrol car in the vicinity of the defendant's home about an hour or an hour and a half after the shooting incident. He observed two suspicious males on that occasion. Upon being stopped and questioned about the shooting incident, they indicated that they had been at the tavern at the time of the shooting incident but had not done any of the shooting. The officer then looked into their car and found a fully loaded shotgun and rifle.

This testimony by Officer Turnage was also properly excluded as irrelevant. The victim was not in the automobile when it was stopped and no evidence was introduced to indicate that he was in any way connected with the actions of the two males stopped by Officer Turnage. Such evidence did not reflect upon the character of the deceased or tend to establish that the defendant shot the deceased in self-defense. The testimony was properly excluded and the assignment is overruled.

[3] The defendant also contends that the trial court erred in denying his motion for dismissal made at the close of all of the evidence. In considering such a motion, the trial court must determine whether there is substantial evidence of each element of the crime charged or a lesser included offense and that the defendant is the person who committed the crime. *See State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977). In determining whether such evidence has been presented, all of the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference that may be drawn therefrom. *See State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

The defendant in the present case stipulated that the deceased victim died as a result of a .22 caliber gunshot wound and the stipulation was introduced into evidence. On direct examination, the defendant testified that he shot at the deceased. On cross-examination, the defendant made the following statement concerning the deceased: "I guess I shot him once and hit him." When considered in the light most favorable to the State, such evidence was sufficient to show that the crime of voluntary manslaughter was committed and that the defendant was the perpetrator of that crime. Therefore, the trial court did not err in denying the defendant's motion to dismiss.

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

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. JERRY LEANDER POE

No. 7814SC550

(Filed 20 March 1979)

1. Crime Against Nature § 1— consensual fellatio between man and woman

The crime against nature includes consensual fellatio between a man and woman.

2. **Constitutional Law § 21— consensual fellatio in private—prosecution not prohibited by right to privacy**

The right of privacy does not prohibit the prosecution of unmarried persons for consensual fellatio done in private, and the State, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples.

3. **Crime Against Nature § 1; Constitutional Law § 28— statute not unconstitutionally vague**

G.S. 14-177 is not unconstitutionally vague, as persons of ordinary intelligence would conclude fellatio between a man and a woman would be classified as a crime against nature and forbidden by the statute.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 31 January 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 October 1978.

This is an appeal by the defendant from a conviction of the crime against nature. The defendant, a male person, was charged with the rape of a female person and committing a crime against nature with her. At the end of the State's evidence, the court dismissed the charge of rape. The evidence for the State and defendant showed the prosecuting witness performed a fellatio on the defendant. Defendant's evidence was to the effect that the act was done in private with the consent of both parties, who were adults. The court refused the request of the defendant to charge the jury that if the act was done in private between two consenting adults, the defendant would be not guilty. The defendant was found guilty and from the imposition of a prison sentence, he has appealed.

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

Upchurch, Galifianakis and McPherson, by William V. McPherson, Jr., for defendant appellant.

WEBB, Judge.

G.S. 14-177 provides:

> If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

The defendant advances three arguments as to why the trial in the superior court should be reversed. These are: (1) the crime against nature does not include a consensual fellatio between an adult man and adult woman, (2) defendant may not be prosecuted for a consensual fellatio with an adult female because to do so violates his constitutionally guaranteed right of privacy, and (3) the statute as applied to the defendant is unconstitutionally vague. We discuss the arguments in order.

[1] (1) The crime against nature includes a consensual fellatio between a man and a woman.

The defendant urges this Court to define a crime against nature so as not to include an act between an adult man and an adult woman if no force is used. We decline to do so. In *State v. Jernigan*, 255 N.C. 732, 122 S.E. 2d 711 (1961), the Court said by way of dictum that force was not an essential element of the crime against nature when committed between a man and a woman. It is said at 81 C.J.S., Sodomy, § 5, at page 653, "Thus, the offense of sodomy may be committed with the consent of both parties, and without compulsion or force." We believe we would be changing a definition of a crime which has stood for many years if we followed the suggestion of the defendant, and this we cannot do.

[2] (2) The defendant's right of privacy does not prevent his prosecution under G.S. 14-177.

The defendant contends that the right of privacy which he has under the United States Constitution protects him from prosecution in this case. He argues that *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) enunciated a constitutionally protected right of privacy in sexual relations between married persons and that *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972) extended the same right of privacy to unmarried persons. The appellant cites authority that a state may not punish married persons for sodomic acts committed within the marriage. 58 A.L.R. 3d 636 (1974); *State v. Lair*, 62 N.J. 388, 301 A. 2d 748 (1973); *Cotner v. Henry*, 394 F. 2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847, and *Lovisi v. Slayton*, 539 F. 2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977. The appellant argues that the United States Supreme Court has held in *Eisenstadt* that unmarried persons have the same right of privacy

in sexual relations as married persons. He argues further that the right of privacy prohibits the prosecution of married persons for fellatio done in private. He concludes the right of privacy prohibits the prosecution of unmarried persons for consensual fellatio done in private. The appellant's position depends on the interpretation of the *Eisenstadt* case. In *Griswold v. Connecticut, supra*, it was held there is a zone of privacy protected by several constitutional guarantees; that within this zone is the sexual relationship between the husband and wife, and it violates this right of privacy to convict a third person for prescribing a contraceptive for the wife. In *Eisenstadt v. Baird, supra*, the Court interpreted this right of sexual privacy as it applied to unmarried persons. In that case the defendant was convicted under a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons to prevent pregnancy. The statute did not prohibit the distribution of contraceptives to anyone for the purpose of preventing the spread of disease. The United States Supreme Court interpreted the Massachusetts law not as an attempt to discourage premarital sex, but as an effort to prevent the use of contraceptives. The Court held that under the Fourteenth Amendment, there was not a rational basis for the class created by this statute. As we read *Eisenstadt*, it holds that if the state is not trying to proscribe premarital sex but is attempting to stop the use of contraceptives by unmarried but not by married persons, the equal protection clause extends the right of privacy of married persons to unmarried persons. We do not believe *Eisenstadt* protects the defendant in this case. In this case the state has proscribed certain sexual conduct. In *Eisenstadt* sexual conduct was not proscribed, but merely the use of contraceptives while engaging in that conduct by unmarried persons. The Court held that was an unreasonable classification. Conceding for purposes of argument that a husband or wife could not be prosecuted for engaging in fellatio in private with his or her spouse, we do not believe it creates an unreasonable class to treat unmarried persons differently. The state can forbid certain types of sexual conduct. The statute under which the defendant was prosecuted forbids homosexual as well as heterosexual unnatural sex acts. It has been upheld as to homosexual acts. *See State v. Enslin*, 25 N.C. App. 662, 214 S.E. 2d 318, *appeal dismissed*, 288 N.C. 245 (1975), *cert. denied sub nom. Enslin v. North Carolina*, 425 U.S. 903, *aff'd sub nom. Enslin v. Wallford*, No.

77-1309 (4th Cir. Nov. 1, 1977). In this state, fornication and adultery have been proscribed since at least 1805. G.S. 14-184. We believe the state, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. We hold that the constitutional right of privacy does not protect the defendant in this case.

[3] (3) The statute is not unconstitutionally vague.

The defendant argues that the statute is unconstitutionally vague.

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> * * *
>
> . . . If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness." 16 Am. Jur. 2d, Constitutional Law, § 552, pp. 951-52.

In interpreting a statute, we must incorporate in it decisions interpreting that statute. *See Perkins v. State*, 234 F. Supp. 333 (W.D.N.C. 1964). The defendant concedes in his brief that *State v. Fenner*, 166 N.C. 247, 80 S.E. 970 (1914) and *State v. Griffin*, 175 N.C. 767, 94 S.E. 678 (1917) are "perhaps sufficiently broad to cover consensual heterosexual fellatio" as proscribed by the statute. We do not rest on this. We believe that persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by G.S. 14-177. This keeps it from being unconstitutionally vague.

No error.

Judges MORRIS (now Chief Judge) and VAUGHN concur.

STATE OF NORTH CAROLINA v. JESSE EVANS

No. 7816SC1079

(Filed 20 March 1979)

1. **Criminal Law § 91.7— absence of witnesses—continuance properly denied**

The trial court did not err in denying defendant's motion for continuance made on the ground of the absence of a necessary witness where defendant's motion was not timely and where there was no showing that, had the continuance been granted, defendant would ever have been able to find either of the missing witnesses, nor, if found, what the testimony of either would be, nor, indeed, whether either would be willing to testify at all.

2. **Assault and Battery § 15.6— self-defense—actual necessity not required—jury instructions sufficient**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court made it abundantly clear to the jury that defendant's right to act in self-defense was not limited to actual necessity.

APPEAL by defendant from *Clark, Judge.* Judgment entered 29 June 1978 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 1 March 1979.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. He was convicted of assault with a deadly weapon inflicting serious injury. Judgment was entered sentencing defendant to prison for not less than twelve nor more than twenty-four months. From this judgment, defendant appeals.

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

John H. Horne, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the denial of his motion for a continuance made on the ground of the absence of a necessary witness. We find no error.

> The rule is firmly established that ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and his ruling is not subject to review on appeal in the absence of gross abuse. But when the motion is based on a

right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable.

State v. Smathers, 287 N.C. 226, 230, 214 S.E. 2d 112, 114-15 (1975). In the present case defendant contends that the denial of his motion resulted in depriving him of the constitutional right, guaranteed both by Article I, Sec. 23 of the Constitution of North Carolina and by the Sixth Amendment to the Federal Constitution, to confront his accusers and the witnesses against him with other testimony. The record does not support this contention.

The record reveals that the felonious assault for which defendant was tried occurred on 18 February 1978. A warrant charging defendant with the offense was issued on the same day. Two days later defendant was arrested, and on 21 February 1978 Attorney John H. Horne, Jr. was appointed to represent him. On 4 April 1978 a preliminary hearing was held and probable cause was found. On 24 April 1978 the grand jury returned as a true bill the indictment charging defendant with the same felonious assault for which the warrant had previously been issued. Defendant's case was calendared for trial at the 26 June 1978 Criminal Session of Superior Court. On Tuesday, 27 June 1978, the case was called and defendant pled not guilty. After the arraignment and plea, but before a jury was selected, defendant's counsel made an oral motion for a continuance on the ground that a necessary witness was not available. The motion was denied, and defendant's trial occurred on the following day, 28 June 1978.

We note initially that defendant's motion was not timely made. G.S. 15A-952(c) provides that where, as here, arraignment is to be held at the session for which trial is calendared, a motion to continue "must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins." In such case the motion must be in writing, stating the grounds therefor and the relief sought. G.S. 15A-951(a). By waiting until the session for which his trial was calendared and then making an oral motion to continue, defendant failed to comply with these statutes. Defendant's failure to make a timely motion was in itself sufficient basis for its denial. Moreover, although no longer required by statute, it is still desirable that a motion for continuance be supported by an affidavit showing the grounds for con-

tinuance. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). None was filed in this case.

Even had defendant's motion to continue been timely made, its denial was proper. There was no showing that in denying the motion the trial judge either abused his discretion or deprived defendant of any constitutional right. From the oral statements made to the trial court by defendant's counsel it appears that the missing witnesses were a Mrs. Gibson, who is defendant's sister, and a Mr. Bailey. Warrants had been issued against each of these persons charging participation in the same assault for which defendant was tried. Neither of these warrants had been served. Defendant's counsel frankly admitted that he had previously been granted one continuance to give him time to find these witnesses, and that at the time of defendant's trial he still had no information as to the whereabouts of Mrs. Gibson and no reason to believe that she could be found. As to Bailey, defendant's counsel stated he had received information that approximately ten days prior to defendant's trial Bailey had been in Scotland County and had even called someone at the Scotland County Sheriff's Department, that Bailey had visited his mother, and that "the mother believes that he possibly lives near Rockingham, North Carolina," in Richmond County. Defendant's counsel admitted that he had no address for Bailey in Richmond County, that no subpoena had been issued for Bailey in Richmond County, and that the only subpoena which had been issued for him in Scotland County was one issued on the same day on which counsel made his oral motion for a continuance. Defendant's counsel had never interviewed either Mrs. Gibson or Bailey and the only thing he knew concerning them was what defendant had told him. If available, Mrs. Gibson and Bailey would each have been codefendants in this case, and defendant's counsel acknowledged that he had no assurance that either would be willing to testify. Thus, on this record there has been no showing that, had the continuance been granted, defendant would ever have been able to find either of the missing witnesses, nor, if found, what the testimony of either would be, nor, indeed, whether either would be willing to testify at all. Under these circumstances it is clear that the denial of the continuance did not deprive defendant of any constitutional right. Defendant's first assignment of error is overruled.

[2] The only other assignment of error brought forward in defendant's brief is addressed to a portion of the court's charge to the jury on self-defense. In this connection defendant contends that the court's instruction was deficient in that it failed to make clear that the defendant had a right to act in self-defense in case of apparent as well as actual necessity. We find no error. It is, of course, true that "[t]he right of self-defense, as defendant correctly contends, rests upon necessity real or apparent; and, in the exercise of his lawful right of self-defense, an accused may use such force as is necessary or apparently necessary to protect himself from death or great bodily harm." *State v. Jackson*, 284 N.C. 383, 390-91, 200 S.E. 2d 596, 601 (1973). When the charge in the present case is examined as a whole, the court made it abundantly clear to the jury that defendant's right to act in self-defense was not limited to actual necessity.

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

No error.

Judges HEDRICK and CARLTON concur.

WILLIAM B. GARRISON III, PLAINTIFF v. JAMES MILLER, MAUDE CARTER, CHARLES W. CRAIG, WILLIAM L. CRAIG, JR., CHARLES D. GRAY III, MARIE HAMILTON, CLYDE LUTZ, FREDRICK L. SMYRE AND J. BRUCE TRAMMELL, INDIVIDUALLY AND AS MEMBERS OF THE GASTON COUNTY BOARD OF EDUCATION, DEFENDANTS, AND JOHN KINLAW AND EVERETTE L. CARLTON, ORIGINAL DEFENDANTS AND ADDITIONAL DEFENDANTS, AND ZANE EARGLE, SUPERINTENDENT, ADDITIONAL DEFENDANT

No. 7827SC500

(Filed 20 March 1979)

Injunctions § 5.1— temporary order—no jurisdiction to decide constitutionality of policy

In an action to restrain a county board of education from enforcing its policy concerning athletic eligibility for transfer students, the trial court had no jurisdiction to declare the policy unconstitutional upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, since the constitutionality of the policy could only be determined at the final hearing.

APPEAL by defendants from *Davis, Judge.* Judgment and order entered 30 March 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 6 March 1979.

On 22 February 1978 plaintiff filed a complaint against defendants, members and agents of the Gaston County Board of Education, requesting the court to temporarily restrain and permanently enjoin enforcement of their policy concerning athletic eligibility for transfer students. The policy provides essentially that a student who transfers from a school in his attendance zone to a school located in another attendance zone in Gaston County, without moving to the attendance zone of the school to which he transferred, loses his eligibility to participate in interschool athletics for one year. By reason of the policy, plaintiff was ineligible to participate in interscholastic athletic competition during the 1977-78 school year. Plaintiff alleged that the policy violated his rights to equal protection and due process.

On 22 February 1978, the trial court entered a temporary injunction and order to show cause. In the order, the court noted that the plaintiff would suffer irreparable harm unless a temporary restraining order was issued without notice in that the athletic season was in full progress and the track team on which plaintiff desired to participate had its first competition on 2 March 1978.

On 22 March 1978, defendants filed an answer admitting that the plaintiff, upon application of his mother, was permitted to transfer from the school in his attendance zone to a school in another zone. By reason of the transfer, plaintiff is ineligible to participate in interscholastic athletic activities for the 1977-78 school year. Defendants denied that the athletic policy violated any of plaintiff's constitutional rights.

On 2 March 1978, at the show cause hearing, plaintiff presented evidence, primarily from several defendants, that the primary purpose of the policy is to prevent recruiting of athletes. However, 723 students in Gaston County were transferred within the school system during the 1977-78 school year and none were transferred for recruiting purposes. The policy does not prohibit a transfer student from participating in such school activities as band competition. All student transfers are subject to approval by the board of education and the policy provides no formal pro-

cedure for a hearing and appeal. There was no evidence of any recruiting involved in plaintiff's transfer. The policy in question was adopted by the Gaston County Board of Education; it is not a state policy. A similar state policy applies only to transfers between administrative units but local school boards have the authority under state law to extend the policy to transfers within an administrative unit.

Defendants offered evidence, primarily by cross-examination of plaintiff's witnesses, tending to show that the rule has been uniformly applied since its adoption in 1971. No exceptions have been made. A similar policy has been adopted by the North Carolina High School Athletic Association, Inc. The rule is a rational approach to control recruiting of high school athletes and "floating" between schools. It is supported by six of the seven coaches in Gaston County.

On 30 March 1978 the trial court entered an order and judgment which (1) continued the temporary injunction "until final judgment is entered", (2) restrained defendants from applying the policy to "any other similarly situated student", (3) held that the policy is a "patent violation" of the Fourteenth Amendment to the U.S. Constitution and Article I, § 19 of the N.C. Constitution, and (4) continued the cause pending further orders of the court. Defendants appealed.

Henry M. Whitesides, for plaintiff appellee.

Garland and Alala, by James B. Garland, for defendant appellants.

CARLTON, Judge.

Counsel for plaintiff and defendants expressed their desire that this Court fully address the merits of the action. We are precluded from doing so by prevailing law.

We think the case at bar is clearly controlled by the decision of our Supreme Court in *Union Carbide Corp. v. Davis*, 253 N.C. 324, 116 S.E. 2d 792 (1960) and other similar cases. Justice Higgins succinctly stated the salient principles pertinent to the instant action: (1) Courts should pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of the matter then pending; (2) The jurisdiction

of appellate courts is derivative. Questions of law or legal inference come to it for purposes of review. If the lower court has no jurisdiction, the appellate court cannot acquire jurisdiction by appeal; (3) The constitutionality of a statute will not be determined in collateral proceedings, on preliminary motions, or on interlocutory orders; (4) Trial courts grant or deny injunctions upon the evidence presented. The only question is whether the order should be made, dissolved or continued. It cannot go further and determine the final rights of the parties, that being reserved for the final trial of the action. *Union Carbide Corp. v. Davis, supra* at 327, 116 S.E. 2d at 794.

At the show cause hearing, the only question presented to the superior court was whether the temporary injunction should be continued to the hearing. Judge Davis went beyond the scope of his authority and declared the policy unconstitutional.

Our holding cannot be different because the parties consented that the court "could issue such further orders or judgments as the Court may deem appropriate out of term and out of district." The Supreme Court has resolved that question also. In *MacRae & Co., Inc. v. Shew*, 220 N.C. 516, 17 S.E. 2d 664 (1941) the parties agreed that the court might "either make the temporary order permanent or dissolve it at this hearing." The Court held, "However, since the judgment entered was beyond the jurisdiction of the judge sitting at chambers, such jurisdiction could not be conferred by agreement . . . ." 220 N.C. at 518, 17 S.E. 2d at 665.

We are impressed by plaintiff's argument that the trial court probably had as much information before it at the show cause hearing as it would at the final hearing. However, it is not our prerogative to overrule firmly-stated principles enunciated by the Supreme Court; nor are we inclined to do so. A final ruling on this action would have obvious statewide ramifications on athletic eligibility in our secondary schools. It may well be that the ends of justice will be better met if, at final hearing, the trial court has before it evidence of athletic eligibility with respect to transferees from other administrative units across the state.

We hold that the trial court had sufficient evidence before it to support the findings of fact and conclusions of law in continu-

ing the temporary injunction. However, the court went beyond its jurisdiction in ruling that the policy was unconstitutional.

The result is that the judgment must be modified so as to extend no further than to continue the temporary injunction to the final hearing.

The cause is remanded for judgment in accord with this opinion.

Modified and remanded.

Judges VAUGHN and HEDRICK concur.

ROBERT MICHAEL FUNGAROLI v. JUDITH DIANE FUNGAROLI

No. 7821DC442

(Filed 20 March 1979)

1. **Divorce and Alimony § 18.2— alimony pendente lite—supporting spouse out of state—no notice required**

Where the supporting spouse abandons the dependent spouse and leaves the state, notice of hearing on motion for alimony pendente lite is not required nor is service on the supporting spouse's counsel of record required.

2. **Divorce and Alimony § 18.10— marital relationship—finding by court not required**

Where both plaintiff and defendant alleged they were married to each other, their marital relationship was a judicially established fact and was not required to be stated by the court.

3. **Trial § 3.2— counsel unprepared for hearing—continuance properly denied**

The trial court did not err in denying defendant's motion to continue a contempt hearing, though plaintiff's counsel stated that he had been employed only thirty minutes and was not prepared for the hearing, since plaintiff had had notice of the hearing for ten days, discharged his counsel three days before the hearing, and had sufficient time to employ new counsel.

APPEAL by plaintiff from *Tash, Judge*, and *Freeman, Judge*. Orders entered 1 March 1978 and 7 March 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 5 February 1979.

On 21 December 1977, plaintiff sued for custody of the minor child of plaintiff and defendant. On the same date, plaintiff was

granted custody by an *ex parte* court order. On 18 February 1978, another *ex parte* order allowed defendant visitation privileges with the child. Still another *ex parte* order was issued 24 February 1978 for plaintiff to show cause why he should not be punished for contempt for violation of the order of visitation. Defendant answered 28 February 1978, counterclaiming for alimony and child custody. On 1 March 1978, defendant filed motion for alimony *pendente lite* and on that date a hearing was conducted, and plaintiff was ordered to pay alimony *pendente lite* to defendant. A hearing on the contempt order was held on 6 March 1978, and plaintiff was adjudged to be in contempt. Plaintiff appealed from the orders of 1 March 1978 and 7 March 1978.

Morrow, Fraser & Reavis, by John F. Morrow, for plaintiff appellant.

Stephens, Peed & Brown, by B. Ervin Brown II, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff first argues the alimony order is invalid as plaintiff was not given notice of the hearing. Defendant's counterclaim for alimony was filed 28 February 1978. At that time, plaintiff had already left the state of North Carolina with the minor child of the parties. On 21 February 1978, an order was issued by the Juvenile and Domestic Relations District Court of Fairfax County, Commonwealth of Virginia. This order stated plaintiff and the child were living at 7225 Braddock Road, Springfield, Virginia 22151. The petition of plaintiff in the Virginia court, filed 21 February 1978, alleged under oath that plaintiff and the child lived in Springfield, Virginia.

[1] The trial court, in its order of 1 March 1978, found as facts that plaintiff had left the state of North Carolina, taking with him the child of the parties; plaintiff had not supported defendant in any way since 21 December 1977; plaintiff was gainfully employed, being the co-owner of Ridgetop Records in Winston-Salem; that defendant has no income at all and no residence. The evidence before the court supported the findings of fact. These findings of fact support the conclusions of law by the court that plaintiff had abandoned defendant and left the state of North Carolina; that plaintiff was the supporting spouse and defendant

the dependent spouse. Where the supporting spouse abandons the dependent spouse and leaves the state, notice of hearing on motion for alimony *pendente lite* is not required. N.C. Gen. Stat. 50-16.8; *Barker v. Barker*, 136 N.C. 316, 48 S.E. 733 (1904). Plaintiff argues that where a party has counsel of record, notice is required to be given to counsel, even though the party has left the state. In *Barker, supra*, the facts are similar to this case. Plaintiff husband brought the action for divorce, defendant wife counterclaimed for alimony *pendente lite*, plaintiff husband left the state, and went to Hot Springs, Arkansas. Plaintiff had counsel of record. Section 1291 of the Code in effect in 1904 was substantially identical to the notice provision now found in N.C. G.S. 50-16.8. The Court held in *Barker* that notice of hearing was not required.

Service on an attorney of record is service on a party for the reason that the attorney is the agent of the party. If service is not required to be made on a party, it is not necessary to serve his attorney. N.C. Gen. Stat. 1A-1, Rule 5.

Plaintiff by his own conduct eliminated the necessity of service upon him of the notice. The assignment of error is overruled.

[2] Plaintiff contends the trial court's findings of fact and conclusions of law are insufficient. Plaintiff argues the court failed to find the existence of a marital relationship between plaintiff and defendant. Both plaintiff and defendant allege they are married to each other. This is a judicially established fact and is not required to be stated by the court. The findings of fact and conclusions of law by the court are sufficient to support the order for temporary alimony. Plaintiff failed to appear for the hearing and presented no evidence as to his expenses or income. The order of 1 March 1978 was in accord with N.C.G.S. 50-16. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). The assignment of error is overruled.

[3] Plaintiff argues the court erred in not continuing the 6 March 1978 contempt hearing. Plaintiff's counsel says he had been employed only thirty minutes and was not prepared for the hearing. Plaintiff had notice of the contempt hearing. Notice was mailed to plaintiff and his then counsel, G. Edgar Parker, on 24 February 1978. On 3 March 1978, plaintiff discharged Parker as his attorney. The court allowed Parker to withdraw as attorney on 6 March 1978. Plaintiff had sufficient time to employ new coun-

sel. The record indicates plaintiff was in Forsyth County on the day of the hearing. He contacted attorney Leslie G. Frye of the Forsyth County bar about 10:00 a.m. Plaintiff was referred to attorney John F. Morrow. He was able to talk with Morrow about 1:30 p.m. Yet plaintiff did not appear in court for the hearing.

Motions for continuance are addressed to the sound discretion of the trial court. They are not favored, and the party seeking a continuance bears the burden of showing sufficient grounds. N.C. Gen. Stat. 1A-1, Rule 40(b); *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). Attorney Morrow made a statement in argument of his motion to continue, but failed to offer any evidence in support of his motion. The trial court had before it the evidence set out above. The chief consideration to be weighed in passing upon the motion to continue is whether the grant or denial will be in furtherance of substantial justice. *Id.* Plaintiff contends he was prejudiced by the denial of the continuance. Although he made an exception to the entry of the order of 7 March 1978 holding plaintiff in contempt, plaintiff does not attempt to argue any error in his brief with respect to that order. Plaintiff thereby abandoned the exception to the order. Rule 28(a), North Carolina Rules of Appellate Procedure; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). We hold the court properly denied plaintiff's motion to continue.

The orders of 1 March 1978 and 7 March 1978 are

Affirmed.

Chief Judge MORRIS and Judge CARLTON concur.

CAROLINA GARAGE, INC. v. JOHN ROBERT HOLSTON

No. 7821SC432

(Filed 20 March 1979)

Rules of Civil Procedure § 13— denial of leave to add counterclaim

In an action to recover the amount remaining due under a contract for purchase of a dump truck after the truck was sold at public auction, the trial court did not abuse its discretion in the denial of defendant's motion for leave

to amend its answer to add a counterclaim where defendant's motion was filed some one and a half years after the suit was instituted and over three years after the truck was sold at public auction, and plaintiff would be prejudiced if the counterclaim were allowed because it set forth for the first time allegations of fraud and false statements under oath, and these allegations changed the nature of the defense and subjected plaintiff to defending a claim in addition to proving his own case. G.S. 1A-1, Rule 13(f) and 15(a).

APPEAL by defendant from Order of *McConnell, Judge,* entered 10 April 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 8 February 1979.

This is a civil proceeding instituted on 22 December 1976, wherein plaintiff seeks to recover $5,350.96 plus interest for the amount remaining due under a contract for the purchase of a dump truck. In the complaint, plaintiff alleged that pursuant to a written contract, defendant purchased a Dodge truck with a dump body for $20,976.00 on 17 July 1973; that defendant defaulted on the payments on 17 December 1974; that at the time of default there was $14,858.00 of the principal amount still owing; that the vehicle was surrendered to plaintiff on 6 January 1975 and sold at public auction on 15 January 1975 for $8,000.00; and that after crediting defendant's account with the deferred interest charges, the principal balance due was $5,350.96.

On 16 February 1977, defendant, pursuant to G.S. § 1A-1, Rules 12(b)(6) and 12(b)(7), filed motions to dismiss the complaint for failure to state a claim upon which relief could be granted and for failure to join a necessary party. On 6 February 1978, after a hearing which defendant failed to attend, the trial judge denied defendant's motions.

On 9 March 1978, defendant filed an answer denying the material allegations of the complaint and alleging as a defense that the disposition of the truck was not performed in a commercially reasonable manner. The case was calendared for trial for the week beginning 10 April 1978. On 6 April 1978, defendant, pursuant to Rule 13(f), filed a motion for leave to set up a counterclaim by amendment, and filed the proposed counterclaim and an affidavit in support of his motion. In his motion defendant alleged "that the Counterclaim may be in the nature of a compulsory counterclaim," that defendant was ready for trial, and that justice required "that the defendant be allowed to set up the

compulsory counterclaim." The proposed couterclaim alleged that "plaintiff, in violation of the Purchase Money Security Agreement, and otherwise unlawfully, disposed of the [vehicle] without giving timely notice to the defendant and without proceeding in a commercially reasonable manner." The counterclaim contained further allegations upon information and belief that plaintiff had falsified records and the certificate of title for the truck, and had made false statements under oath with regard to the transfer of ownership of the vehicle. Defendant alleged that he was entitled to $10,000 compensatory and $50,000 punitive damages.

On 10 April 1978, the trial judge, after a hearing, entered an Order denying defendant's motion which stated in part:

> AND IT APPEARING TO THE COURT that there was no oversight, inadvertence or excusable neglect involved herein;
>
> AND IT FURTHER APPEARING TO THE COURT that justice does not require such an amendment in view of the facts that:
>
> (1) said Motion was not asserted until five days prior to the time this cause was scheduled for trial, and defendant's attorney, by his own affidavit, admits that he was aware of all attendant facts over two years prior to this hearing; and
>
> (2) the asserted counterclaim appears to be without merit.

From the foregoing Order, defendant appealed.

Hudson, Petree, Stockton, Stockton & Robinson, by F. Joseph Treacy, Jr., for the plaintiff appellee.

Wesley B. Grant for the defendant appellant.

HEDRICK, Judge.

Defendant's single assignment of error is as follows:

> The Court's denial of defendant's Motion under North Carolina Rule of Civil Procedure 13(f) for leave to set up a counterclaim by amendment to the defendant's Answer, on the grounds that the counterclaim was omitted from the Answer by oversight, inadvertence or excusable neglect and justice required the allowance of the Motion and the denial of

the Motion was prejudicial to the defendant and demonstrated an abuse of discretion.

Rule 13(f) provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." Additionally, Rule 15(a) provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed in the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

Defendant points out that his motion for leave to amend was filed 28 days after filing of the answer, but that the case had been calendared for trial prior to the time he sought to add his counterclaim, and, under Rule 15(a), he could not amend his answer without leave of court. He now contends that he sufficiently demonstrated "oversight, inadvertence or excusable neglect" in his motion pursuant to Rule 13(f), that justice requires that he be permitted to add the proposed counterclaim, and that the trial judge's denial of his motion constituted an abuse of discretion.

Assuming that defendant's proposed counterclaim is compulsory and thus the Order in the present case is immediately appealable, *see Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119, *cert. denied and app. dismissed*, 294 N.C. 736, 244 S.E. 2d 154 (1978), we think the trial court acted well within its discretion in denying defendant's motion. It has repeatedly been held that a motion under Rule 15(a) for leave of court to amend a pleading is addressed to the sound discretion of the trial judge and the denial of such a motion is not reviewable absent a clear showing of an abuse of discretion. *Hudspeth v. Bunzey, supra*; *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588 (1972); *Galligan v. Smith*, 14 N.C. App. 220, 188 S.E. 2d 31 (1972). It has also been held that leave to amend should be freely given and the party objecting to the amendment has the burden to satisfy the trial court

that he would be prejudiced thereby. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977); *Roberts v. Reynolds Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

In the present case, we believe the plaintiff carried its burden in showing that it would be prejudiced if defendant's motion for leave to amend its answer to add a counterclaim was allowed. The proposed counterclaim set forth for the first time allegations of fraud and the making of false statements under oath. These allegations not only greatly changed the nature of the defense but also subjected the plaintiff to defending a claim in addition to proving his own case. Had the motion been allowed, further discovery would likely have been sought, thus further delaying the trial. Defendant's motion was filed some one and a half years after the suit was instituted and over three years after the truck had been sold at public auction. In light of these factors, the judge's denial of defendant's motion did not constitute an abuse of discretion.

Finally, defendant contends that the trial judge improperly considered the merits of the counterclaim in ruling on his motion. Even assuming that the trial judge should not have considered the merits of the proposed counterclaim, the court's statement to that effect is merely gratuitous since there are ample additional grounds for the trial court's denial of defendant's motion. If any error was committed, it could not have been prejudicial to the defendant.

For the reasons stated above, the Order appealed from is affirmed, and the cause is remanded to the superior court for further proceedings.

Affirmed and remanded.

Judges VAUGHN and CLARK concur.

JOHN H. WILLIAMS v. BISCUITVILLE, INC. AND PIZZAVILLE, INC.

No. 7715SC1007

(Filed 20 March 1979)

1. **Partnership § 1.2— "managing partner" of restaurant—profit sharing—insufficient evidence to show partnership**

In an action to recover damages for breach of an alleged implied partnership agreement, evidence that plaintiff, in addition to receiving a weekly salary as manager of a restaurant, also received a share of the profits in the form of keeping whatever part of seventy percent of gross receipts that he was able to retain after paying for food purchases and employees' salaries was insufficient to make out a *prima facie* case of partnership under G.S. 59-37(4) where all the evidence showed that the profit sharing feature was only a part of his wages as an employee; furthermore, evidence that plaintiff was designated as "managing partner" was insufficient to support a finding that a partnership existed.

2. **Master and Servant § 10— discharge of restaurant manager—provision in operations manual not exclusive**

Provision of an operations manual for managers of defendant's restaurants stating that a manager could be discharged after "one verbal and one written warning" was not the exclusive way for discharging employees, since the provision was a part of a policy which was unilaterally implemented by the defendant employer and could be changed by it.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 21 September 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 19 September 1978.

The plaintiff has sued defendants Pizzaville, Inc. and its successor corporation, Biscuitville, Inc., alleging alternative claims. The plaintiff alleges he was a partner with Pizzaville, Inc. in the operation of a restaurant in Chapel Hill, North Carolina and asks for an accounting of partnership assets and for $50,000.00 in damages. In the alternative he prays for damages of $50,000.00 for breach of contract resulting from his wrongful discharge as manager of Pizzaville's Chapel Hill restaurant.

The plaintiff offered evidence that he began working for Pizzaville, Inc. as assistant manager of the Chapel Hill restaurant in 1970. Approximately six months later he was promoted to manager. In 1972 or 1973 plaintiff was designated managing partner of the restaurant and was supplied with business cards describing him as managing partner. In early 1975, an operations

manual was presented to all managing partners of Pizzaville stores. Plaintiff signed a statement at that time by the terms of which he agreed to abide by this operations manual. Among the provisions of the operations manual was the following statement: "After one verbal and one written warning, the managing partner is subject to a fine, loss of salary, or dismissal." At the time of his termination, the defendant was receiving a salary of $270.00 per week. In addition, under a profit sharing formula, the plaintiff was given seventy percent of gross sales from which he paid the employees' wages and for food purchases. He was allowed to retain whatever was left from the seventy percent after making these payments. On 21 May 1976, the plaintiff was terminated from his position as manager of the restaurant in Chapel Hill. Harold Hassenfelt, who had been vice-president of Pizzaville, Inc. and was called as a witness for the plaintiff, testified as follows:

> "Q. Did John Williams ever fail . . . did he ever violate that provision?
>
> A. He didn't make his deposit on time.
>
> I told him he had better not do it again with a verbal and written warning. I had other occasions to warn John Williams that he was not performing adequately as a store manager. It was more than one time. I threatened to fire John Williams."

At the close of the plaintiff's evidence, the court allowed the defendant's motion for a directed verdict. The plaintiff appealed.

Manning, Jackson, Osborn and Frankstone, by Frank B. Jackson, for plaintiff appellant.

Vernon, Vernon and Wooten, by John H. Vernon III and Jeffrey A. Andrews, for defendant appellee.

WEBB, Judge.

Plaintiff's Partnership Claim

[1] In this state, we have the Uniform Partnership Act. G.S. 59-36 provides:

> (a) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

G.S. 59-37 says in part:

In determining whether a partnership exists, these rules shall apply:

* * *

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

* * *

b. As wages of an employee or rent to a landlord, ...

It appears from a reading of the statutes that in order for the plaintiff to prevail there must be evidence from which the jury could conclude that plaintiff and defendants agreed "to carry on as co-owners a business for profit." A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that an inference is justified. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948). The plaintiff in this case may be said to have received a share of the profits in the form of keeping whatever part of the seventy percent of gross receipts that he was able to retain. This is "prima facie evidence that he is a partner in the business" unless he received this share of the profits as "wages of an employee." We conclude that all the evidence shows he did receive this compensation as "wages of an employee." Harold Hassenfelt, formerly a vice-president of Pizzaville, Inc. and plaintiff's supervisor, testified that the operations manual was presented to the managing partners, including plaintiff in early 1975, and told them that if they "accepted these responsibilities that they would be entitled to a secure job, fixed salary, a profit sharing plan and other fringe benefits of the company." Plaintiff testified, "As 'Managing Partner', I was compensated through a weekly salary and through profit sharing." We cannot find any evidence that the profit sharing feature of plaintiff's compensa-

tion was any more than a part of his salary. We hold the profit sharing of the plaintiff does not make a prima facie case of partnership. *See McGurk v. Moore*, 234 N.C. 248, 67 S.E. 2d 53 (1951). The fact that plaintiff was designated managing partner is not of enough legal significance to require the case to be submitted to the jury. When all the evidence shows plaintiff was an employee, his job title alone cannot change the substance of his position.

Plaintiff's Breach of Contract Claim

[2] The plaintiff contends that the operations manual became a part of his employment contract because he was induced to stay with the company by the adoption of this policy which required one verbal and one written warning before the plaintiff could be discharged. He says that since he did not receive the required warnings it was a breach of his employment contract for him to be discharged.

The testimony of Mr. Hassenfelt was that the plaintiff had received a verbal and written warning, but we do not put the decision of this case on that ground. As we read provision for discharge after "one verbal and one written warning," it is not the exclusive way for discharging employees. It was a part of a policy which was unilaterally implemented by the employer and could be changed by it. The employer could discharge plaintiff by ways other than as set forth in the policy manual.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ANDY MARTIN

No. 7830SC1089

(Filed 20 March 1979)

Criminal Law § 131.2— newly discovered evidence—statement contradicting testimony of former witness—new trial properly denied

The trial judge did not abuse his discretion in denying defendant's motion for a new trial on the ground of newly discovered evidence where such evidence consisted of a statement by defendant's partner in the crime to an

SBI agent in Georgia, and such statement was directly in conflict with the testimony of the partner's wife at trial as to how the assault took place, the people involved in the assault and the time and place of the attack.

APPEAL by defendant from *Thornburg, Judge.* Order entered 13 October 1978 in Superior Court, SWAIN County. Heard in the Court of Appeals 1 March 1979.

Defendant was indicted for first degree murder, convicted by a jury of second degree murder and given an active sentence of 50 years. Defendant appealed to this Court and no error was found in his trial. *State v. Martin,* 37 N.C. App. 233, 245 S.E. 2d 596 (1978). Petition for discretionary review was denied 29 August 1978, 295 N.C. 555, 248 S.E. 2d 733. Defendant moved for a new trial based upon newly discovered evidence. The motion was denied by Judge Thornburg and defendant appeals.

Defendant was convicted primarily on the basis of testimony of Myrtle Franklin. She testified that she saw defendant in her home on 18 June 1977 and that he struck Raymond Wiggins with his fist and kicked him two or three times. Her husband, Neville Franklin, also struck Wiggins with his fist and kicked him once. Wiggins did not fight back because he was drunk. At this point, she went into diabetic shock and did not see anything else. The body of Raymond Wiggins was found at noon the next day in an abandoned building. The cause of death was determined to be loss of blood from a ruptured liver caused by being kicked or stomped. Defendant and Neville Franklin were arrested the next day when they were observed near the abandoned building; defendant was wearing boots at the time. Neville Franklin was subsequently released and was unavailable at defendant's trial, having left the state.

Defendant's motion for a new trial is based upon the following confession given by Neville Franklin to an SBI Agent in Georgia on 30 November 1977:

> On the night of June 17 or 18, I'm not sure, but I believe it was a Saturday night . . . Raymond Wiggins and I got into an argument over something, I don't remember what, I asked Raymond Wiggins if he wanted to step outside and settle it and he said yes. Raymond Wiggins and I then went outside and walked over to the Weight Station. I hit Raymond in the

stomach and he (Raymond Wiggins) went down. I then stomped Raymond Wiggins in his stomach and chest. Raymond Wiggins never did get back up. I stomped him about 3 or 4 times and just left him in the Weight Station. Raymond Wiggins did not say anything to me after I stomped him, he just laid there.

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

Joseph A. Pachnowski, for defendant appellant.

CARLTON, Judge.

The sole question for determination is whether the trial court erred in denying defendant's motion for a new trial on the basis of newly discovered evidence.

G.S. 15A-1415 provides in pertinent part as follows:

(a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

. . . .

(6) Evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

In the case at bar, defendant has *procedurally* complied with the requirements of G.S. 15A-1415(b)(6). He has not, however, shown that the trial court abused its discretion in denying the motion on the merits.

It is well settled in this jurisdiction that a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and its order denying the motion will not be disturbed unless abuse of discretion appears. 4 Strong,

N.C. Index 3d, Criminal Law, § 131.1, p. 677; *State v. Dixon*, 259 N.C. 249, 130 S.E. 2d 333 (1963). In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that:

(1) the witness or witnesses will give newly discovered evidence;

(2) the newly discovered evidence is probably true;

(3) the evidence is material, competent and relevant;

(4) due diligence was used and proper means were employed to procure the testimony at trial;

(5) the newly discovered evidence is not merely cumulative or corroborative;

(6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and

(7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Beaver, 291 N.C. 137, 229 S.E. 2d 179 (1976); *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931).

Since it is necessary for defendant to meet *all* of the requirements enumerated above, it is unnecessary to discuss each of them. Defendant has clearly failed to meet the sixth requirement.

The affidavit of Neville Franklin is directly in conflict with the testimony of the former witness, Myrtle Franklin. His statement contradicts his wife's testimony as to how the assault took place, the people involved in the assault and the time and place of the attack. It certainly does not "pick up where" Mrs. Franklin's testimony ends, as defendant argues. The "new evidence" is clearly in conflict with the testimony of a former witness.

In *State v. Grant*, 21 N.C. App. 431, 204 S.E. 2d 700 (1974), this Court held that the trial court did not abuse its discretion in denying defendant a new trial despite his showing by affidavit that a codefendant and a person convicted as an accessory after the fact in the same robberies stated after their convictions that defendant had not taken part in the crimes for which he had been convicted.

We hold that the trial judge did not abuse his discretion in denying defendant's motion for a new trial. The decision of the trial court is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. GARFIELD JORDAN

No. 787SC954

(Filed 20 March 1979)

1. **Searches and Seizures § 43— motion to suppress—appellate review after guilty plea**

A defendant may have the trial court's ruling on his motion to suppress seized evidence reviewed on appeal even though he entered a plea of guilty to the crime arising from the possession of the seized evidence. G.S. 15A-979(b).

2. **Searches and Seizures § 15— illegal search—standing to protest**

If a defendant is aggrieved by an illegal search solely because the search produced evidence damaging to him, that search does not constitute a violation of his Fourth Amendment rights.

3. **Searches and Seizures § 15— search of passenger's pocketbook—no legitimate expectation of privacy by driver**

Defendant's motion to suppress narcotics seized from the pocketbook of a passenger in defendant's automobile was properly denied on the ground that the narcotics were not obtained in violation of defendant's constitutional rights because defendant did not assert a property interest in the passenger's pocketbook and defendant did not have a legitimate expectation of privacy in the passenger's pocketbook.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 16 May 1978 in Superior Court, NASH County. Heard in the Court of Appeals 31 January 1979.

The defendant was charged with felonious possession of heroin with intent to sell and deliver, second offense. The defendant made a pretrial motion to suppress all evidence obtained during a warrantless search of his automobile, his person and the pocketbook of a passenger in his automobile. After hearing evi-

dence on the matter, the trial court denied the defendant's motion to suppress. The defendant then entered a plea of guilty to the charge against him. Upon the defendant's plea of guilty, the trial court entered judgment sentencing him to imprisonment for a term of not less than seven nor more than ten years. From the entry of that judgment, the defendant appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Norman M. York, Jr., for the State.

Fitch and Butterfield, by Milton F. Fitch, Jr., for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the trial court's denial of his pretrial motion to suppress evidence. Although the defendant entered a plea of guilty to the crime arising from the possession of the evidence seized during the search, he may nonetheless have the trial court's ruling on his motion to suppress reviewed on appeal. G.S. 15A-979(b). We must therefore consider whether the evidence seized as a result of the search was obtained in violation of the defendant's rights.

During the hearing on the defendant's motion, the trial court heard testimony by two of the officers who had conducted the search. Their testimony tended to show that R. E. Jackson of the State Bureau of Investigation received a telephone call from a confidential informer at about 12:30 p.m. on 31 December 1977. The informer told Jackson that the defendant was bringing a quantity of heroin to Nash County and that he was expected to arrive there between 11:00 a.m. and 3:00 p.m. that day. After Jackson received the telephone call, he contacted Milton Reams, a deputy sheriff with the Nash County Sheriff's Department, and Steve Winstead, a detective with the Rocky Mount Police Department. The three officers met each other at a prearranged location and then drove to a truck stop on Interstate Highway 95 in Halifax County. After waiting there for approximately twenty to thirty minutes, they observed a car fitting the description of the defendant's car proceeding down the highway. They then followed

the car until it reached Nash County. They caused the car to stop at that time and informed the defendant who was driving that they were going to conduct an emergency search. The officers searched the car and found several pills not consisting of controlled substances scattered throughout the floorboard and in the glove compartment. A search of the defendant's person produced nothing. When the officers searched the female passenger's pocketbook, however, they found four tinfoil packets containing a white powder and a plastic bag containing a green vegetable material. These were found to be controlled substances. The defendant and the passenger were arrested.

[2] A defendant is aggrieved by the introduction of damaging evidence obtained during an unreasonable governmental search only if the search infringes upon the defendant's Fourth Amendment rights. Fourth Amendment rights are personal rights and may not be asserted vicariously. Therefore, if a defendant is aggrieved by an illegal search solely because the search produced evidence damaging to him, then that search does not constitute a violation of his Fourth Amendment rights. *Rakas v. Illinois*, --- U.S. ---, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978).

[3] Assuming arguendo that the entire search conducted by the officers in the present case was unreasonable and without lawful authority, the fruits of that search were nevertheless admissible against the defendant if they were not obtained in violation of *the defendant's* Fourth Amendment rights. The only damaging evidence found as a result of the search in the present case was obtained from the pocketbook of the female passenger in the defendant's automobile. Thus, we must determine whether the search of the female passenger's pocketbook was conducted in violation of the defendant's Fourth Amendment rights.

The defendant has not at any time asserted a property interest in the passenger's pocketbook from which the damaging evidence was taken. However, the defendant had an interest in the pocketbook legally sufficient to confer upon him the protection of the Fourth Amendment from unreasonable searches if he had a legitimate expectation of privacy in the place searched. *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967).

In *Rakas v. Illinois*, --- U.S. ---, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978), the Supreme Court of the United States indicated that the glove compartment of an automobile is not an area in which a passenger within the automobile would normally have a legitimate expectation of privacy. We think that, by analogy, *Rakas* also supports the proposition that the pocketbook of a passenger in an automobile is not an area in which the driver of the automobile would normally have a reasonable expectation of privacy. Although the defendant may have had a property interest in the contraband found in the passenger's pocketbook, the mere presence of the defendant's contraband in the place searched did not give him a reasonable expectation that the place searched would remain private.

Here the evidence in question was found in a place that was under the control of a person other than the defendant. When one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person. Therefore, we find that the defendant did not have a legitimate expectation of privacy in his passenger's pocketbook and that his motion to suppress evidence seized therefrom was properly denied on the ground that the evidence was not obtained in violation of the defendant's rights under the Fourth Amendment to the Constitution of the United States.

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

SARA H. DAVIS, ADMINISTRATRIX OF THE ESTATE OF SELENA PRESTON WHITLEY, DECEASED v. VIVIAN STEVENS BANKS AND VIERL LEVAN BANKS, JR.

No. 7828SC233

(Filed 20 March 1979)

1. Automobiles § 45— striking pedestrian—pedestrian's impaired vision—evidence not prejudicial

In an action to recover damages for the wrongful death of a pedestrian who was struck by defendants' vehicle, plaintiff was not prejudiced by the ad-

mission into evidence of records of the Buncombe County Department of Social Services pertaining to decedent's impaired vision, since that evidence did not affect the jury's determination that the female defendant was not negligent, as there was other evidence admitted without objection as to decedent's impaired vision, and the jury did not reach the question of plaintiff's contributory negligence or that of damages.

2. Automobiles § 90.7— sudden emergency—instructions proper

In an action to recover damages for the wrongful death of a pedestrian who was struck by defendants' vehicle, the trial court properly instructed on sudden emergency where the female defendant's evidence tended to show that she was driving along in a careful and prudent manner when plaintiff's intestate suddenly appeared in her lane of travel less than two car lengths away, and she applied her brakes and tried to turn to avoid striking decedent but was unable to do so.

APPEAL by plaintiff from *Baley, Judge.* Judgment entered 17 October 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 January 1979.

This is an action to recover damages for the wrongful death of Selena Preston Whitley who was killed as a result of being struck by the defendant's car as she was crossing South French Broad Avenue where it intersects with Phifer Street in Asheville. South French Broad is a two-lane through street running north and south. It is straight and inclines downward slightly from a hill some six hundred feet north of the intersection with Phifer. Phifer is a two-lane street which runs east and west, and on its western end terminates at the intersection with South French Broad. A stop sign directs traffic on Phifer to stop at the intersection. The speed limit was thirty-five miles per hour. The female defendant was driving the car owned by the male defendant. The accident occurred around 10:30 p.m. on 20 June 1974. The evidence tends to show that the defendant was proceeding south on South French Broad Avenue at a speed of twenty-five to thirty miles per hour. Her lights were on dim and, as she approached the intersection, she slowed down. She noticed two men to her left and then saw Mrs. Whitley when she was about one and a half car lengths away. She applied her brakes and tried to turn to her left but was unable to avoid striking Mrs. Whitley. She did not blow her horn. Mrs. Whitley had been walking westward on Phifer Street, was crossing South French Broad Avenue, and was within four to five feet of the west side of South French Broad Avenue when she was hit. The evidence was conflicting as to

whether Mrs. Whitley was within an imaginary crosswalk formed by the extension of the sidewalk along the southern side of Phifer Street or whether she was north of that crosswalk. The evidence disclosed that Mrs. Whitley was suffering from glaucoma.

Issues of negligence and contributory negligence were submitted to the jury. They found that the defendant was not negligent. The trial court denied the plaintiff's motions to set aside the verdict and grant a trial. Plaintiff appealed.

Morris, Golding, Blue and Philips, by Steven Kropelnicki, Jr., for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Larry McDevitt and Howard L. Gum, for defendant appellees.

VAUGHN, Judge.

[1] Plaintiff first contends that the trial court erred in admitting an exhibit of records of the Buncombe County Department of Social Services pertaining to the condition of the decedent's eyes. Plaintiff contends that this evidence was irrelevant and immaterial. Plaintiff concedes, however, that there was other evidence, admitted without objection, that tended to show that decedent was suffering from impaired vision and had undergone treatment for that condition. Even if we were to concede that some of the matters set out in the exhibit were incompetent, we would nevertheless conclude that plaintiff was not prejudiced thereby with respect to the jury's answer to the first issue—that of defendant's negligence. The jury, of course, did not reach the question of plaintiff's contributory negligence or that of damages. " '[I]n order to obtain an award for a new trial on appeal for error committed in a trial of the lower court, the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued.' " *State v. Cross*, 284 N.C. 174, 178, 200 S.E. 2d 27, 30 (1973) (quoting *State v. Cogdale*, 227 N.C. 59, 62, 40 S.E. 2d 467, 469 (1946)). This assignment of error is overruled.

[2] In another assignment of error plaintiff argues that the judge erred when he instructed the jury on the law as it applies to a motorist who is faced with a sudden emergency. Plaintiff first argues that if there was a sudden emergency, it was created

by defendant's own negligence. She further argues that she did not contend that defendant was negligent after being confronted with the emergency. The assignment of error is without merit. It is the duty of the judge to declare and explain the law arising on the evidence, including the evidence of defendant. Defendant's evidence tended to show that she was driving along in a careful and prudent manner when plaintiff's intestate suddenly appeared in her lane of travel less than two car lengths away. She applied her brakes and tried to turn to her left to avoid striking plaintiff's intestate but was unable to do so. When plaintiff's allegations and evidence are considered along with defendant's evidence, there were questions of fact for the jury as to whether defendant's negligence created the emergency as well as whether she was negligent after she was faced with the emergency. The assignment of error is overruled.

Plaintiff's final assignment of error addresses the failure of the trial judge to grant her motion to set aside the verdict and for a new trial. The denial of this motion is within the trial court's discretion and, absent a showing of an abuse of this discretion, will not be disturbed. *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JEFFREY LYNN LAMBERT

No. 7820SC947

(Filed 20 March 1979)

Criminal Law §§ 142.3, 145.5— recommendation that restitution be required for work release or parole—constitutionality of statutes

Statutes permitting a trial court which imposes an active sentence to include a recommendation for restitution or reparation as a condition of work release or parole, G.S. 148-33.2(c) and G.S. 148-57.1(c), do not unconstitutionally discriminate against indigent defendants since the Secretary of the Department of Correction and the Parole Commission are not required to follow the trial court's recommendation, and defendant's financial condition could be considered in determining whether to require restitution or reparation as a condition of work release or parole.

State v. Lambert

APPEAL by defendant from *Walker (Hal H.), Judge*. Judgment entered 2 March 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 30 January 1979.

Defendant was charged with assault with a deadly weapon with intent to kill, inflicting serious bodily injury. The State's evidence at trial tended to show that on 30 July 1977, William Brock attended a pig picking in Moore County. About 8:00 that evening, Brock observed the defendant and several other people beating up a man. Brock approached the fight, noticed the man was hurt, and told his attackers to leave him alone. The defendant, who was crouched over the victim, swung around and stabbed Brock in the hip. Brock then threw a beer bottle at the defendant but did not hit him. Brock was hospitalized for three days and underwent surgery. His medical bills amounted to $1,000.00.

The defendant's evidence tended to show that the defendant was watching the fight when he saw Brock approach. When the defendant turned to face him, Brock threw a bottle at him. The defendant ducked and hit Brock with his knife.

Defendant was convicted of assault with a deadly weapon inflicting serious bodily injury. After sentencing defendant to three years imprisonment, the trial court recommended that, as a condition of defendant's being released on work release or parole, defendant should reimburse Brock the sum of $1,000.00 for medical bills incurred. From this judgment, defendant appealed.

Attorney General Edmisten, by Associate Attorney Kaye R. Webb, for the State.

Seawell, Pollock, Fullenwider, Robbins & May, by P. Wayne Robbins, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward only one assignment of error. He contends that the trial court erred in attaching the recommendation for restitution or reparation as a condition of work release or parole. G.S. 148-33.2(c) requires a judge, upon sentencing to consider whether restitution or reparation should be imposed as a condition of attaining work release. He must indicate his decision on the order committing defendant to custody. G.S. 148-57.1(c)

governs restitution or reparation as a condition of parole and is almost identical to the provisions of G.S. 148-33.2(c).

Defendant first contends that these two statutes are confusing because they refer to G.S. 15-199(10) which has been repealed. G.S. 15-199(10) provided for restitution or reparation as a condition of probation. Defendant has not received probation, therefore, this reference to that statute does not affect him. We further note, however, that both G.S. 148-33.2(c) and G.S. 148-57.1(c) have been amended to change the reference from G.S. 15-199(10) to G.S. 15A-1343(d), the new provision governing restitution or reparation as a condition of probation. Any confusion, therefore, has been eliminated.

Defendant's main argument asserts that G.S. 148-33.2(c) and G.S. 148-57.1(c) are unconstitutional because the restitution or reparation requirement discriminates against the indigent defendant. In passing on the constitutionality of this statute, we presume that the statute is constitutional unless the contrary clearly appears. *State v. Anderson*, 275 N.C. 168, 166 S.E. 2d 49 (1969). G.S. 148-33.2(c) and G.S. 148-57.1(c) provide a framework within which provision for restitution or reparation as a condition of work release and parole can be made. The decision to recommend restitution or reparation is discretionary, and the trial court is not required to impose such a condition. G.S. 148-33.2(c) and 148-57.1(c). The Secretary of the Department of Correction and the Parole Commission are not required to follow the trial court's recommendation for restitution or reparation. *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978); G.S. 148-33.2(b) and 148-57.1(b). Defendant's financial status at the time he is eligible for work release or parole could be a reason to disregard the trial court's recommendation. Since the decision to impose restitution or reparation is discretionary with the trial court, the Secretary and the Parole Commission, and since indigency could be considered in making that decision, the statute is not unconstitutional as a denial of equal protection.

We note, in passing, that restitution to a party injured by criminal activity as a condition of probation has been authorized in North Carolina by judicial decisions and statutes. *State v. Simmington*, 235 N.C. 612, 70 S.E. 2d 842 (1952); *State v. Gallamore*, 6 N.C. App. 608, 170 S.E. 2d 573 (1969); G.S. 15A-1343(d). Restitution

may also be required as a condition of probation under federal law. 18 U.S.C. § 3651 (1969); *United States v. Taylor*, 305 F. 2d 183 (1962). Since this condition may be imposed for probation, it follows that it may be imposed for work release and parole. We also note that G.S. 148-33.1(f), governing work release privileges, provides that wages earned by a prisoner can be used to make restitution or reparation to an aggrieved party for damages caused by the criminal activity. Defendant's appeal fails to disclose prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

OSCAR N. HARRIS AND EDDIE PAT DRAUGHON, PARTNERS D/B/A NATIONAL ESTATES v. JAMES W. LATTA AND GLADYS H. LATTA

No. 7816SC460

(Filed 20 March 1979)

Vendor and Purchaser § 2— option to purchase—notice required

Plaintiffs who gave defendants notice of their intent to exercise an option to purchase property on 15 January 1976 failed to comply with the notice requirement of the agreement which provided for notice "at least sixty (60) days prior to March 15, 1976," since the inclusion of the expression "at least" denoted sixty *full* days of notice *prior to* 15 March 1976, and that would have required plaintiffs to give notice of their intent to purchase no later than 14 January 1976.

Judge WEBB dissenting.

APPEAL by plaintiffs from *Hobgood, Judge.* Judgment entered 16 January 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals 28 February 1979.

Plaintiffs brought this civil action seeking specific performance of an option to purchase certain land and improvements owned and leased to plaintiffs by defendants, which option was contained in the lease entered into by the parties 14 March 1974. Defendants declined to perform under the option agreement, contending that plaintiffs failed to give adequate notice of the exercise of the option under its terms. The trial court, at the close of plaintiffs' evidence, directed verdict in favor of defendants. From

judgment dismissing their action, plaintiffs appeal, assigning error to the entry of that judgment.

Bryan, Jones, Johnson, Hunter & Greene, by James M. Johnson, for the plaintiffs.

Johnson and Johnson, by Sandra L. Johnson, for the defendants.

MARTIN (Robert M.), Judge.

The only question this appeal presents is whether, on the undisputed evidence before him, the trial court correctly construed the notice requirement of the option agreement. That requirement specified that notice of intent to exercise the purchase option must be given to the lessors "at least sixty (60) days prior to March 15, 1976." Notice was given by plaintiffs to defendants on 15 January 1976.

We are of the opinion that this case presents a question of construction and does not require the promulgation of a new rule of law, despite the fact that no precedent on point is contained within our case law. We affirmed the ruling of the trial court, as it appears to us that the option, in specifying "at least sixty (60) days" notice, intended by the inclusion of the expression "at least" to denote sixty *full* days of notice *prior to* 15 March 1976. As A.D. 1976 was a leap year, that would have required plaintiffs to give notice of their intent to purchase the property under the option no later than midnight of 14 January 1976. We decline to decide what result might have been reached had the expression "at least" been absent from the agreement. Nor do we find it appropriate at this time to implement as a rule of contract law any analogies to election law questions presented in the cases cited by the parties. As the right to purchase property under an option agreement is a substantive property right, analogy to Rule 6(a) of the North Carolina Rules of Civil Procedure is inappropriate, as a procedural rule is always powerless to vest or divest a property right in a party. Accordingly, the ruling below is affirmed.

Affirmed.

Judge MITCHELL concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. In this case the plaintiffs had an option to purchase real estate from the defendants. The option said:

> "Said option shall be exercised by lessee giving written notice to lessors of his intent to purchase said leased property at least sixty (60) days prior to March 15, 1976."

All the evidence shows the plaintiffs gave written notice to defendants on the sixtieth day before 15 March 1976. I believe persons of ordinary understanding would say that day is sixty days before 15 March 1976 or sixty days prior to 15 March 1976. I do not believe the words mean that sixty full days had to elapse after the giving of notice in order for the notice to be timely given. The addition of the words "at least" merely means that the plaintiffs could have given notice of exercising the option earlier than sixty days before 15 March 1976.

IN THE MATTER OF JERRY WAYNE VINSON

No. 7818DC1096

(Filed 20 March 1979)

Infants § 18— juvenile delinquency proceeding—sufficient evidence of identity

Testimony by the prosecuting witness in a juvenile delinquency proceeding as to the identity of respondent as the person who robbed and assaulted her was sufficient to overcome respondent's motion for nonsuit where she stated that respondent looked the same in the face as the boy who attacked her although he seemed a little smaller than her assailant.

Judge WEBB dissenting.

APPEAL by respondent from *Pfaff, Judge.* Judgment entered 5 July 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 2 March 1979.

This juvenile court delinquency proceeding was commenced against the respondent, a thirteen-year-old boy, by verified petition filed 7 June 1978 in which it is alleged that respondent is

delinquent in that on 8 May 1978 he did unlawfully steal $178.00 from 502 Garrett Street in Greensboro, when Maude Vaden was present and in attendance. Respondent committed this act by means of an assault consisting of having in his possession and threatening the use of a handgun whereby the life of Maude Vaden was threatened and endangered in violation of G.S. 14-87. The petition was signed by J. W. Allen of the Greensboro Police Department. Summons was duly issued and served.

Evidence presented at the hearing tended to show that respondent went to the home of Mrs. Maude Vaden on 10 May 1978 and asked for a drink of water. After Mrs. Vaden let him in, the respondent pulled a gun on her, blindfolded and tied her up, beat her and took almost $200.00 from her pocketbook. Respondent threatened to kill Mrs. Vaden, exposed himself to her and cut the telephone lines in her house. On cross-examination Mrs. Vaden stated that respondent seemed a little smaller than the boy that attacked her but on redirect examination she stated that respondent looked the same in the face as the boy that she saw on that day. No evidence was offered by the respondent.

The court adjudicated the child to be a delinquent and proceeded with the disposition of the case. The State presented the testimony of Detective Allen as to other charges which had been lodged against the respondent. The court found that the respondent's behavior constituted a severe threat to persons and property in the community and that respondent would not adjust in his own home on probation or other services and therefore the court committed him to the Department of Human Resources, Youth Services Division, until his eighteenth birthday and that he be given extensive psychological evaluation and treatment. From this order, respondent appeals.

Attorney General Edmisten, by Associate Attorney Steven Mansfield Shaber, for the State.

Public Defender Wallace C. Harrelson, for the respondent.

MARTIN (Robert M.), Judge.

The question dispositive of this case is whether the court erred in denying defendant's motion for judgment of nonsuit. Defendant does not contest the proof of a crime against Mrs. Vaden.

He argues that Mrs. Vaden's testimony identifying him as her robber and assailant was insufficient to survive his motion for nonsuit. On such motion the evidence is taken in the light most favorable to the State. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Hewitt*, 34 N.C. App. 109, 237 S.E. 2d 311 (1977).

The State's evidence shows that Mrs. Vaden identified the defendant as the person who assaulted her and took her money. Mrs. Vaden's evidence further shows that the defendant used a gun during the robbery. On cross-examination, Mrs. Vaden said, "[In] the face [appellant], looks just like the boy [that robbed me]. Well, it [appellant] looks just like him [the robber] in the face . . .; I could be wrong, but in the face, that's [appellant is] the boy." On redirect examination, Mrs. Vaden said, "Yes, he [appellant] looks the same in the face as the boy that I saw that day." This evidence will survive a motion for nonsuit.

In the trial we find no prejudicial error.

No error.

Judge MITCHELL concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority because I do not feel the prosecuting witness sufficiently identified the respondent to support a finding that he was the person who assaulted her.

HOUSING AUTHORITY OF THE CITY OF RALEIGH v. RITA TRUESDALE

No. 7810DC564

(Filed 20 March 1979)

Appeal and Error § 14— late notice of appeal—appeal dismissed

Plaintiff's appeal is dismissed where she entered notice of appeal at least fourteen days after the entry of judgment.

Housing Authority v. Truesdale

APPEAL by defendant from *Winborne, Judge.* Judgment entered 21 February 1978 in District Court, WAKE County. Heard in the Court of Appeals 8 March 1979.

This is a civil action wherein plaintiff seeks summary ejectment against defendant for failure to make rental payments on time. Defendant answered and, after discovery, moved for summary judgment. Plaintiff made cross motion for summary judgment. The trial court entered judgment for plaintiff. The judgment is dated 21 February 1978 and stamped filed 22 February 1978. Defendant entered notice of appeal 8 March 1978. No other notice of appeal is in the record.

Allen, Steed and Allen, by Noah H. Huffstetler III, for plaintiff appellee.

Wake County Legal Aid Society, by G. Nicholas Garin and Gregory C. Malhoit, for defendant appellant.

MARTIN (Harry C.), Judge.

An appeal in a civil action, when taken by written notice, must be taken within ten days after entry of the judgment. N.C. Gen. Stat. 1-279(c); Rule 3(c), North Carolina Rules of Appellate Procedure. The record before us discloses defendant's appeal was taken 8 March 1978. This was at least fourteen days after the entry of the judgment. Where the appeal is taken more than ten days after the entry of judgment, and the time within which appeal can be taken is not otherwise tolled as provided in N.C.G.S. 1-279 and Rule 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. *Giannitrapani v. Duke University,* 30 N.C. App. 667, 228 S.E. 2d 46 (1976); *Brooks v. Matthews,* 29 N.C. App. 614, 225 S.E. 2d 159 (1976); *Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87 (1966); *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379 (1957).

Appeal dismissed.

Judges VAUGHN and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 MARCH 1979

BANK v. RECORDS No. 785DC430	New Hanover (77CVD1971)	Affirmed
BENTON v. CRAIG No. 7819DC454	Cabarrus (77CVD0814)	Affirmed
FEDICK v. FEDICK No. 785DC431	New Hanover (76CVD1034)	Affirmed
JACKSON v. CHADWICK No. 7821DC424	Forsyth (75CVD2807)	Affirmed
JACKSON v. WOODS No. 7828SC523	Buncombe (76CVS1409)	Affirmed
MOORE v. MOORE No. 7827DC480	Gaston (75CVD1240)	Affirmed
PARKER v. BROWN No. 7820SC304	Richmond (75CVS159)	Vacated
PATE v. ALEXANDER No. 787SC355	Wilson (75CVS206)	Affirmed
STATE v. BAILEY No. 787SC803	Wilson (75CR5812)	No Error
STATE v. BRAWNER No. 7811SC989	Harnett (78CR3565)	No Error
STATE v. LAWRENCE No. 782SC969	Martin (77CRS3438)	New Trial
STATE v. LYALL No. 7822SC1002	Alexander (77CR321)	No Error
STATE v. LYONS No. 786SC1171	Halifax (78CR0264)	No Error
STATE v. MOORE No. 787SC1009	Edgecombe (78CRS4757) Nash (77CRS2004)	Affirmed
STATE v. OXENDINE No. 7816SC1137	Robeson (78CR14385)	No Error
STATE v. PARKER No. 7819SC964	Rowan (78CRS2343)	Dismissed
STATE v. PHILLIPS No. 7819SC968	Randolph (77CRS10962)	No Error

STATE v. PORTER No. 7826SC1105	Mecklenburg (78CRS2923) (78CRS2924)	No Error
STATE v. ROBERTSON No. 7817SC1063	Rockingham (77CR4065)	No Error
STATE v. STEVENS No. 7820SC1046	Stanly (78CRS2270)	No Error
STATE v. WADDELL No. 7818SC1059	Guilford (77CRS18012) (78CRS17030) (78CRS17031)	No Error
STATE v. WITHERSPOON No. 7821SC1101	Forsyth (78CR14058)	No Error
WALSER v. WALSER No. 7822DC509	Davidson (77CVD781)	Affirmed

Church v. State

HERITAGE VILLAGE CHURCH AND MISSIONARY FELLOWSHIP, INC. PLAINTIFF, THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, INTERVENING PLAINTIFF v. THE STATE OF NORTH CAROLINA, RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA; SARAH T. MORROW, SECRETARY OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; AND PETER S. GILCHRIST III, DISTRICT ATTORNEY FOR THE 26TH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, DEFENDANT-APPELLANTS

No. 7826SC769

(Filed 3 April 1979)

1. **Constitutional Law § 22; Charities and Foundations § 2— religious organization—solicitation of funds—protection of First Amendment**

The solicitation of funds by plaintiff religious organizations is a religious activity protected by the First Amendment.

2. **Constitutional Law § 22— regulation of religious activity**

Even though an activity is religious, the State may regulate it if the regulation does not: (1) involve a religious test; (2) unreasonbly burden or delay the religious activity; or (3) discriminate against one because he is engaged in an activity for a religious purpose.

3. **Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—unconstitutional prior restraint on religion**

Provisions of the Solicitation of Charitable Funds Act which require religious organizations soliciting contributions within the State to obtain a license to solicit from the Secretary of the Department of Human Resources, G.S. 108-75.6, and which give the Secretary the discretion to revoke, suspend or deny issuance of a license upon finding that an unreasonable percentage of the contributions has not been or will not be applied to a religious purpose, G.S. 108-75.18(4), constitute a prior restraint on the exercise of religion and violate the First and Fourteenth Amendments to the U. S. Constitution and Art. I, §§ 13 and 19 of the N. C. Constitution.

4. **Constitutional Law § 7.1; Charities and Foundations § 2— Solicitation of Charitable Funds Act—impermissible delegation of legislative power**

Provisions of the Solicitation of Charitable Funds Act which give the Secretary of the Department of Human Resources authority to revoke, suspend or deny a license if he finds that the applicant is or has been engaged in a fraudulent transaction, a solicitation would be a fraud upon the public, or an unreasonable percentage of contributions has not been or will not be applied to a charitable purpose, G.S. 108-75.18(2), (3) and (4), constitute an impermissible delegation of legislative powers in violation of Art. I, § 6 and Art. II, § 1 of the N. C. Constitution, since no adequate guiding standards are provided to control the Secretary's determination.

5. Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—exemptions of certain religious organizations—violation of Establishment of Religion Clause

The statute exempting organizations which are established for religious purposes or which serve religion by the preservation of religious rights from obtaining a license to solicit funds except when engaged in secular activities or when the organization derives its support primarily from contributions solicited from persons other than its own members, G.S. 108-75.7(a)(1), violates the Establishment of Religion Clause of the First Amendment of the U. S. Constitution, since the effect of the statute is to require all nondenominational ministries to obtain a license while the traditional denominational churches are exempted from obtaining a license.

6. Constitutional Law §§ 20, 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—exemptions—denial of equal protection

Provisions of G.S. 108-75.7(a)(1), (5), (7) and (8) which exempt from the licensing requirements of the Solicitation of Charitable Funds Act religious organizations which solicit primarily from their own members, organizations which solicit solely from their own members, local posts of veterans' organizations, fraternal beneficiary societies, and certain nonprofit community, civic and garden clubs violate the Equal Protection Clause of the U. S. Constitution and Art. I, §§ 13 and 19 of the N. C. Constitution because they (a) are arbitrary and irrational, (b) impermissibly infringe upon First Amendment freedoms, and (c) discriminate against preferred freedoms of nondenominational religious groups while favoring secular groups.

7. Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—limitation on fund-raising expenses of religious organizations—violation of First Amendment

Provisions of G.S. 108-75.18(6) permitting the Secretary of the Department of Human Resources to revoke, suspend or deny issuance of a license to solicit funds to a religious organization if he finds that the organization's solicitation and fund-raising expenses will exceed 35% of the total monies raised by solicitation or fund-raising activities violates freedoms protected by the First Amendment of the U. S. Constitution.

8. Constitutional Law § 23; Charities and Foundations § 2— Solicitation of Charitable Funds Act—denial of license to person enjoined in another state—denial of due process

The provisions of G.S. 108-75.20(h)(2) prohibiting persons from soliciting funds in North Carolina if they have ever been enjoined from soliciting in any other state violates the Due Process Clauses of the U. S. and N. C. Constitutions in that it denies the opportunity to solicit on the basis of a permanent and irrebuttable presumption of unfitness when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

9. Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—religious organization soliciting from own "members"—exemption void for vagueness

Provisions of G.S. 108-75.7(a)(1) and (5) which allow licensing exemptions to religious organizations that solicit funds primarily or entirely from their own "members" are void for vagueness since the term "members" is not defined and men of common intelligence must necessarily guess at its meaning and differ as to its application.

Judge MITCHELL concurring.

APPEAL by defendants from *Ervin, Judge.* Judgment entered 27 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 January 1979.

Plaintiff Heritage Village Church and Missionary Fellowship (hereinafter referred to as Heritage Village) filed a complaint on 17 August 1977 seeking a determination of the validity of G.S. 108-75.1 *et seq.*, the Solicitation of Charitable Funds Act (hereinafter cited as the Act), and a preliminary injunction enjoining defendants from enforcing the provisions of the Act against them. Plaintiff Heritage Village is a nonprofit corporation engaged in substantial activity in the State of North Carolina in pursuit and furtherance of the promotion and advocacy of the Christian religion. Plaintiff Heritage Village produces television and radio communications and programs of a religious nature and derives the majority of its financial support from contributions addressed to members of its radio and television audience. Plaintiff Heritage Village alleged that as applied to it, the provisions of the Act violated the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 1, 13, 14, and 19 of the Constitution of North Carolina. Subsequently, plaintiff Heritage Village amended its complaint and alleged:

> " '7. That the Act, and more particularly, but without limitation, the provisions thereof hereinafter mentioned, both upon its face and as applied to this plaintiff, is unconstitutional and void, in that:
>
> 'a. The Act nowhere defines the term "members" as used in GS 108-75.7(a)(1), thereby depriving plaintiff of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 19, of the Constitution of North Carolina.

'b. GS 108-75.7(a)(1) purports to exempt from the licensing requirements of the Act organizations established for "religious purposes" as defined by GS 108-75.3(17), thereby creating an establishment of religion and denying to plaintiff the equal protection of the laws, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 13 and 19, of the Constitution of North Carolina.

'c. GS 108-75.7(a)(1) purports to exempt from the licensing requirements of the Act only such religious organizations as derive their financial support primarily from contributions solicited from their own members, thereby creating an establishment of religion and denying to plaintiff the equal protection of the law, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 13 and 19, of the Constitution of North Carolina.

'd. GS 108-75.7(a)(8) and (9) purport to exempt certain non-religious organizations from the licensing requirements of the Act, without regard to the source of their financial support, thereby denying plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 19, of the Constitution of North Carolina.

'e. The Act, taken as a whole, requires plaintiff to apply for a license as a prerequisite to solicitation of contributions for its religious endeavors, thereby denying to plaintiff the right of free speech and interfering with the free exercise of religion, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 13 and 14, of the Constitution of North Carolina.

'f. GS 108-75.7(a)(1) requires religious organizations to apply for a license with respect to secular activities, as defined by GS 108-75.3(21), thereby interfering with the free exercise of religion, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Section 13, of the Constitution of North Carolina.

'g. GS 108-75.18(2), (3) and (4) authorize and require defendant Secretary and her successors to revoke, suspend or deny a license upon a finding that the applicant has engaged in a fraudulent transaction or enterprise or that a solicitation would be a fraud upon the public, or upon a finding that an unreasonable percentage of contributions solicited will not be applied to a charitable purpose, without providing any standards or guidelines to be followed in making such findings, in violation of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 19, of the Constitution of North Carolina.

'h. GS 108-75.18(4) authorizes and requires the defendant Secretary and her successors to revoke, suspend or deny a license upon a finding that an unreasonable percentage of the contributions solicited will not be applied to a charitable purpose, including a religious purpose, thereby giving defendant Secretary the discretion to determine what is a religious purpose, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 13 and 19, of the Constitution of North Carolina.

'i. GS 108-75.18(6) authorizes and requires defendant Secretary and her successors to revoke, suspend or deny a license upon a finding that the expenses of solicitation and fund raising will exceed 35% of the total contributions raised, in violation of the First and Fourteenth Amendments to the Constitution of the United States and of Article I, Sections 1, 13, 14 and 19, of the Constitution of North Carolina.'

And the plaintiff further moves the Court for leave to amend its Complaint by inserting a Paragraph 7A, to immediately follow Paragraph 7 and immediately precede Paragraph 8, said Paragraph 7A to read as follows:

> '7A. That in the alternative to the foregoing allegations, plaintiff alleges that it derives a substantial majority of its financial support from contributions solicited from its own members within the meaning of said term as used in GS 108-75.7(a)(1), and therefore is exempt from the licensing requirements of the Act; but that the defendants have denied said exempt

status to plaintiff and plaintiff, therefore, desires that the Court find, conclude and declare that it is so exempt.' "

On 20 October 1977, plaintiff Holy Spirit Association for the Unification of World Christianity (hereinafter referred to as Holy Spirit Association) filed a complaint seeking declaratory and injunctive relief from enforcement of the Act on the grounds that the Act violated the Constitution of the United States and the Constitution of North Carolina. Plaintiff Holy Spirit Association alleged that:

"(a) The Act [Sec 108-75.7(6)-(8)] exempts from its licensing provisions certain secular organizations (i.e., garden clubs) without regard to whether their financial support is derived primarily from contributions solicited from members or non-members. At the same time, the Act [Sec 108-75.7(a)(1)] exempts from its licensing provisions all religious corporations except those deriving financial support primarily from contributions solicited from non-members. These provisions taken together violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina on their face and as applied because—

(i) They establish an arbitrary and unreasonable classification between similarly-financed secular and religious organizations; and

(ii) They establish an arbitrary and unreasonable classification between religious organizations based upon their source of financial support.

(b) The Act [Sec 108-75.18(4)] authorizes the Secretary to deny, revoke or suspend the license for public solicitation of any charitable organization, upon a finding that an unreasonable percentage of the contributions received are not applied for a charitable purpose, including a religious purpose. This provision violates the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina on its face and as applied because it requires

the Defendant Secretary to determine whether the use to which solicited contributions are applied is a 'religious purpose.'

(c) The Act [Sec 108-75.18(6)] authorizes the Secretary to deny, revoke or suspend the license for public solicitation of any charitable organization upon a finding that the solicitation and fund-raising expenses will exceed 35% of the total contributions. This provision violates the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina on its face and as applied because it places a fixed percentage limit on the costs of solicitation of a religious organization.

(d) The Act [Sec 108-75.20(h)] forbids any person—and in certain circumstances organizations—from soliciting within North Carolina if he has been convicted in any jurisdiction of any felony unless his civil rights have been restored or if he has been prohibited from soliciting in any other jurisdiction unless the Secretary determines in writing that he is presently entitled to solicit in the other jurisdiction. This provision violates the First and Fourteenth Amendments to the Constitution of the United States and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina on its face and as applied because the standards for excluding persons from soliciting within North Carolina bear no reasonable relationship to their qualifications to solicit and because it establishes an irrefutable presumption that such persons are necessarily unfit to solicit charitable contributions in North Carolina.

11. The Act [Sec 108-75.22] provides for civil and criminal sanctions against religious corporations which violate the Act."

Plaintiff Holy Spirit Association is a Christian church which engages in fund-raising activities in North Carolina and elsewhere by soliciting money from members and nonmembers alike. Approximately eighty percent of plaintiff Holy Spirit Association's income is obtained from solicitation of nonmembers.

Defendants denied the unconstitutionality of the Act and sought preliminary injunctions restraining plaintiffs from solicit-

ing contributions from persons other than their own members until they filed applications for a license to solicit as required by the Act. On 28 March 1978, defendants and intervening plaintiff Holy Spirit Association respectively moved for summary judgment. On 25 April 1978, plaintiff Heritage Village moved for summary judgment. The trial court, in its judgment filed 27 June 1978, allowed summary judgment for plaintiffs.

Defendants appealed.

Attorney General Edmisten, by Special Deputy Attorney General William F. O'Connell and Assistant Attorney General Robert R. Reilly, for defendant appellants.

Wardlow, Knox, Knox, Robinson & Freeman, by H. Edward Knox and John S. Freeman, for Heritage Village Church and Missionary Fellowship, Inc., plaintiff appellee.

Melrod, Redman & Gartlan, by Dorothy Sellers and Roberta Colton; Chambers, Stein, Ferguson & Becton, by Jonathan Wallas and Louis L. Lesesne, Jr., for Holy Spirit Association for the Unification of World Christianity, intervening plaintiff appellee.

ERWIN, Judge.

[1] We note at the outset that plaintiffs' solicitation of funds is a religious activity protected by the First Amendment.

[2] In *Murdock v. Pennsylvania*, 319 U.S. 105, 110-11, 87 L.Ed. 1292, 1297, 63 S.Ct. 870, 146 A.L.R. 81 (1943), the United States Supreme Court, in striking down a license tax on the sale of religious tracts, stated:

> "The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated in *Jones v. Opelika, supra* (316 US p. 597, 86 L ed 1702, 62 S Ct 1231, 141 ALR 514), that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds,' it is proper for the state to charge 'reasonable fees for the privilege of canvassing.' Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in *Jamison v. Texas,*

> 318 US 413, 417, ante, 869, 873, 63 S Ct 669. 'The state can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have "a civic appeal, or a moral platitude" appended. *Valentine v. Chrestensen*, 316 US 52, 55, 86 L ed 1262, 1265, 62 S Ct 920. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be guaged by standards governing retailers or wholesalers of books. . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern."

The Supreme Court recognized the need for a religious organization to raise funds in order to remain an ongoing concern. Even though an activity is religious, the State may regulate it if the regulation does not: (1) involve a religious test; (2) unreasonably burden or delay the religious activity, *Cantwell v. Connecticut*, 310 U.S. 296, 305, 84 L.Ed. 1213, 1218, 60 S.Ct. 900, 128 A.L.R. 1352 (1940); or (3) discriminate against one because he is engaged in an activity for a religious purpose. *Prince v. Massachusetts*, 321 U.S. 158, 177-78, 88 L.Ed. 645, 658-59, 64 S.Ct. 438, *reh. denied*, 321 U.S. 804, 88 L.Ed. 1090, 64 S.Ct. 784 (1944), (Jackson, J., concurring in result, Roberts, J. and Frankfurter, J., concurring). It is with these principles in mind that we examine the Act before us.

G.S. 108-75.6 of the Solicitation of Charitable Funds Act requires charitable organizations which intend to solicit contributions within the State or have funds solicited in the State on their behalf to file an application for a license to solicit. *See* G.S. 108-75.6.

Under G.S. 108-75.18, the Secretary of the Department of Human Resources must revoke, suspend or deny issuance of a license if he finds:

"(2) The applicant is or has engaged in a fraudulent transaction or enterprise.

(3) A solicitation would be a fraud upon the public.

(4) An unreasonable percentage of the contributions solicited, or to be solicited, is not applied, or will not be applied to a charitable purpose.

(5) The contributions solicited, or to be solicited, are not applied, or will not be applied to the purpose or purposes as represented in the license application.

(6) Solicitation and fund-raising expenses (including not only payments to professional solicitors, but also payments to professional fund-raising counsel, and internal fund-raising and solicitation salaries and expenses) during the year immediately preceding the date of application have exceeded, or for the specific year in which the application is submitted will exceed, thirty-five percent (35%) of the total moneys, pledges, or other property raised or received or to be raised or received by reason of any solicitation and/or fund-raising activities or campaigns."

G.S. 108-75.7(a) in pertinent part provides:

"§ 108-75.7. *Exemptions from licensing.*—(a) The following persons shall be exempt from the licensing provisions of this Part:

(1) A religious corporation, trust, or organization incorporated or established for religious purposes, or other religious organizations which serve religion by the preservation of religious rights and freedom from persecution or prejudice or by the fostering of religion, including the moral and ethical aspects of a particular religious faith: Provided, however, that such religious corporation, trust or organization established for religious purposes shall not be exempt from filing a license application with respect to

secular activities, nor shall such religious corporation, trust or organization established for religious purposes be exempt from filing a license application if its financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or recorded religious materials. . . .

* * *

(5) Organizations which solicit only within the membership of the organization by the members thereof.

* * *

(7) A local post, camp, chapter, or similarly designated element, or a county unit of such elements, of a bona fide veteran's organization which issues charters to such local elements throughout this State; a bona fide organization of volunteer firemen; a bona fide ambulance or rescue squad association; fraternal beneficiary societies, orders or associations operating under the lodge system; or bona fide auxiliaries or affiliates of such organizations: Provided that all of the fund-raising activities are carried on by members of such organizations or of auxiliaries or affiliates thereof, and such members receive no compensation directly or indirectly therefor.

(8) Any nonprofit community club, civic club, garden club, or other similar civic group organized and in existence for more than two years, with no capital stock or salaried executive employees, officers, members or agents, with at least 10 members with annual dues collected of not less than five dollars ($5.00) per member, in which all of the funds collected, less reasonable expenses, are disbursed pursuant to the directions of the membership or the board of directors, and with the membership being furnished at least one written report each year by the directors as to its charitable activities."

Thus, the specified organizations are exempt from complying with the licensing provisions of the Act. G.S. 108-75.3(17) defines religious purposes as follows: " 'Religious purposes' shall mean

maintaining or propagating religion or supporting public religious services, according to the rites of a particular denomination." Nowhere in the Act is the term, "members," as used in G.S. 108-75.7(a)(1), defined.

Finally, G.S. 108-75.20(h)(2) prohibits a person or an organization of which such person is an officer, professional fund-raising counsel, or professional solicitor from soliciting if such person has been enjoined by any court or otherwise prohibited from soliciting in any jurisdiction, unless the Secretary shall first determine in writing that such person is entitled to solicit in such jurisdiction at the time of soliciting within this State. *See* G.S. 108-75.20(h)(2). Defendants contend that the Solicitation of Charitable Funds Act is consistent with the First and Fourteenth Amendments of the United States Constitution and the Constitution of North Carolina. With this contention, we do not agree.

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, 128 A.L.R. 1352 (1940); *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149 (1937), *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969); *In re Williams*, 269 N.C. 68, 152 S.E. 2d 317, *cert. denied*, 388 U.S. 918, 18 L.Ed. 2d 1362, 87 S.Ct. 2137 (1967).

In *Cantwell v. Connecticut, Id.* at 301-02, 84 L.Ed. at 1217, 60 S.Ct. at 902, 128 A.L.R. 1352 (1940), the United States Supreme Court was presented with a similarly worded statute:

Connecticut Statute	N. C. Statute
" 'No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the	"§ 108-75.6. *Application for licensing.*—(a) Every charitable organization, except as otherwise provided in this Part, which intends to solicit contributions within the State or have funds solicited on its behalf, shall, prior to any solicitation, file

> county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council.
>
> Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. . . .' "

an application with the Department upon forms prescribed by it for a license to solicit."

"§ 108-75.18. *Denial, suspension or revocation of license.*—The Secretary shall revoke, suspend or deny issuance of a license to a charitable organization, professional fund-raising counsel or professional solicitor at any time upon a finding that:

* * *

(4) An unreasonable percentage of the contributions solicited, or to be solicited, is not applied, or will not be applied to a charitable purpose."

[3] The Supreme Court held that the statute as applied and as construed deprived the appellants in *Cantwell v. Connecticut, supra,* of their liberty without due process of law. In *Cantwell v. Connecticut, Id.* at 305, 84 L.Ed. at 1218, 60 S.Ct. at 904, 128 A.L.R. 1352 (1940), the Supreme Court noted:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a

> religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."

Our Solicitation of Charitable Funds Act contains this same flaw. Under G.S. 108-75.18(4), the Secretary must revoke, suspend, or deny issuance of a license if he finds that an unreasonable percentage of the contributions solicited, or to be solicited, is not applied, or will not be applied to a "charitable purpose." *See* G.S. 108-75.18(4). G.S. 108-75.3(2) defines a "charitable purpose" so as to include a religious purpose. G.S. 108-75.18(4) allows the Secretary to withhold his approval of a license if he determines the purpose for which the money is expended is not a religious one. This exercise of discretion constitutes a prior restraint on the exercise of religion and violates the First and Fourteenth Amendments of the United States Constitution and Sections 13 and 19 of Article I of our State Constitution. *See Cantwell v. Connecticut, supra; Intern. Soc. for Krishna Consciousness v. Rochford,* 425 F. Supp. 734 (N.D. Ill. 1977); *Cf. Schneider v. Irvington,* 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1939). Defendants' contention that the Secretary's discretion is subject to judicial correction in an administrative hearing does not remedy the evil. As Mr. Justice Roberts said in *Cantwell v. Connecticut,* 310 U.S. at 306, 84 L.Ed. at 1219, 60 S.Ct. at 904, 128 A.L.R. 1352 (1940):

> "Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."

Article I, § 6 of our State Constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

Article II, § 1 of our State Constitution provides: "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."

The effect of these two provisions in our State Constitution is to elucidate the circumstances in which delegation of legislative powers is permissible. In *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 60, 74 S.E. 2d 310, 316 (1953), our Supreme Court set forth the law governing such delegation:

> "1. *The question of delegation of legislative power.*—It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative department, that (except when authorized by the Constitution, as is the case in reference to certain lawmaking powers conferred upon municipal corporations usually relating to matters of local self-government, Const., Articles VII, VIII, and IX; *Provision Company v. Daves*, 190 N.C. 7, 128 S.E. 593), the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body. 11 Am. Jur., Constitutional Law, Sec. 214. See also *Motsinger v. Perryman*, 218 N.C. 15, 20, 9 S.E. 2d 511; *S. v. Curtis*, 230 N.C. 169, 52 S.E. 2d 364, and cases there cited.
>
> However, it is not necessary for the Legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. *Provision Company v. Daves, supra.* Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it.
>
> Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate

guiding standards are laid down, is permissible under certain circumstances. 11 Am. Jur., Constitutional Law, Sec. 234."

[4] Sections (2), (3), and (4) of G.S. 108-75.18 transgress this line of demarcation. The Legislature leaves to the absolute discretion of the Secretary the determination of when a license is to be issued, revoked, or suspended. No adequate guiding standards are provided to control his determinations. This the Legislature may not do. *See Harvell v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 699, 107 S.E. 2d 549 (1959).

In *Harvell v. Scheidt, Comr. of Motor Vehicles, supra*, our Supreme Court invalidated G.S. 20-16(a)(5) because it contained no fixed standard or guide for the Department of Motor Vehicles in determining whether or not a driver is an *habitual violator* of the traffic laws. For the same reasons, we hold that Sections (2), (3), and (4) of G.S. 108-75.18 are invalid. To hold otherwise would allow the Secretary's exercise of his determination to serve as a prior restraint on the exercise of plaintiffs' constitutional rights. This our Constitution forbids.

[5] G.S. 108-75.7(a)(1) provides:

"§ 108-75.7. *Exemptions from licensing.*—(a) The following persons shall be exempt from the licensing provisions of this Part:

(1) A religious corporation, trust, or organization incorporated or established for religious purposes, or other religious organizations which serve religion by the preservation of religious rights and freedom from persecution or prejudice or by the fostering of religion, including the moral and ethical aspects of a particular religious faith: Provided, however, that such religious corporation, trust or organization established for religious purposes shall not be exempt from filing a license application with respect to secular activities, nor shall such religious corporation, trust or organization established for religious purposes be exempt from filing a license application if its financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or recorded religious materials."

The statute exempts those religious organizations which are established for *religious purposes* or which serve religion by the preservation of religious rights from obtaining a license to solicit. If such organization established for religious purposes engages in *secular activities* or derives its support *primarily* from contributions solicited from persons *other than its own members*, excluding sales of printed or recorded religious materials, the licensing exemption does not apply.

G.S. 108-75.3(17) provides:

> "§ 108-75.3. *Definitions.*—Unless a different meaning is required by the context, the following terms as used in this Part shall have the meanings hereinafter respectively ascribed to them:
>
> * * *
>
> (17) 'Religious purposes' shall mean maintaining or propagating religion or supporting public religious services, according to the rites of a particular denomination."

Plaintiffs have a broad-based, nondenominational ministry which does not adhere to the "rites of a particular denomination." The effect of G.S. 108-75.7(a)(1) is to require all nondenominational ministries to obtain a license before they may solicit, while the traditional denominational church is exempted from obtaining a license. Appellees contend that G.S. 108-75.7(a)(1) creates an establishment of religion and denies them equal protection of the laws. We agree.

The First Amendment forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. *United States v. Ballard*, 322 U.S. 78, 88 L.Ed. 1148, 64 S.Ct. 882 (1944); *Cantwell v. Connecticut*, *supra*. Such protected freedoms are not limited to members of organized religious bodies, *In re Williams*, 269 N.C. 68, 152 S.E. 2d 317, *cert. denied*, 388 U.S. 918, 18 L.Ed. 2d 1362, 87 S.Ct. 2137 (1967), nor is it restricted to orthodox religious practices. *Follett v. McCormick*, 321 U.S. 573, 88 L.Ed. 938, 64 S.Ct. 717, 152 A.L.R. 317 (1944). The test to determine whether a statute violates the prohibition of the Establishment Clause was stated in *Abington School District v. Schempp*, 374 U.S. 203, 222, 10 L.Ed. 2d 844, 858, 83 S.Ct. 1560 (1963):

"[T]he test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education,* 330 US 1, 91 L ed 711, 67 S Ct 504, 168 ALR 1392, supra; *McGowan v. Maryland,* supra (366 US at 442)."

G.S. 108-75.7(a)(1) violates the Establishment Clause of the First Amendment of the United States Constitution. We do not attribute to the Legislature an intention to advance or promote any religious sect; it is enough that the effect of the statute brings about the prohibited result. *Sherbert v. Verner,* 374 U.S. 398, 10 L.Ed. 2d 965, 83 S.Ct. 1790 (1963). Defendants contend that a rational basis exists for such an exemption. Where First Amendment freedoms are concerned, a rational basis is not enough. *Sherbert v. Verner, supra; West Virginia State Bd. of Edu. v. Barnette,* 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674 (1943).

In *West Virginia State Bd. of Edu. v. Barnette, Id.* at 639, 87 L.Ed. at 1638, 63 S.Ct. at 1186, 147 A.L.R. 674 (1943), Mr. Justice Jackson stated:

"[T]he test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."

To pass constitutional muster, the State's interest must be compelling. *Sherbert v. Verner, supra.* We do not find such an interest in the present case. We hold that G.S. 108-75.7(a)(1)

establishes religion in violation of the First Amendment of the United States Constitution. We also hold that it violates the Equal Protection Clause of the Fourteenth Amendment and Sections 13 and 19 of Article I of the North Carolina Constitution.

[6] G.S. 108-75.7(a)(1), (5), (7), and (8) exempt from the licensing provisions of the statute religious organizations which solicit primarily from their own members, organizations which solicit solely from their own members, local posts of veteran organizations, fraternal beneficiary societies, and certain non-profit community, civic, and garden clubs. *See* G.S. 108-75.7(a)(1), (5), (7), and (8). The statute requires nondenominational religious organizations which solicit *primarily* from nonmembers to obtain a license irrespective of the size of the soliciting organization. The justification set forth by defendants is that such distinction has a rational basis, and thus does not violate the Equal Protection Clauses of the United States or the North Carolina State Constitutions. We disagree.

The Equal Protection Clauses of the United States and the North Carolina Constitutions impose upon lawmaking bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957); *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976); *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972).

G.S. 108-75.2 sets forth the purpose of the Solicitation of Charitable Funds Act as follows:

> "§ 108-75.2. *Purpose.*—It is the purpose of this Part to protect the general public and public charity in the State of North Carolina; to require full public disclosure of facts relating to persons and organizations who solicit funds from the public for charitable purposes, the purposes for which such funds are solicited, and their actual uses; and to prevent deceptive and dishonest statements and conduct in the solicitations of funds for or in the name of charity."

The statutory exemptions provided in G.S. 108-75.7(a)(1), (5), (7), and (8) cannot withstand even the rational basis standard of equal protection analysis. The statute requires plaintiffs to obtain a license to solicit funds while exempting enumerated secular and

religious groups. It makes an arbitrary and irrational distinction unrelated to the purposes of the statute. *See Royster Guano Co. v. Virginia*, 253 U.S. 412, 64 L.Ed. 989, 40 S.Ct. 560 (1920). There is no showing that religious groups, who solicit primarily from nonmembers in the exercise of their religious activities are more likely to engage in fraudulent or deceptive practices in their public solicitation than the groups exempted, *see Morey v. Doud, supra; Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968), nor is there any showing that size is an index to the evil at which the statute is directed. *Cf. Engel v. O'Malley*, 219 U.S. 128, 55 L.Ed. 128, 31 S.Ct. 190 (1911). Under the statute, a small religious group that solicits in excess of two thousand dollars ($2,000) primarily from nonmembers, *i.e.*, fifty-one percent, is required to obtain a license; while a larger religious group is exempted from obtaining a license, even though it solicits one million dollars ($1,000,000) as long as fifty percent of the organization's contributions is obtained from members. Organizations which solicit entirely from its own members, bona fide veterans organizations, and certain nonprofit community clubs are exempted from the licensing provisions, regardless of the amount received from their public solicitations. We hold that the exemptions of G.S. 108-75.7(a)(1), (5), (7), and (8) are violative of the Equal Protection Clauses of the United States Constitution and of the North Carolina Constitution, because they are arbitrary and irrational.

G.S. 108-75.7(a)(1), (5), (7), and (8) also violate the Equal Protection Clauses of the United States and the North Carolina Constitutions, because they impermissibly infringe upon the plaintiffs' First Amendment freedoms.

Plaintiff's solicitation of funds is a religious activity protected by the First Amendment of the United States Constitution. *See Follett v. McCormick*, 321 U.S. at 576-77, 88 L.Ed. at 940-41, 64 S.Ct. at 719, 152 A.L.R. 317 (1944); *Murdock v. Pennsylvania*, 319 U.S. at 110-11, 87 L.Ed. at 1297, 63 S.Ct. at 873, 146 A.L.R. 81 (1943); *International Soc. for Krishna Cons., Inc. v. Conslisk*, 374 F. Supp. 1010 (N.D. Ill. 1973). The State may legitimately act to prevent the fraudulent solicitation of its citizens. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 48 L.Ed. 2d 243, 96 S.Ct. 1755 (1976); *Cantwell v. Connecticut, supra.* But, First Amendment freedoms are in a preferred position. *Follett v. McCormick*, 321 U.S. at 575, 88 L.Ed. at 940, 64 S.Ct. at 719, 152 A.L.R. 317 (1944);

Murdock v. Pennsylvania, supra. Restrictions upon First Amendment rights must be narrowly tailored to achieve legitimate State objectives, *Police Department v. Mosley,* 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972), and where less intrusive means are available, they must be used. *Shelton v. Tucker,* 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247 (1960). The Solicitation of Charitable Funds Act seeks to protect the public from fraudulent practices in solicitation. Less intrusive means are available. *See State v. Williams,* 253 N.C. 337, 117 S.E. 2d 444 (1960). We hold that the exemptions in G.S. 108-75.7(a)(1), (5), (7), and (8) violate the Equal Protection Clauses of the United States and North Carolina Constitutions. We also hold that the exemptions in G.S. 108-75.7(a)(1), (5), (7), and (8) are unconstitutional, because they discriminate against preferred freedoms of nondenominational religious organizations while favoring those of secular groups.

G.S. 108-75.18 of the Solicitation of Charitable Funds Act provides:

> "§ 108-75.18. *Denial, suspension or revocation of license.*—The Secretary shall revoke, suspend or deny issuance of a license to a charitable organization, professional fund-raising counsel or professional solicitor at any time upon a finding that:
>
> . . .
>
> (2) The applicant is or has engaged in a fraudulent transaction or enterprise.
>
> (3) A solicitation would be a fraud upon the public.
>
> (4) An unreasonable percentage of the contributions solicited, or to be solicited, is not applied, or will not be applied to a charitable purpose.
>
> (5) The contributions solicited, or to be solicited, are not applied, or will not be applied to the purpose or purposes as represented in the license application.
>
> (6) Solicitation and fund-raising expenses (including not only payments to professional solicitors, but also payments to profresional fund-raising counsel, and internal fund-raising and solicitation salaries and expenses) during the year immediately preceding the

> date of application have exceeded, or for the specific year in which the application is submitted will exceed, *thirty-five percent (35%)* of the total moneys, pledges, or other property raised or received or to be raised or received by reason of any solicitation and/or fund-raising activities or campaigns." (Emphasis added.)

[7] Pursuant to G.S. 108-75.18(6), the Secretary may revoke, suspend, or deny issuance of a license to a charitable organization, if he finds that the organization's operating expenditures will exceed thirty-five percent of the total monies raised by reason of any solicitation. We hold that this thirty-five percent limitation on expenditures is violative of the First Amendment freedoms protected by the United States Constitution.

In *National Foundation v. City of Forth Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 24 L.Ed. 2d 684, 90 S.Ct. 688 (1970), the Fifth Circuit Court of Appeals upheld the validity of a statute which allowed denial of a permit to solicit if the cost of such solicitation exceeded twenty percent of the amount to be raised. However, the Court was quick to note, "A fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations. What may be proper in one situation may not be so in other situations." *Id.* at 46, *cert. denied*, 396 U.S. 1040, 24 L.Ed. 2d 684, 90 S.Ct. 688 (1970).

In *National Foundation, supra*, the plaintiff was a nonprofit organization. In the case before us, plaintiffs are *religious organizations*. We believe that this is a distinction worth noting. An activity when engaged in may be secular or religious depending on the circumstances. This distinction is oftentimes vital for constitutional purposes. *Murdock v. Pennsylvania, supra.*

In *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed. 2d 659, 96 S.Ct. 612 (1976), the Supreme Court was faced with an analogous limitation on campaign expenditures in federal elections. In *Buckley v. Valeo*, 424 U.S. at 19-20, 46 L.Ed. 2d at 687-88, 96 S.Ct. at 634 (1976), the Court noted:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign

necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theroretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending 'relative to a clearly identified candidate,' 18 USC § 608(e)(1) (1970 ed Supp IV) [18 USCS § 608(e)(1)], would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling." (Footnotes omitted.)

Thus, the Court found the limitations unconstitutional.

As in *Buckley, supra*, plaintiffs are exercising rights protected by the First Amendment. Limiting the amounts of money expendable seriously hampers plaintiffs' ability to effectively exercise their First Amendment freedoms. The limitations are unduly burdensome and thus violative of the First Amendment. *See Cantwell, supra.*

[8] G.S. 108-75.20(h)(2) provides:

"(h) No person, and no organization of which such person is an officer, professional fund-raising counsel or professional solicitor, shall solicit within the State if:

. . .

(2) Such person has ever been enjoined by any court or otherwise prohibited from soliciting in any jurisdiction, unless the Secretary shall first determine in writing that such person is entitled to solicit in such jurisdiction at the time of soliciting within this State."

The primary effect of G.S. 108-75.20(h)(2) is to prohibit persons from soliciting within North Carolina, if they have ever been enjoined from soliciting in any other state. The statute creates a conclusive presumption—that one who has previously been enjoined from soliciting is forever unfit. This presumption is incapable of being overcome by proof of the most positive character. Even if a person were to show that he is presently fit to solicit, G.S. 108-75.20(h)(2) would preclude his solicitation because of some prior enjoining in another state. This enjoining may have taken place without notice or opportunity to be heard; yet the statute would bar solicitation within the State. Where present fitness to conduct the activity sought to be enjoined is relevant, a state may not deprive an individual of an opportunity to conduct that activity without a prior hearing. *See Stanley v. Illinios*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972); *Bell v. Burson*, 402 U.S. 535, 29 L.Ed. 2d 90, 91 S.Ct. 1586 (1971).

The limits of the power of the State to enact laws to promote the health, safety, welfare, and morals of its people must always be determined with appropriate regard to the particular subject of its exercise. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931). Here, the statute impinges on the exercise of a religious activity protected by the First Amendment. *See Murdock, supra.* It serves as a prior restraint in the exercise of First Amendment rights in that a person may be inhibited from soliciting without the State ever proving a previous fraudulent solicitation. *Cf. Near v. Minnesota ex rel. Olson, supra.* It is significant that many solicitation statutes have been held to be unconstitutional. *See Hynes v. Mayor of Oradell, supra; Follett v. McCormick, supra; Murdock v. Pennsylvania, supra; Cantwell v. Connecticut, supra; International Soc. for Krishna Cons., Inc. v. Conslisk, supra.* Due process requires at the very least that any person or organization denied a permit on the basis of G.S. 108-75.20(h)(2) be afforded the opportunity to present evidence establishing such person's or organization's fitness to

solicit within the State of North Carolina. *See Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed. 2d 63, 93 S.Ct. 2230 (1973). We hold that G.S. 108-75.20(h)(2) violates the Due Process Clause in that it denies the opportunity to solicit on the basis of a permanent and irrebuttable presumption of unfitness when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

[9] G.S. 108-75.7(a)(1) and G.S. 108-75.7(a)(5) allow licensing exemptions to religious organizations that solicit primarily or entirely from their own "members." The Solicitation of Charitable Funds Act does not define the term, "members." It is clear from the Act, however, that "members" is not used in the ordinary sense of the word. *See* G.S. 108-75.3(12) (*defines membership to exclude persons granted membership upon making a contribution as a result of a solicitation*). Plaintiffs are engaged in the solicitation of funds—an act which except for the provisions of the Act would be otherwise lawful. Should plaintiffs solicit primarily from persons other than their own "members," they would be guilty of a misdemeanor. *See* G.S. 108-75.22(d).

G.S. 108-75.7(a)(1) and (5), by failing to define "members," forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. The sections are void for vagueness. *See Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926); *State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972); *State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966); *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962).

In *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 9 L.Ed. 2d 405, 418, 83 S.Ct. 328 (1963), the United States Supreme Court stated:

> "[T]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus v. Search Warrant of Property, etc.*, 367 US 717, 733, 6 L ed 2d 1127, 1137, 81 S Ct 1708. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potent-

> ly as the actual application of sanctions. Cf. *Smith v. California*, supra (361 US at 151-154); *Speiser v. Randall*, 357 US 513, 526, 2 L ed 2d 1460, 1472, 78 S Ct 1332. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (Citations and footnotes omitted.)

In *N.A.A.C.P. v. Button, supra*, the Virginia State Legislature had sought to prohibit the solicitation of legal or professional business by the N.A.A.C.P. The Supreme Court noted that only a compelling state interest could justify a limitation of First Amendment freedoms. Likewise, only a compelling state interest could justify infringement upon plaintiffs' First Amendment rights. Indeed, the Legislature's very attempt to define, of its own accord, who church members are is constitutionally suspect. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 21 L.Ed. 69 (1872).

In summary, we have held that: (1) plaintiffs' solicitation of religious funds from nonmembers is a religious activity protected by the First Amendment of the United States Constitution; (2) G.S. 108-75.6 and G.S. 108-75.18(4) act as a prior restraint on the exercise of religion and violate the First and Fourteenth Amendments of the United States Constitution; (3) Sections (2), (3), and (4) of G.S. 108-75.18 constitute an impermissible delegation of legislative powers in violation of Article I, § 6 and Article II, § 1 of our State Constitution; (4) G.S. 108-75.7(a)(1) constitutes an establishment of religion and violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (5) G.S. 108-75.7(a)(1), (5), (7), and (8)'s exemptions are violative of the Equal Protection Clauses of the United States and North Carolina Constitutions, because they (a) are arbitrary and irrational, (b) impermissibly infringe upon First Amendment freedoms, and (c) discriminate against preferred freedoms of nondenominational religious groups while favoring secular groups; (6) G.S. 108-75.18(6)'s thirty-five percent limitation on solicitation and fund-raising expenditures of religious groups violates freedoms protected by the First Amendment of the United States Constitution; (7) G.S. 108-75.20(h)(2)'s prohibition of in-state solicitation of funds without affording a prior opportunity to be heard as to present fitness to solicit creates an irrebuttable presumption in violation of the Due Process Clauses of the United States and

North Carolina Constitutions; (8) G.S. 108-75.7(a)(1) and (5)'s exemptions for organizations which solicit primarily or entirely from their own "members" are void for vagueness.

Our decision does not preclude the Legislature from enacting a statute which could constitutionally prevent the fraudulent solicitation of our citizens.

The judgment entered below is

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL concurring.

I completely concur in the well-reasoned and learned opinion of the majority with the single exception of that portion of the opinion in which the majority finds that the thirty-five percent limitation on solicitation and fund-raising expenditures of charitable organizations set forth in G.S. 108-75.18(6) constitutes a violation of the First Amendment to the Constitution of the United States. With regard to that part of the opinion of the majority relating to G.S. 108-75.18(6), I concur only in the result reached.

I do not think that subsection (6) of that statute violates the First Amendment. *See National Foundation v. City of Fort Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 24 L.Ed. 2d 684, 90 S.Ct. 688 (1970). I would instead hold that by permitting the Secretary of the North Carolina Department of Human Resources to waive the thirty-five percent limitation when "special facts or circumstances are presented" justifying greater expenses in connection with solicitation and fund-raising, subsection (6) constitutes an unconstitutional delegation of the legislative power of the General Assembly to the Secretary in violation of Article I, § 6 and Article II, § 1 of the Constitution of North Carolina. I would not find the offensive delegation of authority severable so as to save the remainder of the subsection (6), however, as it appears clear that the General Assembly would

not have enacted the subsection without the portion vesting discretion in the Secretary. *See Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). I would declare the entire subsection unconstitutional on these grounds rather than the ground relied upon by the majority.

BARBARA L. LINDSEY v. THE CLINIC FOR WOMEN, P.A.; DR. A. H. WESTFALL AND DR. HUGH McALLISTER, INDIVIDUALLY

No. 7716SC927

(Filed 3 April 1979)

1. **Rules of Civil Procedure § 50.3— directed verdict—necessity for stating grounds in motion**

Though G.S. 1A-1, Rule 50(a) provides that a motion for directed verdict shall state the specific grounds therefor, the courts need not inflexibly enforce the rule when the grounds are apparent to the court and the parties; in this case it was obvious that the motion was made on the grounds that the evidence was insufficient to show actionable negligence on the part of defendants, and the court on appeal therefore elects to review the trial court's action in denying defendants' motion.

2. **Physicians, Surgeons and Allied Professions § 20— stillborn child—failure to show connection between injury and defendants' action or inaction**

In an action to recover damages for medical malpractice where plaintiff alleged that her child was stillborn, having died of amnionitis which went undetected by defendants, the trial court erred in denying defendants' motion for directed verdict, since, even if plaintiff's evidence was sufficient to support her allegation, there was nevertheless no evidence that anything which defendants did or failed to do in the course of their care of plaintiff either caused or could have prevented amnionitis.

3. **Rules of Civil Procedure § 50.5— directed verdict for defendants improperly denied—new trial granted plaintiff appellee**

Where the trial court erred in denying defendants' motion for directed verdict and defendants made a timely motion for judgment n.o.v., the court on appeal was not required to direct entry of judgment in accordance with the motion, but could grant plaintiff appellee a new trial.

4. **Evidence § 49.3— medical testimony—hypothetical questions—improper form**

The trial court in a medical malpractice action erred in overruling defendants' objections to hypothetical questions which were unduly long and prolix, contained references to matters which were irrelevant to the purposes for which the questions were asked, and failed to include references to matters which were highly relevant.

Lindsey v. The Clinic for Women

APPEAL by defendants from *Preston, Judge.* Judgment entered 3 June 1977 in Superior Court, ROBESON County. Heard in the Court of Appeals 22 August 1978.

This is a civil action to recover damages for medical malpractice. On 13 June 1974 plaintiff was delivered of a stillborn child. She was a patient of the defendants, Dr. Westfall and Dr. McAllister, who were physicians specializing in obstetrics and gynecology in Lumberton, N. C. In her complaint plaintiff alleged that her child was stillborn and that she suffered great pain and mental distress as a direct and proximate result of defendants' negligence in failing to attend and examine her diligently, in failing to make a proper diagnosis, in failing to provide proper treatment for a breech birth, and in failing to comply with the recognized standard of medical care exercised by licensed physicians in the same specialty in similar circumstances in the general area in which defendants practiced. Defendants answered, admitting they provided plaintiff prenatal treatment and care but otherwise denying the material allegations of the complaint and alleging that at all times in their examination, care, and treatment of the plaintiff they exercised their best skill and judgment.

At trial plaintiff presented evidence to show the following. In September 1973 plaintiff, a married woman with three children, again became pregnant. She consulted defendant doctors and they agreed to provide her with care in connection with her pregnancy, such care to include all office visits, delivery of the child, and postnatal treatment. For these services defendants told her they would charge $220.00, which she paid. She had experienced no difficulty with her prior pregnancies, and at first this pregnancy was uneventful. She made all regularly scheduled visits to the clinic and was examined by defendants. On 29 May 1974 she was examined by the defendant, Dr. Westfall, who told her she had begun to open up just a little and that the birth of the child could be at any time. At that examination she was found to weigh 188½ pounds. On 3 June 1974, at about 9:00 p.m., she experienced a leakage of fluid. About an hour later she experienced a sudden gush of water, approximately three or four quarts in amount. She went to bed, expecting labor pains to begin at any time. They did not. The next morning she phoned the clinic and told the defendant, Dr. McAllister, that her water broke the night before. He asked when her next appointment was, and when she told him it

was the following day he told her, "Pack your bags, get off your feet; come in tomorrow for your checkup." On 5 June she went to the clinic, where she was weighed by the nurse and it was found her weight had dropped to 183½ pounds. She was examined by Dr. Westfall. He asked if she could feel the movement of the baby, and she told him she could. The doctor's examination took approximately two to four minutes. He did not take her temperature or tell her that she should do so. She was not in any pain at that time, and the doctor gave her no medication. He told her it wasn't quite time for her baby to be delivered and for her to come back on Friday, 7 June. She left the clinic on 5 June and went home and to bed. She was in no pain at that time. While she was being examined by Dr. Westfall on 5 June was the last time she felt the baby move.

On the following day, 6 June 1974, at about 5 o'clock in the afternoon, she started having sharp pains in the bottom of her stomach. She was also having a bloody discharge from her vagina, which she had first noticed right after she had left the doctor's office on the preceding day. On the morning of 7 June her pains were about ten minutes apart. She also noticed a thick green and black substance lying on the water of the commode when she used the bathroom. In the early morning of 7 June she went to Dr. McAllister's office, taking her suitcase with her. She told the nurses she was in labor, was having a green and black discharge, and also had a bloody discharge. Her weight had fallen to 180 pounds. Dr. McAllister examined her, told her she was having false labor, that he could not touch the baby, and that if he put her in labor it would take the baby's life. He told her to come back in one week. His examination took from two to four minutes. At this time she did not feel the baby move. Following the doctor's advice, plaintiff went home.

On 8, 9, and 10 June plaintiff continued to have severe pain and to experience the green and black discharge. On 11 June she suffered so badly with labor pains that she called the clinic to beg for help. She phoned three times and talked with the receptionist or nurse. She asked to talk to the doctor but did not get the privilege of talking to either doctor. The defendant doctors did not return any of her calls.

On the following day, 12 June, she started suffering so much that she did not feel she could suffer any more. Without an ap-

pointment, she went to the clinic, arriving about 2 or 2:30 in the afternoon. Dr. McAllister examined her and sent her to the hospital to take an x-ray. The x-ray was taken about 3 o'clock in the afternoon. At 3:30 she was admitted to the hospital. About 5 or 5:30 Dr. McAllister checked her at the hospital for the baby's heartbeat. He told her it was going to be a breech birth and that a Doctor Brown, who she did not then know, would deliver her baby. She continued to have pain. The hospital nurse's notes indicated that no fetal heart tone was heard at 11:30 or at 11:55 p.m. Later that night she was taken to the delivery room, where Dr. Brown attended her. In the early morning of 13 June her child was stillborn. Dr. Brown's delivery notes included a notation that "at delivery pt. had prolapsed cord tight around right thigh of infant; severe amnionitis with gross pus noted when head delivered, running from the vagina." Plaintiff's evidence also showed that the skin of the stillborn child was macerated and was not normal in color. The baby's death certificate listed the cause of death as the prolapsed umbilical cord with amnionitis as a possible contributing condition.

Plaintiff remained in the hospital until 24 June. While in the hospital she continued to suffer pain. After leaving the hospital she used crutches and continued to experience pain. As time went on, the pain grew lighter.

Plaintiff presented the testimony of Dr. Joseph May, an Associate Professor of Obstetrics and Gynecology at the Bowman-Gray School of Medicine, who was accepted by the court as an expert in the field of obstetrics and gynecology. In response to hypothetical questions, Dr. May was permitted to testify over defendants' objections that in his opinion the black and green substance which plaintiff discharged on 7 June was meconium, which he described as a substance contained in the lower intestinal tract of an unborn fetus at or near term and which he testified cannot escape from the fetus without the mother's membrane having first been ruptured; that plaintiff's membranes ruptured on 3 June when she experienced the sudden gush of water; that plaintiff's deceased fetus might have died from infection; that plaintiff's prolonged recovery and pain might have been caused by amnionitis, which he described as an infection of the amnion or membrane lining of the pregnant womb; and that the course pursued by defendant doctors in this case did not conform with ap-

proved medical practices and treatment by physicians specializing in the field of obstetrics and gynecology in Lumberton, N. C. Dr. May also testified that in his opinion skin maceration will not occur unless a fetus has been dead for a minimum of twenty-four to forty-eight hours.

The defendants presented the testimony of the defendant doctors, Dr. Westfall and Dr. McAllister, and of Dr. Brown. Defendants' evidence showed that when plaintiff was examined on 5 and 7 June, there was no evidence of any rupture of her membranes, no dilation of the cervix, and fetal heart tones were good. In the opinion of the examining doctors she was not in real labor at that time. Dr. McAllister's examination of plaintiff on 12 June for the first time indicated that plaintiff's cervix was beginning to open, signifying the beginning of labor. Plaintiff was promptly sent to the hospital. Dr. McAllister's examination on 12 June also revealed a good, strong fetal heart beat. At the hospital on 12 June fetal heart beat was determined and recorded by the hospital nurses at 4:15 p.m. and again at 8 p.m. Dr. Brown, the delivering physician, examined plaintiff at approximately 6:30 p.m. on 12 June and found no indication of any fever. Only once thereafter during plaintiff's stay in the hospital did her temperature reach 100 degrees, that being four days after delivery, and there was never a temperature recorded during her hospital stay which showed any evidence of infection. Plaintiff was delivered of a stillborn infant at 12:40 a.m. on 13 June by a breech extraction. The umbilical cord was wrapped tightly around the infant's leg. The child's skin was not macerated. In Dr. Brown's opinion the tightened cord caused the infant's death and would have killed the infant without amnionitis.

The court directed verdict for the defendant, The Clinic for Women, P.A.

The jury answered issues finding that plaintiff was injured by the negligence of the defendants, Dr. Westfall and Dr. McAllister and awarded damages in the amount of $200,000.00. From judgment on the verdict, defendant doctors appealed.

Daughtry, Hinton & Woodard by N. Leo Daughtry and W. Kenneth Hinton, attorneys for plaintiff appellee.

Anderson, Broadfoot & Anderson by H. W. Broadfoot, attorney for defendant appellants.

PARKER, Judge.

[1] Defendants first assign error to the denial of their motion for a directed verdict made when plaintiff rested her case and renewed at the close of all of the evidence. Plaintiff contends that this assignment of error should be disregarded because defendants failed to state the grounds for their motion as required by G.S. 1A-1, Rule 50(a). That rule provides that "[a] motion for a directed verdict shall state the specific grounds therefor." We have held this provision to be mandatory. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). "However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974). In the present case it seems obvious that the motion was made on the grounds that the evidence was insufficient to show actionable negligence on the part of the defendants. This must have been apparent to the court and to the plaintiff. Certainly nothing in the record suggests to the contrary. Therefore, we elect to review the trial court's action in denying defendants' motion. In the trial court's ruling, we find error.

[2] Plaintiff's theory of this case, as expressed in her brief and by her counsel on oral argument, is that, viewing the evidence in the light most favorable to the plaintiff, it was sufficient to warrant a jury in finding the following facts. Defendants, physicians specializing in obstetrics and gynecology, accepted plaintiff as their patient and agreed to care for her through her pregnancy. On the evening of 3 June 1974 her membrane ruptured. On the following day she reported this to defendant McAllister by telephone. On 5 June she was examined by defendant Westfall. At that time she was not in pain and he sent her home. On 6 June she started having labor pains. She also experienced a discharge of meconium, which could not have occurred unless her membrane had first been ruptured. On 7 June she reported this to defendants' nurse and was examined by Dr. McAllister. He sent her home. She continued to have labor pains until 13 June, at which time the child was stillborn. The macerated condition of the child's skin indicated it had been dead twenty-four to forty-eight hours before delivery. The fetus died of severe amnionitis which went undetected by defendants. Amnionitis also prolonged plaintiff's recovery and prolonged her pain and suffering. In the opin-

ion of plaintiff's expert witness, the course of conduct pursued by defendant doctors did not conform with approved medical practices and treatment by physicians specializing in the field of obstetrics and gynecology in Lumberton, N.C.

The difficulty with plaintiff's theory is that, even if it be granted that the evidence would support a finding of the foregoing facts, still there is no evidence that anything which defendants did or failed to do in the course of their care of the plaintiff either caused or could have prevented the amnionitis, which plaintiff contends caused the death of her child and her own prolonged suffering. Her expert witness testified that in his opinion the course of treatment outlined in long hypothetical questions "did not conform with approved medical practices and treatment of a physician specializing in the field of Obstetrics and Gynecology," but he never testified what in his opinion "approved medical practices" would have been in this case. He never testified as to precisely what the defendants did that in his opinion they should not have done or as to what they did not do that in his opinion they should have done. More importantly, he never testified that had what he considered to be "approved medical practices" been followed by the defendants in their treatment of the plaintiff in this case, her child would not have been stillborn and her own recovery would not have been prolonged by amnionitis. In short while the evidence may have been sufficient to support a jury finding that defendants were negligent in failing to furnish plaintiff with the standard of care which it was their duty to provide, there was no evidence to show that any failure on the part of defendants to furnish the requisite degree of care was the proximate cause of any of the plaintiff's injuries. "To establish liability upon the surgeon or physician in malpractice cases, there must be proof of actionable negligence by the defendant, which was the proximate cause of the plaintiff's injury or worsened condition." *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E. 2d 339, 343 (1968). The evidence in the present case, even when considered in the light most favorable to the plaintiff and even when the plaintiff is given the benefit of every ligitimate inference to be drawn in her favor, simply fails to show that anything defendants did or failed to do caused her injuries. The trial court erred in denying defendants' motion for directed verdict made at the close of all the evidence.

[3] Defendants in this case made a timely motion for judgment notwithstanding the verdict in accordance with G.S. 1A-1, Rule 50(b)(1), which motion the trial court also denied. Since this motion was duly made, this court, having found that the trial judge should have granted the motion for directed verdict made at the close of all the evidence, could direct entry of judgment in accordance with the motion. G.S. 1A-1, Rule 50(b)(2). We are not, however, required to do so. G.S. 1A-1, Rule 50(d) provides:

> (d) *Motion for judgment notwithstanding the verdict—denial of motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Speaking of Federal Rule 50(d), which is in all material respects identical with G.S. 1A-1, Rule 50(d), the United States Supreme Court pointed out that even "[i]f appellee presents no new trial issues in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the matter to the district court, based on factors encountered in its own review of the case." *Neely v. Eby Construction Co.*, 386 U.S. 317, 329, 18 L.Ed. 2d 75, 84-5, 87 S.Ct. 1072, 1080 (1967).

Under all of the circumstances of this case, it is our opinion, and we so decide, that instead of directing entry of judgment directing verdict for defendants, the plaintiff appellee should be granted a new trial.

[4] Since we have decided there must be a new trial and since it is probable that opinions of expert witnesses in response to hypothetical questions will again be offered, we deem it appropriate to discuss some of defendants' assignments of error directed to the trial judge's actions in overruling their objections to hypothetical questions which plaintiff's counsel asked of Dr. May, plaintiff's expert witness. Certain of defendants' objections

to the form of these questions are well taken. The questions were unduly long and prolix. They contained reference to matters which were irrelevant to the purposes for which the questions were asked. In some instances they failed to include reference to matters which were highly relevant. One illustration will suffice. To show that the stillborn child might have died as a result of amnionitis, plaintiff's counsel asked Dr. May the following question:

> Q. Doctor May, I ask you, assuming that if the jury should find from the evidence in this case and by its greater weight thereof that Barbara Lindsey, in her last month of pregnancy, having been checked on May the 29th, 1974, by Doctor Westfall, and having been informed by him at that time that she had opened up slightly and that her child could be born at any time thereafter and that Barbara Lindsey, approximately five days thereafter, on June the 3rd, 1974, experienced a discharge of fluid from her vagina which ran down and soaked both legs of her slacks and that same night approximately one hour thereafter, she experienced another discharge from her vagina which she described as "a gush of fluid containing approximately three to four quarts of fluid" which soaked two bath towels, which she had positioned between her legs, and that Barbara Lindsey, early the following morning on June the 4th, 1974, called and spoke with Doctor McAllister and informed him that in her words "her water had broken" and that Doctor McAllister asked her when was her regularly scheduled appointment and informing him that it was the following morning, he asked her to wait and come in at that time at her regularly scheduled appointment on June 5th, 1974, and that Doctor McAllister did not mention to Barbara Lindsey to take her own temperature, nor did Barbara Lindsey take her own temperature; that Barbara Lindsey, on June 5th, 1974, was seen by Doctor Westfall for an examination of from two to four minutes and that neither Doctor Westfall nor his nurses took Mrs. Lindsey's temperature, nor did Doctor Westfall or any of his nurses ask Mrs. Lindsey to check her own temperature, nor did Barbara Lindsey take her own temperature, nor did Doctor Westfall prescribe any medication for Mrs. Lindsey, nor did the records of the clinic introduced into evidence indicate that any test was given by Doctor Westfall, Doctor McAllister or

anyone in the clinic to determine if the membranes had ruptured nor do the records indicate that her temperature was taken; that Mrs. Lindsey, having had no problem with swelling and having lost by her doctor's records five pounds since May the 29th, 1974, and that Doctor Westfall sent her home to return on Friday, the 7th of June, 1974;

That on June the 6th, 1974, Barbara Lindsey began having a bloody discharge, red in nature, and on the day of June 6, 1974, Mrs. Lindsey began having sharp pains at regular intervals approximately twenty minutes apart and that on the morning of June 7, 1974, Mrs. Lindsey began having a discharge from her vagina which was green and black in color and which she described as "thick in nature so that it remained above the water level in her commode for her to plainly see" prior to flushing that commode and that Barbara Lindsey went to see Doctor McAllister a few hours later on the morning of June 7, 1974, and described to Doctor McAllister and his nurses both the bloody discharge and the green and black discharge as well as the sharp pains at regular intervals which she was having approximately twenty minutes apart and that neither Doctor McAllister nor any of his nurses took the temperature of Mrs. Lindsey on June 7, 1974, nor did Doctor McAllister nor any of his nurses tell Mrs. Lindsey to check her own temperature, nor did Barbara Lindsey check her own temperature and that Mrs. Lindsey, according to her doctor's records had lost eight and one-half pounds at this time, since May 29, 1974, and that Doctor McAllister examined Mrs. Lindsey for approximately two to four minutes and Doctor McAllister noted on his notes on that day of June 7, 1974, "contractions began yesterday; some bloody show; no dilation," and that Doctor McAllister did not prescribe any medication for Mrs. Lindsey nor did the records of the clinic introduced into evidence indicate that any test was given by Doctor Westfall, Doctor McAllister or anyone in the clinic to determine if the membranes had ruptured, nor do the records indicate that her temperature was taken, and that he stated to Mrs. Lindsey, "I could not feel the baby and it is so high up at this time that if I were to induce labor your baby would die," and that Doctor McAllister told Mrs. Lindsey to come back in one week on

the following Friday and that Mrs. Lindsey had not felt her baby move since June 5th, 1974;

That on June 8th, 1974, Mrs. Lindsey continued to have sharp pains although at irregular intervals and that her discharge of black and green substance continued as well as did her discharge of bloody substance and that her pain on June 9th and June 10th continued to be severe and on June 11th, Barbara Lindsey called her Obstetricians and Gynecologist, Doctor McAllister and Doctor Westfall, three separate and distinct times and none of her calls were returned and that she could not contact either Doctor McAllister or Doctor Westfall by phone and she did not receive any calls from Doctor Westfall or Doctor McAllister on or after June 11th, 1974, and that Barbara Lindsey had stayed off her feet unable to perform her normal daily activities and that on June 12th, 1974, early on that afternoon, Mrs. Lindsey of her own free will went to the offices of Doctor McAllister and Doctor Westfall.

Do you have an opinion satisfactory to yourself and to a reasonable medical certainty as to whether or not Angela Lindsey, the deceased fetus in this instance, could or might have died as the result of amnionitis?

Defendants' objection to the question was overruled. To this question, the witness replied that in his opinion "the infant might have died from infection." Defendants' motion to strike was denied.

The question was undoubtedly an effective summation before the jury by plaintiff's counsel of his view of his client's case, but that in itself was not a legitimate purpose to be served in asking a hypothetical question. In addition, it contains reference to so many irrelevant matters that defendant's objection should have been sustained on that ground alone. *See Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964). For example, defendants' failure to return plaintiff's telephone calls, which was also referred to in two other long hypothetical questions, might have been relevant to show a lack of concern for the plaintiff on the part of the defendants, but it could hardly have been relevant to determine whether the deceased fetus "could or might have died of amnionitis." On the other hand the question fails to include reference

to many obviously relevant facts shown by uncontradicted evidence in this case. For example, the question does not state as assumed facts that the child was stillborn, that it was delivered by a breech extraction, that the umbilical cord was wrapped tightly around its leg, that amnionitis was observed by the delivering doctor at the time of the delivery, or that plaintiff ever had amnionitis. With all deference to the impressive credentials of plaintiff's expert witness, it is difficult for this court to understand how, solely on the basis of the facts assumed in the above quoted hypothetical question, Dr. May could express the opinion "to a reasonable degree of medical certainty" that "the infant might have died from infection." It seems probable that he based his opinion, at least in part, by assuming the existence of facts not stated in the question.

It was error for the trial court not to sustain defendants' timely objection to the question and error to deny defendants' motion to strike the answer.

For the reasons stated, this case is remanded for a

New trial.

Judges CLARK and ERWIN concur.

R. D. MORGAN, JR. v. JOE McLEOD, HOOPER HALL, GRAHAM A. BELL, BETTY-ROSE, INC., AND BELMOR CORPORATION

No. 7812SC450

(Filed 3 April 1979)

1. Corporations § 5.1— financial statement—absolute right of stockholder—examination of corporation's records—proper purpose required

In an action by a minority shareholder seeking a writ of mandamus to compel respondents to deliver to him true financial statements of the assets and liabilities of each corporation, the results of the operations and changes in surplus for each corporation for the last year and to allow him to examine and make copies of the records of accounts and other records of each corporation, the trial court properly found that petitioner, as a matter of absolute right pursuant to G.S. 55-37, was entitled to be furnished true financial statements of the corporations, but a jury question arose as to whether petitioner, pursuant to G.S. 55-38, wished to examine the records of the corporation for a

"proper purpose," and respondents' contention that the qualifying language of G.S. 55-38, *i.e.*, that the requested information be for a "proper purpose," was also applicable to G.S. 55-37 was without merit.

2. Corporations § 5.1— denial of stockholder's absolute right—assessment of penalty—determination of value of shares

In order for the trial court to determine the value of the shares owned by petitioner in a corporation for the purpose of assessing penalties pursuant to G.S. 55-38(d), the court must consider all material factors and elements which counsel bring to the court and not depend upon any one formula exclusively; the court in this action had adequate evidence before it to support its determination of the value of petitioner's stock where such evidence included the retained earnings of the corporation, the willingness of an optionee to pay $61,000 for the corporation's stock, the investments in the corporation by petitioner and one of the respondents, the sale shortly after petitioner requested financial information of some assets for $600,000, and various references in the evidence to real and personal properties owned by the corporation.

APPEAL by respondents from *Clark, Judge.* Order entered 9 November 1977, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 February 1979.

The petitioner, a minority shareholder in both respondent corporations, filed a petition seeking a writ of mandamus to compel the respondents to deliver to him true financial statements of the assets and liabilities of each corporation, the results of the operations and changes in surplus for each corporation for the last year and "to allow the petitioner to examine and make copies of the records of accounts and other records, not heretofore furnished of each corporate respondent." The petition also requested that penalties be assessed against respondents for their refusal to provide petitioner with the information pursuant to G.S. 55-37 and G.S. 55-38.

Petitioner owns approximately 30% of the stock in each corporation; respondent Bell owns the remaining 70% in each. Respondents McLeod and Hall are officers and directors of each corporation but own no stock in either.

Petitioner had previously made written demand on the respondents for the information and stated that his purpose was "the protection of both [his] individual interests and . . . both corporations to allow [him] to determine the true value of his stock, to determine the financial condition of each corporation and to determine whether each corporation is efficiently and properly

managed." Petitioner stated he had suffered damages as a result of respondents' failure to provide the information and cited the expiration of an option "from a willing and able purchaser" to buy his stock at "50% of value." Petitioner alleged that the option expired because value could not be determined without the requested information.

In their response, respondents stated that they had furnished the requested information to petitioner but not copies of the financial statements. They contended that they were justified in refusing the request because petitioner's motive was not proper, *i.e.*, petitioner's motivation was to injure the individual and corporate respondents and to aid competitors.

Evidence for the respondents presented at a show-cause hearing tended to show that the petitioner and respondent Bell each originally owned 50% of the stock of each respondent corporation. Both corporations were in the business of garbage collection. Petitioner later purchased additional stock for $50,000 and Bell purchased additional stock for $150,000. This resulted in an adjustment of stock ownership; petitioner then owned 29.426% of Betty-Rose, Inc. and 28.283% of Belmor Corporation and Bell owned the remaining stock in each. Petitioner was chief executive officer for several years but, as a result of numerous disagreements with Bell, his services were terminated in December 1975. Thereafter, petitioner made several threats to harm the companies and Bell and to compete with the companies. Petitioner in fact did compete with the companies by soliciting business from some customers on behalf of a competitor and by divulging inside information about the companies to competitors. Petitioner did make oral and written requests for financial statements from respondents and they did refuse to furnish it because of petitioner's expressed intention to harm the business and because the optionee told respondents that the option given by petitioner was conditioned on Bell's also selling his stock.

Evidence for the petitioner tended to show that since leaving the companies he has repeatedly tried to obtain financial statements from respondents in order to sell his stock. In October 1976 he gave an option to sell his stock for 50¢ on the dollar and had invested $122,000 in the businesses. The optionee paid $5,000 for the option. The option was contingent upon his providing the

optionee with current financial statements on the companies. Because of respondent's refusal to furnish the statements, the option was not exercised and petitioner returned the $5,000 to the optionee. Petitioner never stated that he intended to harm the respondents and never disclosed confidential financial information to competitors. He did solicit some business from at least one customer of one of the companies for a competitor and himself.

The trial court entered an order on 29 July 1977 finding that petitioner, as a shareholder of both corporations, was entitled, as a matter of law pursuant to G.S. 55-37, to be furnished financial statements of the corporations for the year ending 31 July 1976. The court reserved for jury trial the issue of whether respondents had properly refused to permit petitioner to examine other records pursuant to G.S. 55-38. In order to determine the value of stock for the purpose of assessing penalties against respondents, the trial court retained jurisdiction. The writ of mandamus was issued directing respondents to furnish the designated financial records to petitioner by 5:00 p.m. on 4 August 1977.

Respondents appealed and were given an extension of time to file and serve case on appeal to 18 October 1977.

On 13 October 1977 petitioner moved to dismiss respondents' appeal, to compel compliance with the writ of mandamus and for determination of the amount of penalties to be assessed.

On 10 November 1977 the trial court entered an order finding that the respondents had failed to file the appeal within the time allowed, that respondents had provided petitioner with the requested records on 13 October 1977, and that, based on the findings in the 29 July 1977 writ of mandamus, petitioner is entitled to recover penalties. The trial court therefore (1) dismissed respondents' appeal from the writ of mandamus, (2) denied petitioner's motion to compel compliance with the writ as moot, and (3) assessed penalties of $500 from each company and a total of $251 from each respondent.

Respondents appeal.

Nance, Collier, Singleton, Kirkman & Herndon, by Rudolph G. Singleton, Jr., for petitioner appellee.

MacRae, MacRae, Perry & Pechmann, by Daniel T. Perry, III, for respondent appellants.

Joe McLeod, pro se.

CARLTON, Judge.

[1] Respondents first assign as error the finding of the trial court in its order of 9 November 1977 that petitioner, as a matter of absolute right pursuant to G.S. 55-37, was entitled to be furnished true statements of the assets and liabilities and of the operations and changes in surplus for the fiscal year of respondent corporations. It was on the basis of this finding that penalties were assessed against respondents.

The rights of inspection by shareholders to certain corporate documents are included in the Business Corporation Act, N.C. General Statutes, Chap. 55. The salient provisions are contained in G.S. 55-37 and G.S. 55-38. An understanding of these two statutes is crucial to an understanding of our holding in the case at bar. G.S. 55-37 grants certain *absolute* rights to shareholders; G.S. 55-38 grants certain *qualified* rights to shareholders. Respondents have proceeded in this action without acknowledging the distinction between the two statutes.

The pertinent provisions of G.S. 55-37 provide as follows:

Books and records.—(a) Each corporation shall:

. . . .

(4) Cause a true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year, all in reasonable detail, . . . to be made and filed at its registered office . . . and thereat kept available . . . for inspection on request by any shareholder of record, and *shall mail or otherwise deliver a copy of the latest such statement to any shareholder upon his written request therefor.*

(b) Any shareholder may apply for a writ of mandamus to compel a corporation and its officers and directors to comply with this section. (Emphasis added.)

The pertinent provisions of G.S. 55-38 provide as follows:

> *Examination and production of books, records and information—*
>
> . . . .
>
> (b) A qualified shareholder, upon written demand stating the purpose thereof, shall have the right, in person, or by attorney, accountant or other agent, at any reasonable time or times, *for any proper purpose,* to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of a domestic corporation. . . . A shareholder's rights under this subsection may be enforced by an action in the nature of mandamus.
>
> . . . .
>
> (d) Any officer or agent or corporation refusing to mail a statement as required by G.S. 55-37 *or* refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten percent (10%) of the *value* of the shares owned by such shareholder, but not to exceed five hundred dollars ($500.00) . . . . (Emphasis added.)
>
> . . . .

Respondents argue that the qualifying language of G.S. 55-38, *i.e.*, that the requested information be for a "proper purpose", is also applicable to G.S. 55-37. Obviously, under this interpretation, the question of whether petitioner's motives were "proper" would have been an issue for the jury to resolve, as respondents contend. We do not believe respondents' interpretation to be the legislative intent.

G.S. 55-37 refers solely to shareholders' rights to inspect, by having mailed or otherwise delivered to them, a copy of a "true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year." This statute contains no qualifying language. The language is absolute: the corporation "*shall*" mail or otherwise deliver the documents to "*any*" shareholder upon his written request therefor. (Emphasis added.) Our legislature has clearly

decided that the information referred to in this statute is so basic and fundamental that any shareholder is entitled to a copy of it merely by writing for it. The motive of the requesting shareholder is irrelevant.

G.S. 55-38(b), however, refers to *other* corporate records and this statute is qualified. This subsection refers to the rights of qualified shareholders "to examine at the place where they are kept" books and records of account, minutes and record of shareholders. However, the requesting shareholders must have a "proper purpose" in wanting the information. For a shareholder to have the right to actually visit a corporation's office and possibly disrupt its normal operation by inspecting voluminous books and records of account, our legislature has correctly decided that his motives must be "proper".

We believe this to be a sound and logical distinction. The information made available by G.S. 55-37 is annually prepared by any sound business operation. Having to mail its annual financial statements to shareholders who request them is not an undue burden. Indeed, most large business corporations provide this information to all shareholders without any requests being made. Many do so on a quarterly basis. Since any burden on the corporate operation in preparing and delivering this information is minimal, the shareholder's right to it is absolute.

Shareholders could, however, easily abuse the right conferred by G.S. 55-38(b). The information referred to by that section is the actual corporate books, records of account, minutes, and record of shareholders. The right conferred is that of visiting the corporate offices, examining the records, and making extracts therefrom. It would place an obvious undue burden on corporate offices to provide such records to disgruntled shareholders with improper motives. Our legislature wisely limited such inspection rights in this instance to those with "proper purpose".

Respondents also argue that subsection (d) of G.S. 55-38 indicates a legislative intent that the "proper purpose" limitation be extended to G.S. 55-37. That subsection assesses penalties against officers, agents or corporations "refusing to mail a statement as required by G.S. 55-37 *or* refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders,

for *any proper purpose.*" (Emphasis added.) The distinction between the information contemplated by the two statutes is clearly carried through in this subsection. The two situations are separated by "or" and penalties are then assessed for failure to provide either. The "proper purpose" qualification is clearly limited to the information contemplated by G.S. 55-38.

Nor do we agree with respondents that *Cooke v. Outland,* 265 N.C. 601, 144 S.E. 2d 835 (1965) is controlling in this action. There, the requested information was limited solely to that contemplated by G.S. 55-38. Our Supreme Court held that the right of shareholders to such information was limited to those with a "proper purpose." There was no request in that action for the information contemplated by G.S. 55-37.

We also note that the petitioner and the trial judge recognized the distinction made herein. Petitioner prayed for the information contemplated by *both* statutes. His petition tracked the language of both statutes.

Likewise, the trial court's orders indicate a correct interpretation of the statutes and application of the facts. The trial court found that petitioner was entitled to the annual financial information contemplated by G.S. 55-37 as a matter of absolute right. With respect to the right to inspect other corporate records, as contemplated by G.S. 55-38, the trial court concluded that issues of material fact arose from the pleadings and "the same is not before this Court at this time". In other words, the trial court issued the writ of mandamus solely on the basis of G.S. 55-37 and the rights of petitioner under G.S. 55-38 were left for jury determination. The trial court therefore acknowledged, as we do, that respondents' pleadings were sufficient to raise the question of petitioner's "purpose" in requesting the information contemplated by G.S. 55-38 and that it was an issue appropriate for jury determination.

With respect to the information contemplated by G.S. 55-37, however, the trial court properly concluded that petitioner's rights were absolute as discussed hereinabove. Moreover, the respondents admitted in pleadings and evidence that they had refused to furnish the requested information. Hence, there was no question of fact remaining for the jury. Only issues of fact which arise on the pleadings, and are determinative of the rights of the

parties to the action must be submitted to the jury. *Jeffreys v. Boston Ins. Co.*, 202 N.C. 368, 162 S.E. 761 (1932); 12 Strong, N.C. Index 3d, Trial, § 18, p. 386.

Finally, we observe that a shareholder has a fundamental right to be intelligently informed about corporate affairs. Corporate officials, on the other hand, should not be forced to allow disgruntled shareholders to roam at will through books and records without a legitimate purpose. Most states have enacted statutes in an attempt to strike a balance between these conflicting demands. In North Carolina, our legislature has determined that shareholders have an absolute right to two matters—the annual financial statement of the corporation and the record of shareholders or the voting list prepared for each meeting of shareholders. Other rights to inspection are qualified in some respect. *See*, Robinson, N.C. Corporation Law and Practice 2d, § 8-1, *et seq.*, p. 161; 18 C.J.S., Corporations, § 499, *et seq.*, p. 1176.

[2] Respondents next contend that the trial court erred in finding as a fact that the value of the shares owned by the petitioner in each corporation was in excess of $5,000. This finding was necessary for the court to assess penalties pursuant to G.S. 55-38(d). Without citing any authority, respondents argue that petitioner's shares in Betty-Rose, Inc. could not possibly be worth $5,000 because its balance sheet reflected a retained earnings deficit of $240,000.

G.S. 55-38 is silent as to a method of determining value. Value is a word of many meanings and may be used in different senses, ascertainment of the meaning of the word admitting of no precise standard. Since it is a relative term, it is necessary that its true meaning be determined by the context in which it appears. 91 C.J.S., Value, p. 798. It is particularly difficult to value stock in a closed corporation. *See, In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). In that case, our Supreme Court referred to such matters as what an investor would pay for stock by capitalizing the earnings from the corporate property, determination of the book value of the stock, and consideration of the financial status of the corporation with regard to its capital, surplus and undivided profits. Other factors considered by the Court included the determination of what it would cost to

reproduce corporate property at the time of valuation, utility, growth potential of the corporation, probable future dividends, and good will.

In the context of the case *sub judice*, we believe the proper rule to be that the trial court must consider all material factors and elements which counsel bring to the court and not depend upon any one particular formula exclusively. The weight accorded a theory or factor will vary with the circumstances. *See* Anno., 38 A.L.R. 2d 442 at 446.

Applying the stated rule, we find that the trial court had adequate evidence before it to support its determination of the value of petitioner's stock. This evidence included the retained earnings of the Belmor Corp., the willingness of the optionee to pay $61,000 for the stock, the investments in the corporations by petitioner and respondent Bell, the sale in December 1976 of some assets for $600,000 and various references in the evidence to real and personal properties owned by the corporations. Based on its finding that petitioner's approximate 1/3 stock ownership in each corporation was worth more than $5,000, the trial court properly assessed penalties pursuant to G.S. 55-38(d).

The decision of the trial court is

Affirmed.

Judges PARKER and HEDRICK concur.

FRANKIE REID v. ECKERDS DRUGS, INC.

No. 7814SC483

(Filed 3 April 1979)

1. Uniform Commercial Code § 12— breach of implied warranty of merchantability—showing required

An action for breach of implied warranty of merchantability under G.S. 25-2-314 entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of the sale, (3) the plaintiff or his property was injured by such goods, (4) the defect or other condition amounting to a

breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

2. **Uniform Commercial Code § 12— implied warranty of merchantability—failure to warn of dangerous propensities—container and contents**

A failure to warn of dangerous propensities of both a container and its contents may, in a proper case, provide grounds for an action to recover damages for breach of implied warranty of merchantability under G.S. 25-2-314(1).

3. **Uniform Commercial Code § 13— aerosol deodorant—ignition of alcohol in deodorant—warranty of merchantability**

Plaintiff's action to recover for injuries received when alcohol in deodorant he had applied to himself from an aerosol can ignited when he lit a cigarette was cognizable under the theory of breach of implied warranty of merchantability although plaintiff alleged no defect in the deodorant itself.

4. **Uniform Commercial Code § 13— aerosol deodorant—compliance with federal standards—no merchantability as matter of law**

An aerosol deodorant was not merchantable as a matter of law because it conformed to certain federally-established standards for flammability.

5. **Uniform Commercial Code § 12— use of product in normal way—expectation of freedom from injury—warranty of merchantability**

Where a product is being used for its intended purposes in a normal way, the expectation of the consumer that so used it will not injure him may reasonably be found to lie within the warranty of fitness for ordinary purposes provided by G.S. 25-2-314(2)(c).

6. **Uniform Commercial Code § 13— ignition of alcohol in aerosol deodorant—inadequate warnings—warranty of merchantability**

In an action to recover under the implied warranty of merchantability of a can of aerosol deodorant for injuries received when alcohol in deodorant plaintiff had applied to himself ignited when plaintiff lit a cigarette, warnings on the deodorant can that it should not be sprayed toward a flame or exposed or stored at a temperature above 120°F were not sufficient as a matter of law to entitle defendant merchant to summary judgment, since no suggestion was made that the contents of the can might be flammable once they reached their ultimate destination, and the fact that the contents were 92.77% alcohol by volume was not disclosed. Furthermore, plaintiff's allegations and evidence were sufficient to present a question for the jury as to whether the inadequacy of warnings on the aerosol can was the proximate cause of plaintiff's injuries.

APPEAL by plaintiff from *McKinnon, Judge.* Judgment entered 2 March 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 2 March 1979.

Grover C. McCain, Jr., for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson and Kennon, by O. William Faison, for defendant appellee.

MARTIN (Robert M.), Judge.

Plaintiff brought this civil action to recover damages arising on personal injuries sustained, allegedly resulting from the use of an aerosol deodorant sold to plaintiff's wife by defendant. Plaintiff's evidence tended to show that on 23 September 1976, he was preparing to go to work and liberally applied deodorant from an aerosol can of 5-day antiperspirant to his underarms and neck. He then put the can of deodorant down, walked across the room to where his shirt was, took up a cigarette and proceeded to light it with a match from a paper book of matches. When he struck the match, he heard a loud report and he burst into blue flame. He sustained severe burns to his upper torso, the burns following the pattern of the application and running of the deodorant. As a result of his injuries, plaintiff was briefly hospitalized and lost over five weeks from work, and now has large areas of scar tissue where he was burned. Plaintiff also testified that he was familiar with the warning on the aerosol can concerning use near flame or heat, and that the deodorant felt cold when he applied it.

Defendant introduced evidence tending to show that experimental evidence, derived from tests conducted by an expert, indicated that the deodorant would not ignite unless a paper match was no more than one and one-fourth inches (1¼") from the surface to which the deodorant had been applied. Other evidence was introduced to show that vast quantities of this deodorant had been marketed without receiving any complaint other than plaintiff's.

It appears from the evidence that the deodorant is approximately 92% alcohol in the aerosol spray can. The warning and directions placed upon the can are as follows:

> WARNING: Use only as directed. Do not apply to broken, irritated or sensitive skin. If rash or irritation develops discontinue use. Never spray towards face or flame. Do not puncture or incinerate can. Do not expose or store at temperature above 120°F. Intentional misuse by deliberately concentrating and inhaling the contents can be harmful or fatal. Keep out of reach of children.

Plaintiff's complaint alleged counts of negligence and breach of warranty against Eckerds Drugs, Inc., the store that retailed

the deodorant, and against J. P. Williams Company, Inc., the manufacturer. After receiving plaintiff's evidence, and upon motions and affidavits from the defendant, the trial judge entered summary judgment against plaintiff on all counts pursuant to Rule 56, North Carolina Rules of Civil Procedure. Plaintiff appeals, proceeding solely on his claim of breach of warranty against defendant Eckerds Drugs, Inc. We reverse and remand for trial.

Plaintiff has indicated in his brief that he is abandoning any appeal or argument as to tort aspects of his action, but will instead rely upon his theory of breach of implied warranty of merchantability. He derives this theory from the language contained in the Uniform Commercial Code, as adopted by our Legislature and codified in G.S. 25-2-314. We set out the statute in pertinent part below:

> § 25-2-314. Implied warranty. Merchantability; usage of trade.—(1) Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must be at least such as
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> * * *
>
> (c) are fit for the ordinary purposes for which such goods are used; and
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> * * *
>
> (e) are adequately contained packaged and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

Because any right of recovery on plaintiff's part must be found to exist within or under these implied warranty provisions, we will first analyze the nature and scope of the implied warranty of merchantability and actions thereon.

We note at the outset that this is a novel question for the appellate courts of this State: will a duty to warn of dangerous propensities be found to exist as part of the implied warranty of merchantability? Or, to couch the question more precisely in *Code* language, is a product merchantable where, although some directions for its use and some warnings of the dangers inhering to use under certain circumstances are given, the directions and warnings as a whole do not adequately inform the user of the potential dangers?

[1] It is now generally acknowledged that the action for breach of warranty is an offspring of mixed parentage, aspects of it sounding in both tort and contract, but following strictly the rules and precedents of neither. In its pure form, an action for breach of implied warranty of merchantability under G.S. § 25-2-314 (and all other analogous state enactions of U.C.C. 2-314) entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller. The action is akin to the action of strict liability in tort, except that proof of negligence and foreseeability of injury are not required. It is also akin to a contract action, except that privity requirements have become considerably more relaxed by the various courts in recent years and, further, affirmative defenses of disclaimer and failure to give timely notice may be asserted by the seller. We abandon as hopeless any efforts to characterize the warranty action as either tort or contract, but will draw upon both types of precedent as appropriate in fashioning our view of "merchantability" under G.S. § 25-2-314. As was stated by Justice Sharp (now Chief Justice) in her concurring opinion in *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964) (where plaintiff was suing over a green fly found in her bottled soft drink):

> Strict liability for a food manufacturer's or supplier's default is *sui generis*. As to it, distinctions between tort and contract, either procedural or substantive, are artificial and unjustified, so that the law of primary and secondary liability

> ought to be appropriate irrespective of whether warranty is descended from tort or contract.
>
> . . . Whether we call the rule for which I contend strict liability in tort, as the professors and chaste logic might require, or an implied warranty of fitness imposed by law makes no difference. *Id.* at p. 12, 13, 138 S.E. 2d 760, 761.

We likewise find any distinctions between tort and contract in this warranty action to be artificial and unnecessary to our consideration of merchantability. For general commentary on evolution of this area of the law, *see*, J. White and R. Summer, *Handbook of the Law under the Uniform Commercial Code* § 9-6 (1972); Hodge, *Products Liability: The State of the Law in North Carolina*, 8 Wake Forest Law Rev. 481 (1972); Annotation, 83 A.L.R. 3rd 694 (1978); N.C.G.S. § 25-2-314, Official Comment ¶¶ 10, 11 and 13 and North Carolina Comment; *Terry v. Bottling Co., supra;* 2 L. Frumer and M. Friedman, *Products Liability* § 16.01 *et seq.*

> Resolution of these questions [concerning definitional aspects and parameters of merchantability] will depend upon case law and further legislation which can properly evaluate changing standards of fitness in light of the competing interests of seller and buyer. . . . The UCC merely provides a conceptual framework for the deeper and more exacting analysis of merchantability.

C. Bunn, H. Snead and R. Speidel, *An Introduction to the Uniform Commercial Code* § 2.26(B) (1964). Noting the general absence of statutory constraints upon the definition of merchantability, we turn to a detailed factual analysis of the case *sub judice* to assist our consideration of the question posed.

[2, 3] Two things are apparent with reference to the aerosol deodorant can: (1) the product contained therein was not available to the ultimate consumer, and it was not useable by him as it was constituted, without the assistance of the pressurized aerosol can and its propellant. (We are not unaware that non-aerosol deodorant formulations are available; we are merely observing that for the consumer of an aerosol spray deodorant to avail himself of the deodorant, he must also purchase and use the aerosol can. The one is an integral part of the other and the com-

bination of product and dispenser are the "good" that reaches the consumer for his ultimate use.) Hence, any effort to distinguish between the deodorant and its aerosol applicator is unrealistic and specious; (2) the directions for use of the product clearly contemplate the use of the product as contained and dispensed by the aerosol can. The warnings of the label are easily understood to refer to the can itself and its proper use. No specific warnings about the use and formulation of the deodorant itself are given. Therefore, when it is assumed that both the can and its contents are components of the product for the ultimate consumer, it must also be assumed that the labeling and packaging of the whole product should fairly be expected to warn of any dangerous properties of both contents *and* container, especially where the normal and proper use of the product dictates that the contents of the container will be expelled from the container and will be exposed to conditions, after being thus expelled, which are not necessarily similar to the conditions surrounding the container. Defendant vigorously contends that, because plaintiff has failed to allege or prove any defect in the deodorant (the contents of the can) itself, he may not recover on a theory of breach of implied warranty of merchantability. However, when one views the product holistically, and especially where dangerous propensities under specified conditions inhere to both container and contents as well as their several interfaces, a failure to adequately warn of all such propensities may, in a proper case, render a product unmerchantable under G.S. § 25-2-314(2)(c), (e) and (f) and provide grounds for an action to recover damages for breach of the implied warranty of merchantability embodied in G.S. § 25-2-314(1), and we so hold. "No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole." Restatement of the Law, Torts 2d, p. 352, comment h.

At least two other state courts have similarly concluded that a duty to warn may be embraced in the implied warranty of merchantability. The court in *Hanson v. Murray,* 190 Cal. App. 2d 617, 12 Cal. Reptr. 304 (1961) (involving damage done to nearby citrus crops by spray applied to a carrot field) stated:

> Failure to warn . . . of the danger under these facts were both actionable negligence and the factor which caused the warranty to be breached. The existence of negligence does

not obviate the possibility that a warranty was breached and it is clear that the same operative facts can, under proper circumstances, give rise to both causes of action.

Id. at 624, 12 Cal. Reptr. 308. *Also see, Hamon v. Digliani*, 148 Conn. 710, 174 A. 2d 294 (1961) holding that, where a product was advertised as "safe and easy" on hands, that product was not merchantable where it was capable of causing burns on contact and where warnings did not explicitly so indicate.

[4] Defendant has also argued that, since the deodorant in question conforms to certain federally-established standards for flammability, it cannot as a matter of law be unmerchantable. We do not agree. It is becoming well-established that proof of compliance with government standards is no bar to recovery on a breach of warranty theory. Although such evidence may well be pertinent to the issue of the existence of a breach of any warranty, it is not conclusive. *See Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Reptr. 320 (1960) (involving polio vaccine with live polio virus in it); *Brown v. Globe Laboratories*, 165 Neb. 138, 84 N.W. 2d 151 (1957) (involving a swine vaccine); *Jacob E. Decker & Sons v. Capps*, 144 S.W. 2d 404 (Tex. Civ. Appeals 1940). *Cf., Savage v. Peterson Distributing Co.*, 379 Mich. 197, 150 N.W. 2d 804 (1967) holding it error to exclude such evidence. *Also see, generally*, 2 L. Frumer and M. Friedman, *Products Liability* § 16.03 [4][a][i].

The instant case is distinguishable from *Coffer v. Standard Brands*, 30 N.C. App. 134, 226 S.E. 2d 534 (1976). Plaintiff does not contend that there were any impurities, natural or otherwise, in the deodorant. He contends rather that he was given insufficient notice of the natural properties of the product as it was constituted and that the label contained insufficient data from which he could have reasonably inferred any danger of what in fact occurred.

[5, 6] Having thus determined that plaintiff's cause of action is cognizable under a breach of the implied warranty of merchantability as embodied in § 25-2-314 of the North Carolina Uniform Commercial Code, we must consider whether the warnings and instructions concerning the product and placed upon the label of the container (as quoted, *supra*) are sufficient, as a matter of law, to give plaintiff adequate notice of any dangers and thus entitle

defendant to judgment as a matter of law. We conclude that they were not so sufficient. The warnings and instructions, when read as a whole, may easily be construed as referring to the product and container *as a unit*, *e.g.* "Do not expose or store at temperature above 120° F." clearly contemplates both aerosol can and contents as a whole, since it is highly unlikely that a consumer will be storing the deodorant outside its container; the sentence preceding that one stating "Do not puncture or incinerate can" is reinforcement for the idea that the warnings are directed at the product and the can together. No suggestion is made that the contents might be flammable once they have reached their ultimate destination (*i.e.*, armpits, etc.) and the fact that the contents are 92.77% alcohol by volume is not disclosed. The evidence is undisputed that plaintiff used the aerosol can in accordance with its directions and warnings, set the can down, walked across a room and then lit his cigarette, simultaneously igniting the alcohol in the deodorant he had applied to himself, causing it to burn with a blue flame. The instructions accompanying a product have been found to be "an integral part of the warranty," *Helene Curtis, Inc. v. Pruitt*, 385 F. 2d 841, 856 (5th Cir. 1967). The court in *Reddick v. White Consolidated Industries, Inc.*, 295 F. Supp. 243, 250, 6 U.C.C. Rep. 303, 312 (SD Ga. 1969) observed:

> If a manufacturer furnishes instructions as to the manner in which a product is to be used, the consumer is entitled to think that so used it will not injure him. There is an implied warranty that the goods are fit for that particular use.

Although the court in Reddick was speaking to an implied warranty of *fitness* rather than of *merchantability*, we find that where the product was being used for its intended purposes in a normal way, the same expectation of the consumer may reasonably be found to lie within the warranty of fitness for ordinary purposes of G.S. § 25-2-314(2)(c). We further find that the labeling of the deodorant, when viewed in the light most favorable to the plaintiff (who was the non-moving party) and in view of our interpretations of G.S. § 25-2-314(e) and (f), was not sufficient as a matter of law to entitle defendant to summary judgment. A question of fact as to the sufficiency of the packaging and labeling clearly exists and is one for the jury. In *Center Chemical Co. v. Parzini*,

234 Ga. 868, 218 S.E. 2d 580, 17 U.C.C. Rep. 1211 (1975) the Georgia Supreme Court noted:

> Many products cannot be made completely safe for use and some cannot be made safe at all. However, such products may be useful and desirable. If they are properly prepared, manufactured, packaged and *accompanied with adequate warnings* [emphasis supplied] they cannot be said to be defective. To hold otherwise would discourage the marketing of many products because some danger attended their use.

Id. at 870, 218 S.E. 2d 582, 17 U.C.C. Rep. 1213. On remand to the Georgia Court of Appeals, that court observed:

> The jury is first to determine whether the product was defective. In this it has for consideration the manufacture, the packaging *and the warnings connected with its use.* [Emphasis supplied.]

Parzini v. Center Chemical Co., 136 Ga. App. 396, 399, 221 S.E. 2d 475, 478 (1975). While *Center Chemical Co.* was decided under a hybrid products liability statute (Ga. Code Ann. § 105-106) which combines elements of strict liability in tort with warranty concepts and the concept of "merchantability," we find the reasoning persuasive and applicable to the instant case. Whether the product in question, when viewed as a whole (including contents, packaging, labeling and warnings) was merchantable is a jury question not susceptible of summary adjudication.

Finally, we consider whether plaintiff adequately pleaded and proved the essential elements of his claim for relief so as to entitle him to withstand defendant's motion for summary judgment. It is not contested that defendant Eckerds Drugs, Inc. was a "merchant" within the purview of G.S. § 25-2-104(1) (and, accordingly, of G.S. § 25-2-314(1)). Plaintiff is in privity with defendant by virtue of G.S. § 25-2-318. Failure to give timely notice of breach pursuant to G.S. § 25-2-607(3)(a) has not been asserted as an affirmative defense and therefore is deemed waived. Plaintiff's arguments of unmerchantability are directed to the aerosol can's labeling and warnings and not only to its contents; all the evidence tends to show that the labeling of the particular can owned by plaintiff was identical to that on all other similar cans of deodorant. Therefore, it is not necessary for plaintiff to prove

that no alterations were made to the *contents* of the can after the time of sale. No argument having been made that the labeling or warnings on the can were altered in any way after the time of sale, plaintiff has made a *prima facie* showing that the product was unmerchantable when defendant sold it. (Indeed, tests by defendant's expert did indicate that the contents of the can in question were different from the standard formulation, being approximately 60% alcohol rather than 92.77% alcohol. We may take judicial notice that such a lessening of the alcohol content would, if anything, *reduce* rather than increase any danger of vapor ignition under the circumstances described by plaintiff.) Plaintiff has alleged and proved his injury, and alleges that defendant's breach of warranty was responsible for that injury. Therefore, proximate causation is the only remaining issue for our discussion.

Defendant vigorously contends that the deodorant, after having been applied to plaintiff's body, could only have been ignited by a portion of the paper match breaking off from the match head and striking plaintiff's body, thereby igniting the alcohol (and plaintiff with it). We do not express any opinion as to the weight or credibility of defendant's evidence on this point; we find it, however, to be irrelevant and incompetent within the context of the action as it is presently pleaded. Where a consumer has relied upon warnings, directions and implied warranties attached to a product and is then injured by the product although using it according to those directions, etc., the appropriate question to pose is whether, in view of plaintiff's reliance upon such warnings, directions, and implied warranties, was the inadequacy of any warnings, etc., the proximate cause of plaintiff's injuries? In the event a jury should determine that the warnings contained on the can were sufficient notice of danger to plaintiff so as to render the deodorant merchantable, then that jury would never reach the issue of proximate causation, as plaintiff would be denied recovery as a matter of law. However, if the warnings are not found to be so sufficient, inquiry as to proximate causation would focus upon plaintiff's reliance upon the warnings and instructions and not what agent was physically responsible for the ignition of the flame. It would be anomalous and patently unjust to deny plaintiff a recovery on the basis of contributory "negligence" or other fault when the language of the warnings and instructions

for the product do not proscribe the course of conduct which resulted in the ignition of the flame and which course may have been pursued in justifiable reliance upon those warnings and instructions. The "blue flame" described and experimentally engendered by defendant's expert is markedly similar to the "blue flame" which engulfed plaintiff. Arguably, *neither* flame was ignited under conditions described as potentially dangerous by the deodorant can's label.

For the reasons stated above, the entry of summary judgment against plaintiff on his claim for relief based on breach of implied warranty of merchantability is reversed. The cause is remanded for further proceedings and trial not inconsistent with this opinion.

Reversed and remanded.

Judges MITCHELL and WEBB concur.

GLENN A. LAZENBY, JR. AND JEAN G. LAZENBY v. DERWOOD H. GODWIN

No. 7814SC358

(Filed 3 April 1979)

1. **Fiduciaries § 1; Corporations § 13— acquisition by director of shareholder's stock—fiduciary duty under special circumstances**

Under special circumstances, a director of a corporation stands in a fiduciary relationship to a shareholder or director in the acquisition of the shareholder's stock.

2. **Fiduciaries § 2; Corporations § 13— fiduciary duty of director to shareholders —sufficiency of evidence**

Plaintiffs presented evidence of special circumstances which, if found by the jury to be true, would create a fiduciary duty owed by defendant corporation director to plaintiff shareholders where plaintiffs' evidence tended to show that the corporation in question was a closely held corporation with shares not sold on the open market; the shares of the corporation were owned by the children of a deceased man and their spouses; defendant had managed the corporation since its inception in the 1950's; although plaintiffs were technically codirectors of the corporation, they did not take part in the management of the corporation; and plaintiffs placed their trust in the business skills and judgment of defendant because plaintiffs had less experience than defendant in corporate affairs.

3. **Corporations § 13— fiduciary duty of director to codirectors—no equal access to necessary information**

Though the general rule is that a director owes no fiduciary duty to a codirector in regard to the sale or acquisition of stock, a duty to disclose does exist where the parties do not have equal access to the necessary information; evidence presented by plaintiffs in this case that defendant did not disclose to plaintiffs that another corporation was negotiating with defendant to purchase the corporate assets for a large sum, that defendant had requested the persons with whom he was negotiating to refrain from informing the other shareholders of the impending sale, that an inspection of the books would not have revealed that a sale of the corporate assets was being negotiated, and that plaintiffs did not take an active part in the management of the corporation and that there were no regular directors' meetings was sufficient evidence to establish that plaintiffs did not have equal access to the information, and defendant was therefore under a duty to disclose that the other corporation had made an offer to purchase the corporate assets.

4. **Fiduciaries § 2; Corporations § 13— director's duty to shareholders—termination of duty—question of fact**

Defendant's statement made during an informal shareholders' meeting that he wanted to purchase the shareholders' stock for as little as possible was a factor to be taken into consideration by the jury in determining whether or not the fiduciary relationship continued until the date of the sale of the stock, but it was not conclusive on that issue.

APPEAL by defendant from *Lee, Judge*. Judgment and Order for New Trial entered 15 August 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 January 1979.

On 11 April 1974, plaintiffs filed a complaint alleging that the defendant had committed actual and constructive fraud in purchasing the plaintiffs' stock in the Fayetteville Wholesale Building Supply, Inc., without disclosing that there was an impending sale of the corporate assets which greatly increased the value of plaintiffs' stock. Defendant was the president and manager of the corporation as well as the majority stockholder.

Defendant answered denying any fraud on his part, and alleged that the plaintiffs had ratified and approved the sale of their stock to the defendant after becoming fully informed of the sale of the corporate assets.

The evidence tends to show that Fayetteville Wholesale Building Supply, Inc., was a closely held family corporation. In September 1972, the stock in the corporation was owned as follows:

Defendant, Derwood H. Godwin:	42.05%
Larry Godwin:	12.04%
Margaret Godwin Caviness:	11.3%
Linda Godwin Furr:	11.3%
Plaintiff, Jean G. Lazenby:	11.3%
Plaintiff, Glenn Lazenby:	9.86%
O. W. Godwin Estate:	2.15%

The stockholders listed above are the children of O. W. Godwin, deceased, except for plaintiff Glenn Lazenby, who is the husband of the deceased's daughter.

In December 1972, defendant began negotiating with Larry Godwin for the purchase of his stock. On 7 February 1973, defendant purchased the shares of Larry Godwin and thereby obtained a majority interest in the corporation. In February 1973, the defendant mailed a letter to plaintiffs informing them of the defendant's control of the corporation. In the letter, defendant stated that "[i]f something were to happen to me . . . you could wind up with nothing," and "if you would like to sell, let me know. . . ."

On 11 March 1973, an informal shareholders' meeting was held. At that meeting, defendant informed the other shareholders that he was in ill health and would be interested in purchasing their stock. Defendant offered to purchase the shares at less than book value. Defendant also stated that a sale of the corporate assets was not possible. The defendant then offered each shareholder $60,000 for his interest in the corporation. Linda Furr refused, and defendant informed the others that he would purchase all or none of the shares. On 13 March 1973, the plaintiffs reconsidered defendant's offer. Plaintiffs telephoned the defendant, who agreed to purchase plaintiffs' shares for $120,000. On 16 March 1973, defendant executed a note for $120,000 for plaintiffs' stock. Margaret Godwin Caviness also sold her shares to defendant for $60,000. On 26 March 1973, Linda Furr was notified by Ervin Baer, attorney for the corporation, that the corporate assets were to be sold to Valley Forge Corporation for $2,600,000, and she consented to the sale. The next day, Linda Furr informed plaintiffs of the impending sale. Plaintiffs thereupon contacted Baer, who informed plaintiffs that the plaintiffs would not have received any more money if they had retained their stock until the sale of the corporation to Valley Forge. On 28 March, the as-

sets of the corporation were sold to Valley Forge Corporation. On 10 December 1973, plaintiffs accepted partial payment on the note from defendant. On 1 January 1974, the plaintiffs discovered that they would have received about $1,200 per share, or approximately $300,000, if they had retained the stock until the sale to Valley Forge.

Plaintiffs' evidence also tended to show that the defendant did not inform the plaintiffs that in December 1972, defendant was approached in regard to a sale of the corporate assets to Valley Forge Corporation and that in early January 1973 he met with the President of Valley Forge Corporation in Houston, Texas, to discuss the sale. During the last week in January 1973, an auditor from Valley Forge visited Fayetteville Wholesale Building Supply, Inc., and in February the defendant was informed that Valley Forge would be making an offer to purchase. On 4 March 1973, a written offer to purchase the corporation for $2,543,000 was submitted, and the defendant counteroffered for sale at $2,600,000 on 12 March 1973, which was incorporated in the final contract. The corporation was to receive a net of about $1,800,000. The sale was finalized on 28 March 1973.

Defendant's evidence tended to show that he did not inform the other shareholders of the impending sale at the shareholders' meeting on 11 March because he had not received a firm offer. In January 1974, after plaintiffs learned of the sale of the assets, defendant offered to sell back the shares to plaintiffs and also tendered the balance on the $120,000. Plaintiffs refused to accept the stock or the tender.

At the close of the evidence, defendant moved for a directed verdict. The court denied defendant's motion. Five issues were submitted to and answered by the jury as follows:

> "1. At the time of the sale of the 236 shares of stock of Fayetteville Wholesale by the plaintiffs to the defendant on March 16, 1973, did a relationship of trust and confidence exist between the plaintiffs and the defendant?
>
> ANSWER: Yes.
>
> 2. If so, was the sale of stock on that date an open, fair, and honest transaction?
>
> ANSWER: No.

3. Did the defendant, by actual fraud and deceit, obtain the 236 shares of stock of Fayetteville Wholesale from the plaintiffs on March 16, 1973?

ANSWER: No.

4. Did the plaintiffs affirm and ratify the sale of stock as alleged in the answer?

ANSWER: No.

5. In what amount, if any, are the plaintiffs entitled to recover of the defendant for:
(a) Principal 10,000.00?
(b) Interest 0 ?"

The plaintiffs moved for a partial new trial on the issue of damages, pursuant to G.S. 1A-1, Rule 59, on the grounds that the verdict as to damages was inadequate and against the weight of the evidence, and was rendered in disregard of the instructions by the court. The defendant tendered a judgment providing for an additur of $87,123.42, bringing the damages to a total of $97,123.42.

On 15 August 1977, the court set aside the jury verdict and ordered a new trial on all the issues raised by the pleadings. From this judgment and order, defendant appeals.

Murdock & Jarvis by Jerry L. Jarvis for plaintiff appellees.

Poyner, Geraghty, Hartsfield & Townsend by David W. Long and Cecil W. Harrison, Jr.; William A. Johnson; and James B. Maxwell for defendant appellant.

CLARK, Judge.

Defendant first assigns as error the trial court's denial of defendant's motion for directed verdict on the issue of constructive fraud. Defendant contends that a recovery for constructive fraud is predicated on a breach of a fiduciary duty, 6 Strong's N.C. Index 3d, Fraud, § 7, and that under North Carolina law, a manager and director of a corporation does not stand in a fiduciary relationship to shareholders in regard to the acquisition of the shareholders' stock. Therefore, defendant contends, he had no duty to disclose any information relating to the value of the stock or to disclose the impending sale of the corporate assets.

The threshold inquiry, then, is whether or not, under North Carolina law, a director of a corporation stands in a fiduciary relation to a shareholder in a corporation in the acquisition of the shareholders' stock. The North Carolina courts have not directly addressed this issue. *See*, R. Robinson, North Carolina Corporation Law and Practice, § 12-14 (Supp. 1977).

Three different views on this issue are recognized in other jurisdictions. *See*, Annot., 7 A.L.R. 3d 501 (1966); 19 Am. Jur. 2d, Corporations, § 1328. The majority view provides that a director of a corporation does not stand in a fiduciary relationship to a shareholder as to the acquisition of stock, and therefore has no duty to disclose inside information. *See*, Annot., 7 A.L.R. 3d 501, § 3; Annot., 132 A.L.R. 261, § II (1941); 19 Am. Jur. 2d, Corporations, § 1328. The minority view provides that because of his position as a director in the corporation, a director is under a duty to disclose all material information regarding the purchase or sale of stock. *See*, Annot., 7 A.L.R. 3d 501, § 5 (Supp. 1978); Fletcher, 3A Cyc. Corp., § 1168.2 (Perm. Ed. 1975).

The third view is that, although a director or manager of a corporation ordinarily owes no fiduciary duty to shareholders when acquiring their stock, under "special circumstances" a fiduciary relationship arises. Annot., 7 A.L.R. 3d 501, § 4, Annot., 132 A.L.R. 261, § III; Lake, *The Use for Personal Profit of Knowledge Gained While a Director*, 9 Miss. L.J. 427 (1936). The special circumstances include, for example, the fact that the corporation is closely held and its shares are unlisted (*Saville v. Sweet*, 234 App. Div. 236, 254 N.Y.S. 768 (1932), *aff'd* 262 N.Y. 567, 188 N.E. 67 (1933)); the familial relationship of the parties (*see*, *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971)); the forthcoming sale of corporate assets (*Wood v. MacLean Drug Co.*, 266 Ill. App. 5 (1932)); the fact that the director initiates the sale (*see*, *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933)); and the relative ages and experience in financial affairs of the director and shareholder (*see*, *Jaynes v. Jaynes*, 98 Cal. App. 2d 447, 220 P. 2d 598 (1950)).

Although, the North Carolina courts have not expressly adopted any view as to the existence of a fiduciary relationship between a director of a corporation to a shareholder in acquiring stock, there are three pertinent North Carolina cases.

In *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931), the plaintiff was a shareholder in a corporation and the defendant was a manager of the corporation. The defendant agreed to negotiate a sale of plaintiff's stock to a second corporation. The defendant sold plaintiff's stock, misrepresented the sale price to plaintiff and retained the excess funds for his own use. The court held that a fidiciary relationship existed between the defendant and plaintiff, but refused to specify whether the fiduciary duty arose on a principal-agent theory or some other basis. The court held that it was unnecessary to determine whether a fiduciary relationship arose merely because the defendant was a director and plaintiff a shareholder in the corporation. The court stated that "[t]he relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* at 598, 160 S.E. at 906.

In *Link v. Link*, *supra*, the plaintiff-wife transferred corporate debentures and stock to her husband, the defendant, in a separation agreement. The defendant was a manager and director of the corporation. Plaintiff brought suit alleging that defendant had fraudulently concealed the value of the stock. The court noted the decision in *Abbitt* and stated that "[w]hen, as here, there are added the further circumstances that the transferor is the wife of the transferee, she is inexperienced in business affairs and is laboring under great emotional strain, the stock is unlisted, is closely held within the family of the transferee and has never paid dividends, the duty of disclosure is clear." *Id.* at 193, 179 S.E. 2d at 704.

In *Ragsdale v. Kennedy*, 22 N.C. App. 509, 207 S.E. 2d 301, *reversed* 286 N.C. 130, 209 S.E. 2d 494 (1974), this court considered whether or not a manager of a corporation had a duty to codirectors to disclose information regarding the financial condition of the corporation when selling stock. In a divided opinion, this court held that "a president-manager of a corporation does not stand in a fiduciary relationship to his directors merely by virtue of his position as such president-manager; and, absent a showing of special circumstances creating a fiduciary relation between the parties, or absent a showing of active fraud, such president-manager may sell his stock to his directors, and fraud

or unfair dealing will not be inferred." *Id.* at 516, 207 S.E. 2d at 30¢. The court held that the defendants had not alleged any special circumstances. Judge Baley, in a dissenting opinion, indicated that a fiduciary relationship existed. On appeal, the Supreme Court reversed, noting that the evidence tended to show that the plaintiff, the manager of the corporation, was aware that the corporation was in dire financial straits and had informed the defendants that the corporation was a "gold mine." The court held that once a vendor assumes to speak, he is then under a duty to make a full and fair disclosure. The Supreme Court did not specifically address the issue of constructive fraud.

[1] In light of the language of the North Carolina Supreme Court in *Link*, it is our opinion that, under special circumstances, a director of a corporation stands in a fiduciary relationship to a shareholder or director in the acquisition of the shareholder's stock.

[2] We therefore must consider whether plaintiffs presented evidence of special circumstances, which if found by the jury to be true, would create a fiduciary duty owed by defendant to the plaintiffs. The evidence presented by the plaintiffs tends to show that the Fayetteville Wholesale Building Supply, Inc., was a closely held corporation with shares not sold on the open market. The shares in the corporation were owned by the children of O. W. Godwin and their spouses. The defendant had managed the corporation since its inception in the 1950's.

Although the plaintiffs were technically codirectors of the corporation, they did not take part in the management of the corporation. They placed their trust in the business skills and judgment of the defendant because the plaintiffs had less experience than defendant in corporate affairs. The defendant initiated the sale by sending a letter to plaintiffs informing them that he was in ill-health and advising them to consider selling their interest.

Plaintiffs have presented sufficient evidence of special circumstances, which if found by the jury to be true, would create a fiduciary relationship between defendant and plaintiffs. "Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee . . . to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud." *Link v. Link, supra*, at 192,

179 S.E. 2d at 704. *See, Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951).

[3] We note that in the case *sub judice*, the plaintiffs, in addition to being shareholders, were codirectors of the corporation. The general rule is that a director owes no fiduciary duty to a codirector in regard to the sale or acquisition of stock. Annot., 84 A.L.R. 615, § IV (1933). *See, Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 171 P. 431 (1918). The basis of this rule is that codirectors ordinarily have equal means of knowledge of the corporation's finances. *Perry v. Pearson*, 135 Ill. 218, 25 N.E. 636 (1890); *Boulden v. Stilwell*, 100 Md. 543, 60 A. 609 (1905). But where the parties do not have equal access to the necessary information, a duty to disclose exists. *Morrison v. Snow*, 26 Utah 247, 72 P. 924 (1903); *George v. Ford*, 36 App. D.C. 315 (1911); Annot., 84 A.L.R. 615, § IV. In the case *sub judice*, the defendant did not disclose to the plaintiffs that Valley Forge Corporation was negotiating with defendant to purchase the corporate assets for $2,600,000. The evidence tends to show that defendant had requested the persons with whom he was negotiating to refrain from informing the other shareholders of the impending sale. An inspection of the books would not have revealed that a sale of the corporate assets was being negotiated. In addition, although the plaintiffs were nominally codirectors of the corporation, the evidence tends to show that they did not take an active part in the management of the corporation and that there were no regular directors' meetings. There is sufficient evidence presented to establish that plaintiffs did not have equal access to the information and therefore, the defendant was under a duty to disclose that the Valley Forge Corporation had made an offer to purchase the corporate assets.

[4] Defendant, however, contends that the defendant's statement during the 11 March 1973 meeting that he wanted to purchase the stock for as little as possible, terminated the fiduciary relationship. This is a factor to be taken into consideration by the jury in determining whether or not the fiduciary relationship continued until the date of the sale of the stock, but it is not conclusive on that issue. The court did not err in denying defendant's motion for a directed verdict on the issue of constructive fraud.

Defendant also assigns as error the trial court's refusal to sign the Judgment and Additur submitted by defendant.

A ruling on a motion for additur or remittur is within the discretion of trial judge. *Caudle v. Swanson*, 248 N.C. 249, 103 S.E. 2d 357 (1958). The judge, however, may not merely reduce or increase the award without the consent of the affected parties. *Bethea v. Kenly*, 261 N.C. 730, 136 S.E. 2d 38 (1964); Shuford, North Carolina Civil Practice and Procedure, § 59-9 (1975). There is nothing in the record before us which indicates that the trial court abused its discretion in denying defendant's additur, and therefore defendant's contention is without merit.

Plaintiffs cross-assign as error the trial court's denial of plaintiffs' motion to limit the new trial to the issue of damages. "A motion in this regard is directed to the sound discretion of the trial judge . . . ." *Setzer v. Dunlap*, 23 N.C. App. 362, 363, 208 S.E. 2d 710, 711 (1974). The appellate courts will not supervise the lower court's judgment except in "extreme circumstances." *Id.*; *see, Godwin v. Vinson*, 254 N.C. 582, 119 S.E. 2d 616 (1961). It is not an abuse of discretion to require a new trial on all issues, even though the error giving rise to a new trial occurred in only one issue. *See, Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164 (1911). The trial court did not abuse its discretion in ordering a new trial on all issues.

Affirmed.

Judges VAUGHN and HEDRICK concur.

HARRINGTON MANUFACTURING CO., INC. v. LOGAN TONTZ COMPANY AND TRIAD METAL PRODUCTS COMPANY

No. 786SC377

(Filed 3 April 1979)

1. Uniform Commercial Code § 23— justifiable revocation of acceptance—burden of proof

Once goods have been accepted by the buyer, he is thereafter precluded from rejecting them, G.S. 25-2-607(2), and when he revokes his acceptance, the

burden is on him to show that such revocation was justifiable. G.S. 25-2-607(4); G.S. 25-2-711(1).

2. Uniform Commercial Code § 23— justifiable revocation of acceptance—showing required

In order for the buyer to show that his revocation of acceptance of goods was justifiable, he must prove the following four elements: (1) that the goods contained nonconformity that substantially impaired their value to him, G.S. 25-2-608(1); (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, G.S. 25-2-608(1)(a), or that he accepted the goods not knowing of the nonconformity due to the difficulty of discovery or reasonable assurances from the seller that the goods were conforming, G.S. 25-2-608(1)(b); (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect, G.S. 25-2-608(2); and (4) that he notified the seller of his revocation, G.S. 25-2-608(2).

3. Uniform Commercial Code § 23— revocation of acceptance—reasonable time—factors considered

In determining whether revocation was made within a reasonable time after the buyer discovered or should have discovered a nonconformity, it is proper to consider all the surrounding circumstances, including the nature of the defect, the difficulty of its discovery, the complexity of the goods involved, and the sophistication of the buyer.

4. Uniform Commercial Code § 23— revocation of acceptance—reasonable time—jury question

What is a reasonable time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury.

5. Uniform Commercial Code § 24— justifiable revocation of acceptance—sufficiency of evidence

Plaintiff's evidence was sufficient to permit a jury finding that plaintiff justifiably revoked its acceptance of latches ordered from defendant for use in tobacco barns made by plaintiff where it tended to show that defendant offered to manufacture latches made like samples submitted to plaintiff for a certain price; plaintiff initially ordered 500,000 of the latches and later ordered an additional 250,000 latches; the latches were used by plaintiff in manufacturing its tobacco barns and were later found to be unsatisfactory because they would not hold loaded tobacco racks; the latches did not conform to the models submitted by defendant to plaintiff; and plaintiff notified defendant of the problem with the latches within 24 hours after plaintiff discovered that a problem existed.

6. Uniform Commercial Code § 22— revocation of acceptance—damages for "cover" and incidental expenses

Plaintiff's evidence was sufficient for the jury to find that, after it revoked its acceptance of latches ordered from defendant, it properly "covered" in procuring substitute latches for those ordered from defendant and that it was entitled to damages for the cost of effecting "cover" as well as incidental and consequential damages it incurred in shipping the latches back to defendant,

for amounts paid to farmers for the replacement of the latches in tobacco barns made by plaintiff, for labor to install the new latches in the barns, and for transportation of the replacement latches to farmers and dealers. G.S. 25-2-712(1) and (2).

APPEAL by defendant Triad Metal Products Company from *Martin (Perry), Judge.* Judgment entered 27 October 1977 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals on 1 February 1979.

This is a civil proceeding wherein plaintiff seeks to recover damages in excess of $300,000 based on breach of a contract pursuant to which the defendant was to manufacture and sell to plaintiff a special type of latch used in the construction of tobacco barns. The defendant Triad Metal Products Company counterclaimed for $47,083.36 damages for the failure of plaintiff to pay for all of the latches it ordered. The defendant Logan Tontz Company was voluntarily dismissed prior to trial. The relevant facts in this complex lawsuit are as follows:

Plaintiff is a North Carolina corporation engaged primarily in the manufacture of various types of farm equipment and industrial machinery. Defendant is a metal stamping company located in Cleveland, Ohio, that makes parts for automobiles, appliances and other manufactured goods. One of the plaintiff's products is a bulk tobacco curing barn. This type of barn is designed to hold racks on which green tobacco is placed for curing. The tobacco is picked in the field and loaded onto the racks and the loaded racks are then placed in the barns. The later models of this barn contain three tiers of racks. Each barn holds 126 racks. Each rack consists of two separate pieces, one of which has several long nails or tynes that hold the tobacco leaves. These two components are held together by a piece called a latch or a latch spring, there being two latches for each rack, one on each side. The latches are designed to snap into place and fit onto a latch guide or sleeve in the barn.

In February of 1974, Mr. Logan Tontz of Triad Metal Products contacted Mr. George Britton of Harrington Manufacturing Company and they discussed the possibility of the defendant manufacturing the latches for the barns made by the plaintiff. Mr. Tontz was provided a drawing of the latch that was then being manufactured by plaintiff and used in the barns. He was also pro-

vided with one of the latches that plaintiff had manufactured. On 9 May 1974, defendant delivered 25 latches for examination and testing to plaintiff. On 22 May 1974, Harrington ordered an additional 550 of these latches, 275 to be 3/4″ wide and 275 to be 7/8″ wide, all to be 1/8″ longer than the first 25 latches sent but having the same thickness of .062 inches. The latches ordered were in all other respects identical to the original 25 latches provided by the defendant. The 550 latches were received on 28 June 1974 and were field tested on tobacco racks by the Harrington Engineering Department. These tests proved to be successful and this was communicated to Triad.

On 10 July 1974, defendant sent the following letter to Harrington:

Dear Mr. Britton:

We recently submitted samples to you on the subject part made of 7/8″ wide material and .062 thick. Our representative, Mr. Logan Tontz, has requested that we quote on manufacturing this part for you made like the samples we submitted, mentioned above, and we quote as follows:

$125.15/M — 100,000 piece lots
$124.80/M — 250,000 piece lots
$124.70/M — 500,000 piece lots
$124.65/M — 1,000,000 piece lots

Tool cost: $3175.00
Delivery: 8-10 weeks

Our terms are f.o.b. our plant, Cleveland, Ohio. Net 10 days for tools and net 10th and 25th for production.

The above quotation is based upon making these parts, as previously stated, out of 7/8″ wide material, .062″ thick, SAE 1070 Annealed Spring Steel and heat treated to Rockwell C48 and with a phosphate and oil finish.

We hope you find the above attractive and that we may have an opportunity to supply this part to you.

Sincerely yours,

R. L. Steinheiser

On 12 August 1974, plaintiff placed an order for 500,000 of the 7/8" wide latches with defendant using part #6983 (Triad #78159). Subsequently, Triad sent a letter dated 13 August 1974, confirming this order, which stated:

> Dear Mr. Britton:
>
> Confirming your conversation with our representative, Mr. Logan Tontz, we are entering your purchase order number 11395 for the tooling and 500,000 pieces of the subject part as quoted July 10, 1974.
>
> Per Mr. Tontz's request, we are enclosing herewith a copy of the print of the subject part which coincides with the last samples we made for you on this part and which were approved.
>
> We wish to thank you very much for this order and the opportunity to manufacture this part for you.
>
> Sincerely yours,
>
> R. L. Steinheiser

A detailed design print of a latch was also sent with this letter.

When the latches from the defendant were received, Harrington ceased its production of latches and began using the Triad latches. On 28 January 1975, Harrington ordered an additional 250,000 latches. After manufacturing approximately 1,000 barns using over 250,000 Triad latches, Harrington began receiving complaints in late February that the racks would not hold when weighted down. Harrington notified defendant of the problem with the racks not holding within 24 hours of receiving complaints and immediately ceased using the Triad latches and resumed production of its own latches on an emergency basis. On 14 March 1975, Harrington paid Triad $14,377.04 on account for shipments of the latches, bringing the total amount paid for the latches to $35,748.64. After that, Harrington made no further payments to Triad and returned, at the request of Triad, all the unused latches that had been shipped to it. Harrington had received 638,789 latches from the defendant pursuant to its shipment orders.

At trial, Harrington introduced evidence tending to show that Triad did not send a drawing or diagram of any latch for ap-

proval prior to 12 August 1974, the date on which Harrington sent its purchase order for 500,000 latches; that prior to 12 August 1974, Triad had sent only the two sets of samples, one of 25 and one of 550, that had been successfully field tested by Harrington; and that the production latches sent were not like these samples, but if they had been they would have worked; that the latches manufactured by Harrington were tested and withstood a load of 600 pounds without pulling out of the latch guides, but that the latches manufactured by Triad failed to hold with loads ranging from 150 to 590 pounds; that when loaded with tobacco, the racks would weigh between 250 and 300 pounds; and that the order from Harrington was placed before the 13 August 1974 drawing was in existence. With regard to the issue of damages, Harrington presented evidence tending to show that it paid Triad $35,748.64 on the account for the latches that were delivered; that the cost to Harrington of manufacturing 750,000 latches to replace the ones made by Triad is $281,250.00; that it incurred $6,750.00 in labor expenses for replacing the latches; that it paid $6,749.00 to farmers and dealers for replacing latches; and that it incurred $3,000 expenses for transporting the latches to dealers and farmers.

Defendant presented evidence tending to show that Harrington's order on 12 August 1974 for 500,000 latches was not based on the earlier samples that had been submitted, but rather on the basis of information forwarded by Mr. George Britton of Harrington and transmitted to Mr. Elmer Reidel of Triad, who designed the die for the latches made by Triad, that this information concerned a reduction in the angle of a bend or detent in the latch, which was incorporated into the design and finalized in the drawing dated 13 August 1974, which accompanied the letter of even date sent to Harrington confirming the purchase order; and that the latches made by Triad conformed to the drawing dated 13 August 1974, and not to the original samples. With regard to its counterclaim, Triad presented evidence tending to show that Harrington had a current indebtedness of $32,722.40 to Triad for the latches delivered to it, and that Harrington had been regularly billed each month for this balance on their account.

At the close of all the evidence, plaintiff's motion to dismiss the counterclaim of the defendant on the grounds that no

evidence was introduced that Harrington was indebted to defendant in any amount was allowed by the trial court.

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

1. Did the defendant expressly warrant to manufacture the latches and deliver the same in accordance with the samples submitted?

Answer: Yes

2. If so, did the defendant materially breach its express warranty to the plaintiff?

Answer: Yes

3. If the defendant materially breached its express warranty to the plaintiff, what amount of damages, if any, is plaintiff entitled to recover?

Answer: $42,498.64.

After the jury had returned its verdict, the plaintiff moved to set aside the verdict as to the third issue as being against the greater weight of the evidence. The court allowed this motion and entered an order that a new trial be held as to the third issue only. Defendant appealed.

Pritchett, Cooke & Burch, by Stephen R. Burch and William W. Pritchett, Jr., for plaintiff appellee.

Turner, Enochs, Foster & Burnley, by James R. Turner, and Allsbrook, Benton, Knott, Cranford & Whitaker, by Thomas I. Benton, for defendant appellant.

HEDRICK, Judge.

The issues submitted to and answered by the jury do not resolve the controversy between the parties disclosed by the evidence. While warranties are involved, the issues raised by the evidence are more complex and involve principles of law either not considered or incorrectly applied by the trial court. Since the error appearing in this record has been only indirectly raised and discussed by the defendant in its brief, it is unnecessary for us to discuss separately each of its several assignments of error in this opinion. We confine our discussion to what we perceive to be the issues raised by the evidence in this record and the correct application of the several principles of law thereto.

[1, 2] Once goods have been accepted by the buyer, he is thereafter precluded from rejecting them, G.S. § 25-2-607(2), and when he revokes his acceptance, the burden is on him to show that such revocation was justifiable before he will be allowed to recover. G.S. §§ 25-2-607(4), -2-711(1). In order for the buyer to show that his revocation was justifiable, the following four elements must be proved: (1) that the goods contained a nonconformity that substantially impaired their value to him, G.S. § 25-2-608(1); (2) that he either accepted the goods knowing of the nonconformity but reasonably assuming that it would be cured, G.S. § 25-2-608(1)(a), or that he accepted the goods not knowing of the nonconformity due to the difficulty of discovery or reasonable assurances from the seller that the goods were conforming, G.S. § 25-2-608(1)(b); (3) that revocation occurred within a reasonable time after he discovered or should have discovered the defect, G.S. § 25-2-608(2); and (4) that he has notified the seller of his revocation, G.S. § 25-2-608(2). *See also Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972); *Davis v. Vintage Enterprises, Inc.*, 23 N.C. App. 581, 209 S.E. 2d 824 (1974); 2 Anderson, Uniform Commercial Code § 2-608:4 (2d ed. 1971); 3 Williston on Sales, § 25-6 (4th ed. 1974); Annot., 65 A.L.R. 3d 388 (1975).

[3, 4] Under G.S. § 25-2-106(2), goods are " 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." Furthermore, the existence of any express or implied warranties would be relevant to show the standard to which the goods were supposed to conform. *See* G.S. § 25-2-313(1). In determining whether revocation was made within a reasonable time after the buyer discovered or should have discovered the nonconformity, it is proper to consider all the surrounding circumstances, including the nature of the defect, the complexity of the goods involved, the sophistication of the buyer, and the difficulty of its discovery. G.S. § 25-1-204(2); 2 Anderson, Uniform Commercial Code § 2-608:20 (2d ed. 1971); Annot., 65 A.L.R. 3d 354, 360-61 (1975). Indeed the reasonable time period may extend in certain cases beyond the time in which notice of the nonconformity has been given, as for example where the parties make attempts at adjustment. *Dopieralla v. Arkansas Louisiana Gas Co.*, 255 Ark. 150, 499 S.W. 2d 610 (1973); 2 Anderson, Uniform Commercial Code § 2-608:19 (2d ed. 1971); Comment 4 of the Official Commentary to G.S. § 25-2-608. What is a reasonable

time for a buyer to revoke his acceptance is ordinarily a question of fact for the jury. *See Four Sons Bakery, Inc. v. Dulman*, 542 F. 2d 829 (10th Cir. 1976).

Plaintiff's evidence with regard to the nonconformity element in G.S. § 25-2-608(1) tended to show the following:

[5] Plaintiff supplied defendant with one of the latches that it manufactured for its barns and with a drawing of the latch; that defendant represented that it could manufacture a better latch at a cheaper price; that defendant had knowledge of how the latch was to be used; and that plaintiff relied on the defendant's representations as to their ability to design and manufacture a latch suitable for use in the plaintiff's barns. Plaintiff's evidence also tended to show that defendant manufactured and submitted model latches to the plaintiff for testing; that plaintiff tested these models and found them to be satisfactory; that defendant offered to manufacture latches "made like the samples we submitted" and quoted a price to plaintiff; that plaintiff initially ordered 500,000 of the latches and later ordered an additional 250,000 latches; that the production latches were used by the plaintiff in manufacturing the barns and were found to be unsatisfactory because they did not hold the loaded racks; and that the production latches did not conform to the models submitted. With regard to the notice element, plaintiff's evidence tended to show that once it discovered that a problem existed with the latches not holding the racks, it notified the defendant of the problem within twenty-four hours.

This evidence raises the threshold issue whether the plaintiff justifiably revoked its acceptance of the latches purchased from the defendant. Before the plaintiff is entitled to recover any damages, it must first prevail on this issue. From the evidence introduced, a jury could find that the plaintiff did justifiably revoke its acceptance of the latches. If a jury did find such a revocation of acceptance, then, under G.S. § 25-2-711(1), plaintiff would be entitled to recover the amount of the contract price it has paid for the goods involved. In addition to allowing the recovery of so much of the purchase price as has been paid, G.S. § 25-2-711 provides additional remedies for the buyer upon a justifiable revocation of acceptance. Under G.S. § 25-2-711(1)(a) the buyer is entitled to "cover" by procuring substitute goods for those found to be nonconforming.

In order to employ the remedy of "cover," the buyer must meet the requirements set out in G.S. § 25-2-712(1). First, there must have been a breach of the contract, and the seller must have either repudiated the contract or failed to deliver the goods, or the buyer must have rightfully rejected or justifiably revoked his acceptance of the goods. Second, the buyer must have acted in good faith and without unreasonable delay in procuring the substitute goods. Finally, the replacement goods must be a reasonable substitute for those the buyer contracted to purchase. 3 Williston on Sales § 25-11 (4th ed. 1974); Annot., 64 A.L.R. 3d 246 (1975). With regard to the second element, a merchant buyer is held to a good faith standard of "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." G.S. § 25-2-103(1)(b).

[6] Plaintiff's evidence in the present case tends to show that the latches used in the barns were specially designed and unique, that the plaintiff had previously manufactured the latches it needed, and that once the problem was discovered, it immediately ceased using the defendant's latches and resumed production of its own latches on an emergency basis since it needed them to continue production of the barns. Thus, the second issue raised by plaintiff's evidence is whether it properly "covered" by procuring substitute latches for those purchased from the defendant.

If the plaintiff can establish that it properly "covered" under G.S. § 25-2-712(1), then it is entitled to such damages as it can prove, measured by the difference between the cost of "cover" and the contract price, together with any incidental or consequential damages. G.S. § 25-2-712(2). Incidental damages are defined in G.S. § 25-2-715(1) as including "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to delay or other breach." Consequential damages include losses resulting from the buyer's requirements which were reasonably foreseeable and which could not have been prevented by "cover." G.S. § 25-2-715(2). *See also* 2 Anderson, Uniform Commercial Code §§ 2-715:15, 16 (2d ed. 1971); 3 Williston on Sales § 25-12 (4th ed. 1974).

In the present case, the plaintiff's evidence would permit the jury to award it damages for the cost of effecting "cover" as well

as incidental and consequential damages for expenses it incurred in shipping the latches back to the defendant, for amounts paid to farmers for replacement of the latches, for labor furnished so that the new latches could be installed in the barns, and for transportation of the replacement latches to the farmers and dealers.

If, on the other hand, the jury should conclude that the plaintiff did not justifiably revoke its acceptance, it would then consider the issue raised by the defendant's counterclaim and the evidence, i.e., whether the plaintiff is liable for the balance of the purchase price of the latches. Defendant alleged in its counterclaim that plaintiff was liable to it for the amount remaining on the contract price, and its evidence tended to show that it had regularly billed the plaintiff for this balance, which amounted to $32,722.40. Under G.S. § 25-2-607(1), the buyer is obligated to pay at the contract rate for any goods which it has accepted. If the jury should determine that the plaintiff accepted the latches and did not effectively revoke its acceptance, then the plaintiff would be liable for this balance.

For the reasons stated above, the entire verdict is set aside, and the Order awarding a new trial on the issue of damages is vacated, and the cause is remanded to the superior court for a new trial on all issues.

Vacated and remanded.

Judges VAUGHN and CLARK concur.

SAMUEL H. WATKINS AND WIFE, RUTH H. WATKINS; WILLIE PERRY WILSON AND WIFE, THELMA P. WILSON; GRADY CLINTON MILLS AND WIFE, PEARL MAE MILLS; WAYNE MILLS AND WIFE, LESSIE MILLS, AND OTHERS SIMILARLY SITUATED v. WILLIE E. SMITH AND LOIS E. RUSSELL

No. 7821SC556

(Filed 3 April 1979)

1. Highways and Cartways § 11.1— neighborhood public road—insufficiency of evidence

Plaintiffs did not establish a right to use of defendants' land as a neighborhood public road where plaintiffs introduced no evidence that the

roadway in question was a portion of the public road system which had not been taken over and placed under maintenance or which had been abandoned by the Department of Transportation and no evidence that the road had been constructed with unemployment relief funds, but plaintiffs' evidence did show that the road served essentially a "private use" and therefore was not embraced in the definition of neighborhood public road. G.S. 136-67.

2. Easements § 6.1— prescription—failure to show possession adverse

Plaintiff's evidence was insufficient to establish an easement by prescription over the land of defendants where such evidence disclosed that plaintiffs and their predecessors did not request permission to use the land of defendants and that defendants and their predecessors did not voice objection to such use, and these facts did not show that the use of the land by plaintiff was accompanied by circumstances giving it an adverse character so as to rebut the presumption that the use was permissive.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 20 March 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 March 1979.

Plaintiffs filed a complaint alleging: that they are owners of lots fronting on Jones Avenue in Salem Chapel Township, Forsyth County; that in order to get to their lots it is necessary to cross a "30 foot dirt road . . . [which] has been used as a neighborhood public road for more than 100 years"; that defendants own a portion of the dirt road and it is the only suitable means of ingress and egress to plaintiffs' lots; that the road has been used by plaintiffs and their predecessors in title for more than 20 years and that such use has been hostile, adverse and "of right so recognized by the defendants and their predecessors in title"; that defendants (who have owned a portion of the road since 1954) have obstructed the road by erecting gates, blocking the plaintiffs from traveling the road, and by plowing up the road to make it impassable; that defendants have threatened plaintiffs if they use the road. Plaintiffs prayed that defendants be enjoined from obstructing the road or interfering with plaintiffs' right to travel on and across the road.

Defendants answered and alleged that "there is no right of way easement of any kind or description of record across their land." Additionally, defendants alleged: that ingress and egress to plaintiffs' lots is not limited to this road; that plaintiffs have been traveling over defendants' land under protest from defendants; that defendants have plowed up a portion of their land and

erected "no trespass" signs; that defendants have not threatened plaintiffs but have told them in open court that they were not wanted on defendants' property. Defendants prayed that the action be dismissed and that plaintiffs be enjoined from traveling across defendants' land.

A preliminary injunction was issued allowing plaintiffs to use the roadway, referred to as "Jones Avenue Extension," pending the suit.

Evidence for the plaintiffs tended to show the following: that a gravel-covered roadway about 20 feet wide and 1,000 feet long connects Jones Avenue and Pine Hall Road; that the roadway has existed since before plaintiffs were born and that plaintiffs and others have continually used the roadway; and, that the roadway is the only passable access to their property. One plaintiff was 90 years old and testified that she had used the roadway all her life.

Evidence for the defendants tended to show the following: that defendants' property was formerly used as a school; that defendants purchased the property in 1954; that there was no right of way over the property in 1954; that defendants started a club on the property and cut a roadway to Pine Hall Road; that defendants maintained the roadway and plaintiffs began using it for access to and from their property; that defendants did not object "because we wanted the people to come to the club and we wanted community good will"; that defendants began using the property differently in 1973; that defendants started telling plaintiffs not to use the roadway; and, that plaintiffs' access out the other end of Jones Avenue was passable.

The matter was tried without a jury and the trial court found facts, *inter alia*, as follows: that the roadway in question had been used by plaintiffs for ingress and egress throughout the period of time the defendants' property was used as a public school and until 1973 when the defendants tried to stop persons from using the roadway; that defendants had permitted plaintiffs to use the roadway while operating a club on their land from 1954 until 1973; and that plaintiffs have other legal access to Pine Hall Road. The court concluded that plaintiffs had failed to show the following: that the disputed roadway was part of a public road system or built or maintained with public relief funds; that the roadway had ever been used for anything other than private use; that the road-

way was a necessary means of ingress and egress; or that the roadway had been used hostilely or adversely to the school board. The court further concluded that use of the roadway "was with the permissive use of the defendants."

Plaintiffs' claim for relief was denied in that they had not shown that the roadway "has ever been a neighborhood public road nor have they shown adverse possession of said roadway." The court, however, continued the injunction prohibiting defendants from blocking the use of the roadway pending final determination of the issue.

Plaintiffs appealed.

Robert M. Bryant and J. F. Motsinger, for plaintiff appellants.

Willie E. Smith and Lois E. Russell, pro se.

CARLTON, Judge.

It is difficult, from the record before us, to determine under which principle of law plaintiffs claim right of ingress and egress over the property of defendants. In their complaint, plaintiffs allege that the roadway in question is a "neighborhood public road" and that it has been used by plaintiffs and their predecessors in title for more than 20 years "and the said use of the road has been hostile, adverse and of right so recognized by the defendants and their predecessors in title." In their brief, plaintiffs argue that they are entitled to use defendants' land because they have established an easement by prescription *and* by virtue of adverse possession.

In the various pleadings filed by them, defendants alleged that plaintiffs have no right to use of their land under any of the principles of prescription, adverse possession, public highway, private cartway, easement or neighborhood road.

The trial court, in its final order, found that the plaintiffs had failed to establish the roadway as "a neighborhood public road nor have they shown adverse possession of said roadway." However, a review of the court's findings of fact and conclusions of law, and the evidence introduced at the hearing, compels us to conclude that the trial court treated plaintiffs' attempt to

establish their claim of right over defendants' land as an action for the establishment of either an easement by prescription or a neighborhood public road. The trial court properly determined that plaintiffs failed to establish their claim under either of these principles. We therefore treat all findings and conclusions with respect to other doctrines of real property possession and ownership in the trial court's order as mere surplusage and give effect to the obvious intent of the judgment, *i.e.*, that plaintiffs failed to establish an easement by prescription or a neighborhood public road.

A judgment should be interpreted with reference to, and in light of, the findings of fact and conclusions of law of the court and, if possible, should be interpreted so as to harmonize them. If the judgment fails to clearly express the final determination of the court, reference may be had to the pleadings and findings for the purpose of ascertaining what was determined. A judgment must be construed in light of the situation of the court, what was before it, and the accompanying circumstances. Judgments should be liberally construed so as to make them serviceable instead of useless. Necessary legal implications should be included although not expressed in precise terms. *See* 49 C.J.S., Judgments, §§ 436, 438, 439, pp. 864, 867, 870, 871.

While the trial court's order referred to adverse possession, we believe it did so simply because both that doctrine and the principle of easement by prescription require that the use be adverse and hostile. This action was clearly not one bottomed on adverse possession as plaintiffs conceded on oral argument. Under the doctrine of adverse possession, "the possession must be . . . in the character of owner, denoted by the exercise of exclusive dominion over the land in making such use of the land . . . ." 1 Strong, N.C. Index, Adverse Possession, § 1, p. 97.

Here, plaintiffs have never asserted the character of ownership or exclusive dominion over the property. They merely assert the right of ingress and egress across the property which they acknowledge to be owned by defendants.

Moreover, while a person may acquire an easement by prescription at the same time he is acquiring title to the dominant tenement by adverse possession, generally, he cannot simultaneously acquire title to the servient estate by adverse

possession and acquire an easement by prescription. 28 C.J.S., Easements, § 21, p. 675.

[1] We first turn to the question of whether plaintiffs established a right to use of defendants' land as a neighborhood public road. G.S. 136-67 establishes a procedure for having a road declared a "neighborhood public road." The statute declares three distinct types of roads to be neighborhood public roads: (1) Those portions of the public road system which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress and egress from the dwelling house of one or more families; (2) Those roads laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources; (3) Those roads outside the boundaries of municipal corporations which serve both a public use and as a means of ingress and egress for one or more families.

The statute contains the following *proviso*: "Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially *private use* . . . ." (Emphasis added.)

Plaintiffs clearly did not introduce evidence which would indicate that the roadway in question would fall within either of the first two categories referred to above. There was no evidence that the roadway was ever a part of the "public road system" or that it had been constructed with unemployment relief funds.

Moreover, the roadway in question is not one contemplated by the third category. The *proviso* makes clear the legislative intent that no road serving an essentially "private use" is embraced in the definition of neighborhood public road. *Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56 (1972), *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972). The roadway was used by defendants and their guests and invitees and by plaintiffs and their guests and invitees. Such a road or driveway is not a neighborhood public road within the meaning of G.S. 136-67. *Walton v. Meir, supra.*

In *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E. 2d 371, 373 (1946) the Supreme Court stated:

> The General Assembly is without authority to create a public or private way over the lands of any citizen by legislative fiat, for, to do so, would be taking private property without just compensation. *Lea v. Johnson*, 31 N.C. 15. In construing the amendment, [G.S. 136-67 had been amended in 1941 to add the *proviso*] therefore, we may not assume that such was its intent. It follows that the 1941 Act, ch. 183, Public Laws 1941, necessarily refers to traveled ways *which were at the time established easements or roads or streets in a legal sense. It cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement.* (Emphasis added.)
>
> . . . .
>
> Furthermore the *proviso* expressly excludes streets and roads which serve an essentially private use. While there is evidence that the mail carrier used the old road during 1906 and 1907 and that members of the public traveled both the old and new road, *all the evidence tends to show that the road was laid out and maintained primarily as a convenience for those who resided on the Speight and Anderson tracts, an essentially private purpose. No continuous use for a public purpose is disclosed.* (Emphasis added.)

[2] We now turn to the question of whether plaintiffs' evidence was sufficient to establish an easement by prescription over the land of defendants. We agree with the trial court that the evidence was insufficient for this purpose.

Several legal principles relating to easements by prescription have been firmly established by our appellate decisions:

1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. *Williams v. Foreman*, 238 N.C. 301, 77 S.E. 2d 499 (1953).

2. The law presumes that the use of a way over another's land is *permissive* or with the owner's consent unless the contrary appears. *Henry v. Farlow*, 238 N.C. 542, 78 S.E. 2d 244 (1954).

3. The use must be adverse, hostile, and under a claim or right. *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966).

4. The use must be open and notorious. *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912).

5. The adverse use must be continuous and uninterrupted for a period of twenty years. *Speight v. Anderson, supra.*

6. There must be substantial identity of the easement claimed. *Hemphill v. Bd. of Aldermen*, 212 N.C. 185, 193 S.E. 153 (1937).

See also, Dickinson v. Pake, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Coggins v. Fox*, 34 N.C. App. 138, 237 S.E. 2d 332 (1977).

It is unnecessary for us to discuss all the principles enumerated above. Plaintiffs have failed to establish that their use of defendants' property was adverse or hostile as required by the third principle, especially in light of the permissive presumption enunciated in the second principle. The evidence discloses that plaintiffs and their predecessors did not request permission to use the land of defendants and that defendants and their predecessors did not voice objection to such use, at least until 1973. Our Supreme Court has held that such facts did not show that the use of the land by plaintiff was accompanied by circumstances giving it an adverse character so as to rebut the presumption that the use was permissive. *Henry v. Farlow, supra*, 238 N.C. at 544, 78 S.E. 2d at 245.

As stated by Justice Ervin in *Henry*:

> The circumstance that the owners of the soil did not object to the use of the way harmonizes with the theory that they permitted the use of the way. There is, moreover, no inconsistency between the circumstance that the plaintiff and her tenants used the way without asking the owners of the soil for permission to do so, and the conclusion that the plaintiff and her tenants used the way with the implied consent of the owners of the soil. When all is said, the assertion that the plaintiff and her tenants used the way without asking the permission of the owners of the soil is tantamount to the assertion that the plaintiff and her tenants used the way in silence. Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use.

Plaintiffs rely on the decision of our Supreme Court in *Hemphill v. Bd. of Aldermen, supra.* That case, however, is clearly distinguishable from the case at bar. In *Hemphill,* the defendants contended that the *public* had acquired by prescription a right of way over plaintiff's alley *within corporate limits.* The Supreme Court stated:

> To establish the existence of a road or alley as a public way in the absence of laying out by public authority or actual dedication, it is essential not only that there must be twenty years' user under claim of right adverse to the owner, but the road must have been worked and kept in order by public authority. *Hemphill, supra,* 212 N.C. at 188, 193 S.E. at 155.

There is no evidence in the record before us of any activity on the part of any public authority.

While we agree with plaintiffs that some of the trial court's findings were irrelevant to the principles of law on which the judgment was based, we treat them as surplusage and further hold that the findings of fact were adequate to support the conclusions of law. Moreover, the evidence was sufficient to support the trial court's findings and conclusions.

The decision of the lower court is

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL EDWARD ROBINSON

No. 7815SC1074

(Filed 3 April 1979)

1. Criminal Law § 113.1— statement of evidence—necessity for request for additional summary of evidence

Where the court's brief summary of the evidence was sufficient to apply the law to the evidence, it was incumbent on defense counsel who desired more extensive instructions on the evidence to request them at trial.

2. Arrest and Bail § 5.1; Assault and Battery § 15.7— assault on officers—failure to instruct on self-defense—instructions favorable to defendant

In a prosecution for assault on officers in the performance of their duties, the trial court's failure to instruct on self-defense did not constitute error where the trial court did instruct the jury that defendant should be found not guilty if the officers used excessive force in effecting an arrest of defendant, since the court's instruction was more favorable to defendant than a general charge on self-defense which would have restricted defendant to the use of reasonable force under the circumstances. Furthermore, the defense of self-defense was not available to defendant since his unjustified resistance to being handcuffed by an officer who had authority to arrest him precipitated his fight with the officers.

3. Assault and Battery § 15; Criminal Law § 114.2— instructions that certain actions constituted assault—no expression of opinion

In this prosecution for assault on officers in the performance of their duties, the trial court did not express an opinion on the evidence but was merely applying the law to the evidence in instructing the jury that the striking of a person with a fist or the flinging of a person against a wall is in fact an assault.

4. Criminal Law § 18.2— misdemeanor conviction in district court—trial de novo in superior court—instruction on another misdemeanor

Where defendant was charged in the district court with drunken driving under G.S. 20-138 but was convicted of the lesser included offense of reckless driving as the result of operating a vehicle while directly and visibly affected by the consumption of intoxicating liquor under G.S. 20-140(c), the superior court on trial de novo erred in instructing the jury on reckless driving under G.S. 20-140(a) but should have instructed on the elements of G.S. 20-140(c), the specific misdemeanor of which defendant was convicted in the district court and the charge for which the superior court had derivative jurisdiction.

5. Criminal Law § 166— unnecessary narration of evidence in brief—taxing costs against counsel

Counsel for appellant is personally taxed with the cost of printing an unnecessary narration of the evidence in the statement of the case in appellant's brief. Appellate Procedure Rule 28(b).

APPEAL by defendant from *Bailey, Judge.* Judgment entered 22 June 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 28 February 1979.

Defendant was cited for driving under the influence of intoxicating liquor in violation of G.S. 20-138, and charged with two counts of assault on a police officer in violation of G.S. 14-33(b)(4) and one count of resisting arrest in violation of G.S. 14-223. In the District Court defendant was found guilty of reckless driving (G.S. 20-140(c)), resisting arrest (G.S. 14-223), and two counts of as-

sault on an officer (G.S. 14-33(b)(4)). Defendant appealed from that judgment for a trial de novo in the Superior Court. Defendant waived arraignment and pled not guilty to the charges of resisting arrest, assault on an officer, and reckless driving.

The State's evidence at trial is summarized as follows: Officer Steve Pryor of the Burlington Police Department testified that he was summoned to the scene of an accident on Alamance Road and Mebane Street. When he arrived he found defendant sitting in a 1971 Pontiac automobile which had run into the ditch on Mebane Street. The officer smelled the odor of alcohol on the defendant. Defendant was not moved from the car until medical assistance arrived because he complained of back injuries. The officer's investigation indicated that the vehicle ran off the right side of the road, struck a brick column several hundred feet down the road, crossed over to the opposite lane of traffic, weaved back to the right, and came to rest in a ditch 647 feet from where the car first left the road.

Defendant was taken to Alamance County Hospital for x-rays of his back. While defendant was waiting to be x-rayed, Officer Pryor asked him to produce his driver's license. Defendant refused. After the x-rays were completed, Officer Pryor again requested defendant to produce his driver's license. Defendant cursed the officer, told him to leave him alone, and then "jerked-out" his license. Officer Pryor advised defendant that he was being placed under arrest because of the evidence of alcohol on his breath. Defendant was released from the hospital and given a prescription to alleviate muscle spasms. When Officer Pryor attempted to handcuff defendant's right hand, he used abusive language toward the officer and attempted to escape. Officer Pryor and Officer C. E. Clemmons, who had been sent to assist Pryor, pushed defendant against the wall and attempted to place the other handcuff on defendant. Pryor put his knee in defendant's back while holding him against the wall. A struggle ensued wherein defendant grabbed and threw Officer Clemmons into the wall before striking and wrestling with Officer Pryor. During the affray, Officer Pryor struck the defendant once in the face and one time in the shoulder with his blackjack. Officer Clemmons struck defendant three times on the head with his flashlight after defendant had knocked Officer Pryor to the floor with his fist. Members of defendant's family had arrived at the scene and

encircled the officers as they attempted to subdue the defendant. An unidentified member of his family tried to take the flashlight away from Officer Clemmons.

Defendant's evidence is summarized as follows: Defendant testified that he was driving about 40 miles per hour. He reached down to get his glasses from the console of the car, the car drifted onto the gravel shoulder of the road, slid down the grade, and hit a brick column. As he braced himself for the impact he felt his back snap, and when the car bounced back up onto the road he could not lift his foot to gain control of the car. Defendant admitted that he had one and one-half drinks of Canadian Mist before the wreck. He testified that after the x-rays were completed, Officer Pryor told him he was under arrest. As he was walking with the officer, the officer was pushing him along the shoulder. Defendant then asked for a cigarette, the officer refused, and defendant cursed him. Officer Pryor then placed handcuffs on defendant which pinched defendant as the officer squeezed down. Defendant reacted by jerking his arm back. Then he said, "[T]he next thing I know they pushed me up against the wall. He put his knee in the middle of my back and was bending me backwards . . . He was trying to hurt me." Defendant then stated that he turned around and hit the officer. Pryor then knocked defendant to the floor and defendant testified, "I fell on the floor and he had me with his arm around my neck beating me in the top of the head and he took his—that black stick and was beating me in the back with it. I was helpless then, 'cause I couldn't get up." After the struggle, defendant received 14 stitches in his head and was sent to Memorial Hospital in Chapel Hill as a precautionary measure.

The case was submitted to the jury which returned verdicts of guilty of reckless driving and guilty on two counts of assault on an officer. Defendant was sentenced to serve consecutively two terms of two years each for the charges of assault on an officer. A 60-day jail term for reckless driving was imposed to be served concurrently with the second two-year term for assault on an officer. Defendant appeals.

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

Grady Joseph Wheeler, Jr., for the defendant appellant.

MORRIS, Chief Judge.

[1] Defendant's first argument brought forward on appeal assigns error to the trial court's summary of the evidence. He alleges that the trial judge failed to state *any* contentions of the defendant with respect to his summary of evidence applying to the charges of assault on an officer. It is apparent to this Court that the trial court did not summarize the evidence in the form of contentions of the State and contentions of the defendant. The summary of the evidence is brief and reviews evidence which is essentially uncontroverted by either party. The State accurately points out that the court's brief summary of the evidence omitted evidence favorable to the State just as it omitted evidence favorable to the defendant. The evidence omitted favorable to the State included that relating to the general uncooperative conduct of the defendant and the abusive language used toward Officer Pryor. Similarly, the trial court failed to underscore certain testimony that the officer had clamped the handcuffs on so tightly as to hurt defendant, and that this pain precipitated the affray.

It has long been the accepted practice in this State, and appropriately so, that when counsel is unsatisfied with the summary of the evidence or contentions of the parties, in order to preserve the error, he must bring this to the court's attention before the jury is sent to deliberate on the issues. This affords the trial court the opportunity to correct any misstatements or to expand on its summary when this is deemed necessary. *See State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). There are, nevertheless, circumstances where no objection is required in order to preserve the error on appeal. *See e.g., State v. Moore*, 31 N.C. App. 536, 230 S.E. 2d 184 (1976) (misstatement of material point including assumption of evidence entirely unsupported by the evidence); *State v. Hewett, supra* (trial court states fully contentions of State but fails to state *any* contentions of defendant). The summary of the evidence was unquestionably brief. However, G.S. 1-180 (now G.S. 15A-1232) only requires that the trial court state the evidence to the extent necessary to explain the application of the law to the evidence. It is incumbent upon defense counsel who desires more extensive instructions on the evidence to request them at trial. *State v. Watson, supra; State v. Ford*, 266 N.C. 743, 147 S.E. 2d 198 (1966).

[2] The defendant next contends that the trial court erred in failing to instruct the jury on the issue of self-defense. We do not disagree with defendant's argument that when there is sufficient evidence to present the question of self-defense the trial court must instruct the jury on that defense even in the absence of a request to do so. *State v. Berry*, 35 N.C. App. 128, 240 S.E. 2d 633 (1978).

Similarly, there is no question that "where there is evidence tending to show the use of . . . excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force." *State v. Mensch*, 34 N.C. App. 572, 575, 239 S.E. 2d 297, 299 (1977), *cert. denied*, 294 N.C. 443, 241 S.E. 2d 845 (1978). The trial court instructed the jury that the officers have the right to use only reasonable force to arrest a suspect and to protect themselves or another officer. He also instructed the jury that they must find beyond a reasonable doubt that defendant intentionally and *without justification or excuse* assaulted the officers. As in *State v. Mensch, supra*, the trial court instructed the jury in effect that if the officers used excessive force in effecting the arrest that defendant should be found not guilty. Judge Clark's comments on the instructions in the *Mensch* case are equally applicable here:

> "These instructions were favorable to defendant, even more so than a general charge on self-defense which would have restricted defendant to the use of reasonable force under the circumstances." 34 N.C. App. at 574, 239 S.E. 2d at 299.

In our opinion, the charge to the jury was more favorable to defendant than a specific self-defense charge. Furthermore, the traditional rule in assault cases is that the right to self-defense is not available to a person who aggressively and willfully enters into a fight unless he first abandons the fight, withdraws from it, and gives notice to his adversary he has done so. *State v. Marsh*, 293 N.C. 353, 237 S.E. 2d 745 (1977). It is not contested that Officer Pryor had the authority to place defendant under arrest and use handcuffs to maintain custody. *See generally* G.S. 15A-401. Therefore, defendant was not justified in objecting to, or resisting, being handcuffed. This resistance precipitated the con-

flict, and he may not now avail himself of the right to defend himself from acts he brought upon himself. *See generally Anno.*, 77 A.L.R. 3d 281 (1977).

[3] Defendant next contends that the trial court improperly expressed an opinion on the evidence by defining assault in terms of the acts defendant allegedly committed. The instruction in question follows:

> "Now an assault is simply an offer or an attempt to inflict an injury upon another; such offer or attempt being without the permission of the man to whom the offer is made. The striking of one person by another with the fist, the flinging of a person up against a wall, is in fact an assault, if you find it happened."

In our opinion, the trial court was properly following the mandate of G.S. 1-180 (now G.S. 15A-1232) in applying the law to the facts. Moreover, defendant does not himself deny "the flinging of a person (Officer Clemmons) up against a wall." His primary defense was that of self-defense as discussed above. This assignment of error is overruled.

[4] Finally, defendant contends that the trial court committed error by instructing the jury on careless and reckless driving under G.S. 20-140(a). Defendant argues, and we agree, that the trial judge was required to charge defendant on the same offense of which he was convicted in the District Court, that being G.S. 20-140(c).

Defendant was charged in the District Court with drunken driving, G.S. 20-138, and convicted of the lesser included offense of reckless driving as the result of operating a vehicle while directly and visibly affected by the consumption of intoxicating liquor, G.S. 20-140(c). Upon trial de novo in the Superior Court, the court instructed the jury on the elements of reckless driving under G.S. 20-140(a). A jury verdict was returned finding defendant guilty of reckless driving. The judgment does not reflect under which section defendant was convicted, although it is clear from the record that the instructions did not apply to G.S. 20-140(c).

Reckless driving is a misdemeanor. G.S. 20-140; G.S. 20-176. The district court has original exclusive jurisdiction of misde-

meanors except as otherwise provided by statute. G.S. 7A-272. The jurisdiction of the superior court to try misdemeanor cases is characterized as "derivative jurisdiction" and arises primarily upon appeal for trial de novo from the district court. G.S. 7A-271; *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827 (1973). Furthermore, our State Constitution provides in essence " 'that the Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor*.' " *State v. Guffey*, 283 N.C. at 96, 194 S.E. 2d at 829 (*quoting State v. Hall*, 240 N.C. 109, 81 S.E. 2d 189 (1954)). *See also State v. Craig*, 21 N.C. App. 51, 203 S.E. 2d 401 (1974).

The offense of reckless driving under G.S. 20-140(c) should, in our opinion, be treated as a specific misdemeanor. The distinction between the types of reckless driving has been recognized by the legislature. In *State v. Craig, supra*, this Court determined that a conviction under the reckless driving statute which applied to the case under consideration did not constitute a lesser included offense of drunken driving under G.S. 20-138. Subsequently, the legislature amended G.S. 20-140 to add what is now subsection (c), and specifically provided that subsection (c) was to be considered a lesser included offense of drunken driving. The legislature did not, however, change the rule in *State v. Craig* that reckless driving under G.S. 20-140(a) is not a lesser included offense of drunken driving.

We hold that the Superior Court erred in instructing on G.S. 20-140(a), and should have instructed the jury on the elements of G.S. 20-140(c), the misdemeanor of which he was convicted in District Court. We cannot say that, because the sentence imposed in this case, 78CRS117, was to run concurrently with another, there has been no prejudice. A conviction for this offense results in the assessment of four points against defendant's driver's license. G.S. 20-16(c). Because of the court's failure properly to instruct the jury with respect to G.S. 20-140(c), there must be a new trial as to the charge of reckless driving.

[5] North Carolina Rules of Appellate Procedure, Rule 28(b), provides that "appellant's brief in any appeal shall contain, . . . (2) A

concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court. It should additionally contain a *short*, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review." (Emphasis supplied.) The record in this case contained a narration of the testimony at trial. This narration consisted of 18½ pages. The appellant's brief also contained a narration of the evidence consisting of 11½ pages entitled "Statement of Case". The narration of testimony in the record was properly done and entirely sufficient for the Court to understand the evidence presented. The additional narration in the brief was completely unnecessary, but additional time of the Court was required in reading material which was neither necessary nor helpful in understanding the question presented for review. Counsel for defendant will be personally taxed with costs in the amount of $13.00 to cover the printing of a portion of the statement of case.

No. 77CRS17467—no error.

No. 77CRS17468—no error.

No. 78CRS117—new trial.

Judges CLARK and ARNOLD concur.

L. M. LACKEY, JR., ADMINISTRATOR OF THE ESTATE OF MICHAEL HENRY COURAIN v. JAMES WILLIAM COOK

No. 7822SC444

(Filed 3 April 1979)

Rules of Civil Procedure § 4— alias summons—time of issuance—no relation back to original summons

The trial court erred in determining that an alias summons issued more than 90 days after the original summons was issued could relate back to the date of issue of the original summons so as to keep alive the action originally instituted; an alias summons could be issued after the original action was discontinued as to defendant, but, by the express language of G.S. 1A-1, Rule

4(e), the action would be deemed to have commenced on the date of such issuance.

Judge ERWIN concurring.

APPEAL by defendant from *Collier, Judge*. Order entered 23 February 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 9 February 1979.

The plaintiff instituted this wrongful death action against the defendant on 8 June 1977 by filing a complaint alleging that the defendant negligently caused the death on 28 June 1975 of the plaintiff's intestate, who was injured while riding as a guest passenger in an automobile driven by defendant. Summons was issued on the same day the complaint was filed. The summons was returned with endorsement by the sheriff showing that it had been served as follows:

> On James William Cook on the 9th day of June, 1977, at the following place: Route 8, Box 90, Statesville, NC By: Leaving copies with Mrs. Willard Cook—mother—who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

On 17 June 1977 the defendant filed answer alleging *inter alia* that the plaintiff had not obtained in personam jurisdiction over him and moving to dismiss pursuant to G.S. 1A-1, Rule 12.

A hearing was held in January 1978 for the purpose of considering the defendant's motion. At that hearing, the defendant presented twelve affidavits in support of his motion to dismiss. The defendant's affidavits indicate that the summons was served upon his mother at her home. They further show that for more than three years prior to 9 June 1977 the defendant and his wife had lived in their own place of residence separate and apart from his mother and that the defendant was not present in his mother's home at the time the summons was served by leaving a copy with her.

Following the hearing, the trial court entered an order dated 23 February 1978 in which the court found as a fact that the return on the summons indicated that it had been served on the defendant by leaving a copy with his mother and that at no time either reasonably before or after 9 June 1977 did the defendant's

mother reside in his dwelling house or usual place of abode. The trial court concluded as matters of law that because the return was valid on its face, the defendant was presumptively properly served with process; that this presumption continued until a contrary factual determination was made; that the service of process upon the defendant was in fact defective, "a conclusion reached as a matter of law on the date of this order;" and that the defendant was therefore entitled to an order quashing the service of process which had been attempted to be made on 9 June 1977. The order then contains the following additional conclusions of law:

> 4. Until the within determination by the court that the service of process involved here was in fact defective, the plaintiff was unable as a matter of law to swear out an alias summons.
>
> 5. The plaintiff is now entitled to swear out an alias summons in this cause notwithstanding the provisions of G.S. 1A-1, Rule 4(d).
>
> 6. The alias summons, which the plaintiff is entitled to swear out, must be issued within ninety (90) days of the date of this order; the effect of such alias summons will be to keep alive the action originally filed on June 8, 1977.

On these findings and conclusions the court denied the defendant's motion to dismiss the action, ordered the original service quashed for defective service of process, and granted the plaintiff's oral motion for leave to swear out an alias summons. From this order the defendant appeals.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele and Jay F. Frank, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper, for defendant appellant.

PARKER, Judge.

Defendant contends that the trial court erred in determining that an alias summons issued more than 90 days after the original summons was issued could relate back to the date of issue of the original summons so as to keep alive the action originally instituted on 8 June 1977. We agree with the defendant's contention and accordingly reverse.

The summons in this case was issued on 8 June 1977. G.S. 1A-1, Rule 4(c) provides (with certain exceptions not here pertinent relating to tax and assessment foreclosures) that "[p]ersonal service or substituted personal service of summons as prescribed in Rule 4(j)(1) a and b, must be made within 30 days after the date of the issuance of summons." The factual findings in the trial court's order, which are not in dispute, establish that no such service or substituted personal service was actually made in this case within 30 days after the date of issuance of the original summons. G.S. 1A-1, Rule 4(d) provides that when, as in the present case, any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Plaintiff failed to employ either of these methods within 90 days after the date of issuance of the original summons and, indeed, had not done so even at the date of the hearing on defendant's motion to dismiss, which occurred more than six months after the date the original summons was issued. G.S. 1A-1, Rule 4(e) provides:

> (e) Summons—discontinuance.—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4 (d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to

have commenced on the date of such issuance or endorsement.

The official comment on Sections (d) and (e) of Rule 4 is as follows:

> Section (d).—This section preserves unchanged the essence of former § 1-95. Alternative methods, either endorsement or the issuance of alias or pluries summons, are provided for continuing the life of an action after the time for service of summons has expired. The same time limits for securing the endorsement or alias or pluries summons are prescribed and the special treatment accorded tax suits is retained.
>
> Section (e).—This section is similar to former § 1-96. Accordingly, an action will be discontinued under the new rules just as formerly. It will be observed that while under Rule 3 the commencement of an action is ordinarily tied to the filing of a complaint, the discontinuance of an action is tied to the failure in apt time to secure an endorsement or an alias or pluries summons. Further, it will be observed that in the special case of an action in which endorsement or the issuance of an alias or pluries summons is secured after the ninety (90) day period, in that case the action will be deemed commenced with the endorsement or the issuance of summons rather than with the filing of a complaint.

In cases interpreting our former statutes, our Supreme Court held that in order for an alias summons to relate back to the original summons so as to keep the action alive from the date of issuance of the original summons, it was necessary for the plaintiff to correctly maintain his chain of summonses. If he failed to do so, a discontinuance of the action resulted. *Webb v. R.R.*, 268 N.C. 552, 151 S.E. 2d 19 (1966); *Hodges v. Insurance Co.*, 233 N.C. 289, 63 S.E. 2d 819 (1951); *Mintz v. Frink*, 217 N.C. 101, 6 S.E. 2d 804 (1940). The last cited case is on its facts particularly pertinent to the present case. In *Mintz* the original summons was issued on 26 November 1938 and was returned with endorsement showing service was made on the defendant on the same date. On 12 December 1938 defendant entered a special appearance and moved to dismiss the action for that, contrary to the sheriff's return, the summons had not been served on 26 November 1938 but had been served on 27 November 1938, which was on Sunday.

Upon hearing defendant's motion in the Superior Court, Judge Harris found as a fact from the affidavits filed that the summons was served on Sunday, 27 November 1938, and held such service a nullity. (A statute then in effect made it unlawful for any sheriff or other officer to execute any summons or other process on Sunday.) Accordingly, Judge Harris ordered the return stricken and remanded the case to the clerk of superior court, who was authorized to serve immediately an alias summons with an attached copy of the complaint. Thereafter, on 12 January 1939, the assistant clerk of superior court issued a summons in form of an original summons but marked at the top "Alias Summons," which was returned by the sheriff endorsed "Served January 13, 1939, by delivering a copy of the within summons and a copy of the complaint" to defendant. Defendant again entered a special appearance and moved to dismiss the action and to strike out the officer's return on the summons marked "Alias Summons" dated 12 January 1939 for the reasons, *inter alia*, that the same was not an alias summons and there was no complaint filed for that suit. The clerk denied the motion and plaintiff appealed to the superior court, where the matter was heard at the September 1939 term before Judge Stevens. Upon finding as fact that the summons marked "Alias Summons" issued on 12 January 1939 was not in fact an alias summons and that same was actually served upon the defendant without a copy of the complaint, Judge Stevens ruled that such summons so marked and served was inoperative. However, being further of opinion that the court had "inherent right to correct its mistakes and errors," Judge Stevens denied defendant's motion to dismiss the action and ordered the cause remanded to the clerk of superior court with direction to him to issue at once an alias summons and attach thereto copy of complaint for service on defendant. On appeal by defendant from this order of Judge Stevens, our Supreme Court, after ruling that the service of the original summons on Sunday was invalid and that the summons issued on 12 January 1939, although marked at the top "Alias Summons," was not a valid alias summons, held:

> (3) Section 481 of Consolidated Statutes of 1919 [later G.S. 1096] provides that "a failure to keep up the chain of summonses issued against a party, not served, by means of an *alias* or *pluries* summons, is a discontinuance as to such party; and if a summons is served after a break in the chain

it is a new action as to such party, begun when the summons was issued." See *Hatch v. R.R.*, supra; *Neely v. Minus*, 196 N.C., 345, 145 S.E., 771.

In the case in hand the service of summons being invalid and an *alias* as required by statute not having been issued, nothing else appearing, the action was discontinued at the expiration of ninety days next after the issuance of the original summons. The order of Harris, J., that the clerk issue an alias summons is merely directory, and does not and cannot have the effect of suspending the provisions of the statute. Likewise, after the expiration of period provided in the statute within which an alias summons can and must be issued Stevens, J., was without authority to order an *alias* summons issued. Therefore, at September Term, 1939, upon the finding that the summons issued 12 January, 1939, was not in fact an *alias* summons, nothing else appearing, a discontinuance of the action as originally instituted should have been decreed.

217 N.C. at 104, 6 S.E. 2d at 807.

We find the decision in *Mintz v. Frink, supra*, controlling in the present case. Although the statute in effect when that case was decided, C.S. Sec. 481 [later G.S. 1-96], has now been replaced by G.S. 1A-1, Rule 4(e), there is no significant difference between the former statute and our present rule insofar as the decision of this case is concerned.

We note that when, on 17 June 1977, defendant's answer in the present case was filed containing his motion to dismiss for failure of plaintiff to obtain *in personam* jurisdiction over the defendant, plaintiff still had 81 days remaining of the 90 day period after the date of issuance of the original summons within which to secure an endorsement upon the original summons or to sue out an alias so as to keep his action alive. He did not do this. Instead, he waited until after the 90 day period had expired before obtaining a hearing on defendant's motion to dismiss in order to learn why the service of summons, which the return indicated was valid, was in fact not valid. What was said in *Hodges v. Insurance, Co., supra*, is pertinent here:

At the time defendant entered its motion to dismiss the original action, the plaintiff still had more than sixty days in

> which to sue out an alias summons and thus keep his action alive. He elected instead to rest his case upon the validity of the service had. The unfortunate result is unavoidable.

233 N.C. at 293-94, 63 S.E. 2d at 822.

The record on appeal in the present case indicates that following the entry of the order appealed from an alias summons was issued on 6 April 1978 and that this was returned showing personal service on defendant on 10 April 1978. On authority of *Mintz v. Frink, supra,* we hold that the trial court was in error in its ruling, contained in its conclusion of law No. 6, that the effect of such an alias summons would "be to keep alive the action originally filed on June 8, 1977." When in the present case there was neither endorsement by the clerk nor issuance of alias summons within the time specified in G.S. 1A-1, Rule 4(d), the original action was discontinued as to the defendant. Thereafter, an alias summons could be issued, but by express language of G.S. 1A-1, Rule 4(e), "the action shall be deemed to have commenced on the date of such issuance."

For the reasons stated, the order appealed from is

Reversed.

Judge MARTIN (Robert M.), concurs.

Judge ERWIN concurring.

I agree with the opinion in this case. I wish to add that G.S. 1A-1, Rule 6(b), was not relied upon by the plaintiff nor did Judge Collier refer to it in his order. Under these circumstances, I feel that the application of Rule 6(b) is not before us in the case *sub judice.*

BARRY T. HARRINGTON v. JOSEPH BRIGHT COLLINS

No. 7811SC390

(Filed 3 April 1979)

1. **Automobiles § 94— passenger's failure to take action for own safety—contributory negligence—jury question**

Whether an automobile passenger's failure to take affirmative action for his own safety constitutes contributory negligence is for the jury where conflicting inferences may be drawn from the circumstances.

2. **Automobiles § 94.10— contributory negligence by passenger—willful or wanton conduct by driver**

Ordinarily, contributory negligence on the part of a plaintiff does not bar recovery when the willful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries.

3. **Automobiles § 37— violation of racing statute—negligence per se**

Violation of the racing statute, G.S. 20-141.3(a), is negligence per se.

4. **Automobiles §§ 52, 94.10— prearranged racing—willful or wanton conduct**

Defendant's participation in a prearranged automobile race on the public highway in violation of G.S. 20-141.3(a) constituted willful or wanton conduct and was, as a matter of law, a proximate cause of injuries received by plaintiff passenger in a collision during the race.

5. **Automobiles § 94.6— contributory negligence of passenger—failure to leave automobile—failure to remonstrate with driver**

In a passenger's action to recover for injuries received in a collision between two racing automobiles, the evidence was sufficient for submission of an issue as to whether plaintiff was contributorily negligent in failing to leave the automobile in which he was riding when he had an opportunity to do so prior to the race in which he was injured and in failing to remonstrate with the driver about the racing or driving at a high speed.

6. **Automobiles § 94.10— willful or wanton conduct by both driver and passenger**

A plaintiff cannot recover against a defendant whose conduct is willful or wanton when the plaintiff's negligence is also willful or wanton and a proximate cause of his injuries.

7. **Automobiles § 94.1— acquiescence of passenger in prearranged race—willful or wanton conduct—jury question**

In order for a passenger in a racing vehicle to be barred from recovery for injuries received in a collision during the race on the ground that he "acquiesced" in the race, the evidence must show that the passenger did more than fail to speak, remonstrate or leave the vehicle, but must show that he in some way participated or was involved in the race. The evidence in this case was insufficient to show as a matter of law that plaintiff passenger acquiesced in his driver's participation in the race, and whether he did so acquiesce was a

question of fact for the jury under the issue of whether plaintiff's conduct was willful or wanton.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 2 February 1978 in Superior Court, HARNETT County. Heard in the Court of Appeals 6 February 1979.

Plaintiff appeals from directed verdict at close of his evidence, based upon the trial court's finding plaintiff contributorily negligent as a matter of law. We reverse.

Plaintiff's evidence tends to show that on 24 December 1974, he left his girlfriend about 11:30 p.m. and drove to the Pioneer Grill in his car. He went to the car of Woody Salmon parked at the grill. Salmon was in the driver's seat, and Lynn Stewart and Ronnie Dennis were seated in the car. Dennis asked him to get in Salmon's car and he did so, in the seat behind the driver. The car motor was already running. The defendant, J. B. Collins, pulled up beside them, and they "took off." The two cars were racing. They headed down U.S. Highway 421 toward the crossroads. On the way, plaintiff was not concerned at all about the racing and did not say anything to the driver. The Salmon car got to the crossroads first, pulled to the shoulder of the road, and stopped. Plaintiff never said anything to Salmon about the way he was driving. Collins pulled in shortly, and wanted to race back to the grill. Salmon said he didn't want to race back as he did not have much gas. Collins offered to bet Salmon $5.00 to race back, and when one of the other boys in Salmon's car agreed to cover the bet, they decided to go ahead and race. They were stopped at the crossroads about a minute, and while they were talking, plaintiff did not say anything at all. They started back almost immediately, and the Salmon car passed Collins. When they got back to the grill, Collins attempted to pass Salmon, hit the left side of his car, causing it to leave the road. Plaintiff suffered severe and permanent injuries, as did Dennis. Salmon and Stewart were killed. The entire episode lasted about five minutes.

Woodall and McCormick, by Edward H. McCormick, and Bowen and Lytch, by Wiley F. Bowen, for plaintiff appellant.

Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff argues that the trial court committed error in dismissing the action at the conclusion of plaintiff's evidence. In considering the motion for directed verdict, plaintiff's evidence must be taken as true and treated in the light most favorable to him. A directed verdict may be granted only if the evidence is insufficient to justify a verdict for plaintiff as a matter of law. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1973). A directed verdict on the basis of contributory negligence may be granted only when the evidence, taken in the light most favorable to plaintiff, establishes his negligence so clearly that no other reasonable inference or conclusion may be legitimately drawn therefrom. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). Ordinarily, the question of contributory negligence of a guest in an automobile is for the jury to determine in the light of the facts and circumstances of the case. *Allen v. Metcalf*, 261 N.C. 570, 135 S.E. 2d 540 (1964). Thus, whether a passenger's failure to take affirmative action for his own safety constitutes contributory negligence is for the jury where conflicting inferences may be drawn from the circumstances. *Samuels v. Bowers*, 232 N.C. 149, 59 S.E. 2d 787 (1950); *Jackson v. Jackson*, 4 N.C. App. 153, 166 S.E. 2d 541 (1969).

Defendant Collins avers, and plaintiff's evidence shows, that Salmon and Collins were engaged in a prearranged automobile race on the public highway when the collision occurred. This evidence is uncontradicted. Plaintiff did not allege defendant was negligent by engaging in prearranged racing. However, defendant on cross-examination brought out facts to support such allegation. When issues not raised by the pleadings are tried by the consent of the parties, express or implied, they shall be treated in all respects as if they had been raised in the pleadings. It is not necessary that the pleadings be amended. N.C. Gen. Stat. 1A-1, Rule 15(b).

[2] Ordinarily, contributory negligence on the part of a plaintiff does not bar recovery when the wilful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971); *Brendle v. R. R.*, 125 N.C. 474, 34 S.E. 634 (1899).

[3] Violation of the racing statute, N.C.G.S. 20-141.3(a), is negligence *per se*. *Boykin v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12 (1961). The Court in *Brewer* quoted with approval the following from *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929):

> "An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitner*, 93 N.C. 509; *S. v. Lumber Co.*, 153 N.C. 610 [69 S.E. 58]), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson, supra.* [174 N.C. 483, 93 S.E. 967]. 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.' Thompson on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R. R.*, 149 N.C. 169 [62 S.E. 912].
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> "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers*, 121 N.C. 519 [27 S.E. 991]; *Bailey v. R. R., supra.* A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.*, 186 N.C. 704, 706 [120 S.E. 334, 335]."

Brewer v. Harris, supra at 296-97, 182 S.E. 2d at 350; *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E. 2d 858 (1978).

[4] Defendant pleaded guilty to violating N.C.G.S. 20-141.3(a) (prearranged racing), it being stipulated that the facts involved in the racing charge were the same facts out of which this lawsuit arose. Defendant has judicially stipulated that he wilfully violated the statute. The statute by its terms involves wilful and wanton conduct. The Court in *Boykin* stated:

> "Since two motorists racing make a plain and serious danger to every other person driving along the highway, and one which is often impossible to avoid, it is of itself an act of such negligence as to make the racing drivers responsible for damaged caused by it. . . . Where the negligence of a driver racing with another motorist cannot be attributed to a person

> riding in the car with him, the mere fact that such person was riding in a car engaged in a race does not defeat his right to recover for injuries resulting therefrom." Blashfield: Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 1, s. 761, p. 706.
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> . . . " . . . 'Racing motor vehicles on a public highway is negligence, and all those who engage in a race do so at their peril, and are liable for an injury sustained by a third person as a result thereof, regardless of which of the racing cars actually inflicted the injury, or of the fact that injured person was a passenger in one of the cars.' 60 C.J.S., Motor Vehicles, s. 297, p. 702." *Landers v. French's Ice Cream Co.*, 106 S.E. 2d 325, 329 (1958).

Boykin v. Bennett, supra at 728-29, 118 S.E. 2d at 14-15. We hold that Collins' participation in the prearranged race with Salmon was wilful or wanton conduct, and, as a matter of law, a proximate cause of plaintiff's injuries. *See Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979).

[5] We turn now to the issue of plaintiff's alleged contributory negligence. Defendant's motion for directed verdict was on "the ground that plaintiff's evidence proved the plaintiff to be contributorily negligent as a matter of law." Defendant did not contend in his motion that plaintiff's conduct was wilful or wanton. Nor does he so aver in his answer. Defendant alleges plaintiff aided and encouraged Salmon to operate his motor vehicle at a high rate of speed. The record does not contain any evidence to support this allegation. Defendant also alleges Salmon was under the influence of intoxicating beverages while driving the car and that plaintiff knew this and still rode with him. There is no evidence in the record to sustain this allegation. Defendant alleges that plaintiff, when he knew (or should have known) Collins and Salmon were going to race their cars on the highway, failed to leave the Salmon automobile, although he had an opportunity to do so, and failed to remonstrate with Salmon about the racing, or driving at a high speed. The evidence, in the light most favorable to plaintiff, tends to show that plaintiff did not know Collins and Salmon were going to race when he got into the Salmon car at the grill and Salmon drove off. He did not object, remonstrate or speak to

Salmon about his driving at all. Plaintiff was really surprised that Salmon raced. The cars were at the crossroads about a minute, and although plaintiff heard the talk about racing back, he did not participate in the conversation or say anything to Salmon. When they got to the crossroads and started back, plaintiff knew they were racing.

In *Pearce v. Barham*, 271 N.C. 285, 156 S.E. 2d 290 (1967), the defendant alleged as contributory negligence plaintiff's failure to protest and remonstrate to the driver about his operation of the car, and failure to ask the driver to stop and let her get out of the car. The Court held: "Such conduct on the part of plaintiff would be no more than ordinary negligence and would not be a bar to recovery if plaintiff were injured as a result of Calvin's wilful or wanton conduct." *Id.* at 289-90, 156 S.E. 2d at 294. We hold the evidence was sufficient to submit the question of plaintiff's contributory negligence to the jury.

Although plaintiff may have been contributorily negligent as a matter of law, a question that we do not decide, it is not a sufficient basis to direct a verdict against plaintiff, where defendant Collins' conduct is wilful or wanton as a matter of law, or where there is sufficient evidence to submit the issue of whether his conduct was wilful or wanton to the jury. *Brewer, supra; Pearce, supra.*

[6] The law as stated in *Brewer* and *Pearce* is that ordinarily, contributory negligence on the part of a plaintiff does not bar a recovery when the wilful and wanton conduct of a defendant is a proximate cause of plaintiff's injuries. The question then logically arises, whether plaintiff can recover against a defendant whose conduct is wilful and wanton, when plaintiff himself is responsible for wilful or wanton conduct which is a proximate cause of his injuries. The following appears in *Pearce*:

> "While there is some authority to the contrary, it has been held that no recovery can be had for an injury willfully and wantonly inflicted, where willful or wanton conduct for which plaintiff is responsible contributed as a proximate cause thereof." 65A C.J.S., Negligence § 131(a), p. 113. *Accord,* 38 Am. Jur., Negligence § 178, p. 856; 2 Restatement 2d, Torts § 503; *Gulf Mobile & Ohio R. Co., v. Freund,* 183 F. 2d 1005 (8th Cir., 1950), 21 A.L.R. 2d 729.

Pearce v. Barham, supra at 289, 156 S.E. 2d at 294. It is unclear in *Pearce*, whether the Court adopted this quotation as law in North Carolina. The Court noted that defendant did not characterize plaintiff's conduct as wilful or wanton. *Pearce* was decided before the adoption of N.C.G.S. 1A-1, Rules of Civil Procedure, and therefore Rule 15(b) had no application to the facts in that decision. In *Brewer*, the following appears: "We note, in passing, that this appeal does not require decision as to whether plaintiff [Brewer] could recover if both Brewer and Rudisill had been guilty of wilful and wanton conduct which was a proximate cause of Brewer's injury." *Brewer v. Harris, supra* at 299, 182 S.E. 2d at 351. We hold the answer to the above question is that a plaintiff cannot recover against a defendant whose conduct is wilful or wanton, when the plaintiff's conduct is also wilful or wanton and a proximate cause of his injuries. However, in the case at bar, the trial court did not consider whether plaintiff's conduct was wilful or wanton as a matter of law. This appeal does not require us to so decide.

[7] Finally, we are faced with the issue of whether plaintiff's conduct constituted "acquiescence" within the meaning of *Boykin*:

> The violation of the racing statute, G.S. 20-141.3(a) and (b), is negligence *per se*. Those who participate are on a joint venture and are encouraging and inciting each other. The primary negligence involved is the race itself. All who wilfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to *one not involved in the race* proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury, and regardless of the fact that the injured person was a passenger in one of the racing vehicles. *Of course, if the injured passenger had knowledge of the race and acquiesced in it, he cannot recover.*

Boykin v. Bennett, supra at 731-32, 118 S.E. 2d at 17 (emphases added). Here the Court appears to equate "being involved in the race" with "having knowledge of the race and acquiescing in it." The Court held in *Pearce* that mere failure to protest or remonstate or ask the driver to stop and let plaintiff out, is no more than ordinary negligence. It thus appears something additional is required to constitute "acquiescence."

"Acquiescence" is defined:

> Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect; it is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it, and thus differs from "confirmation," which implies a deliberate act, intended to renew and ratify a transaction known to be voidable.

Black's Law Dictionary 40 (4th ed. rev. 1968). "Acquiescence" implies acceptance or approval, active assent, active consent, knowledge and assent. 1 C.J.S. 915.

Collins' negligence is the wilful violation of N.C.G.S. 20-141.3(a), the prearranged racing statute, and constitutes a crime. In order for plaintiff to be a party to the offense, he must do more than fail to speak, remonstrate or leave the car. The evidence presented is not sufficient to hold as a matter of law that plaintiff was a principal in the second degree, as an aider or abettor, with Collins or Salmon in committing the offense. Mere presence, even with no effort to prevent the crime, or even with silent approval of or sympathy with the criminal, or even with the intention of assisting, is not aiding and abetting, unless the intent to assist, if necessary, is in some way communicated to the perpetrator of the crime. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102 (1976); *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973). We hold the evidence must show plaintiff in some way participated or was involved in the race in order to constitute acquiescence.

We hold the evidence was not sufficient to find as a matter of law that plaintiff acquiesced in Salmon's participation in the race. Whether he did so acquiesce is a question of fact for the jury under the issue of whether plaintiff's conduct was wilful or wanton.

As the case will be returned for a new trial, we think it proper, although not necessary, to make the following statment. If, at retrial, the evidence is substantially as in the record before us, it appears that the following issues would arise:

1. Was plaintiff injured by the negligence of Collins?
2. Was the conduct of Collins wilful or wanton?
3. Did plaintiff by his own negligence contribute to his injuries?
4. Was the conduct of plaintiff wilful or wanton?
5. What amount, if any, is plaintiff entitled to recover from defendant?

On the evidence before us, plaintiff would be entitled to a directed verdict or peremptory instruction on the first and second issues.

The judgment of dismissal on defendant's motion for directed verdict is reversed, and the case remanded for new trial.

Chief Judge MORRIS and Judge CARLTON concur.

ESTELLE ROUSE, PLAINTIFF v. CHARLES L. MAXWELL, TRADING AS MAXWELL SUPPLY COMPANY, AND LARRY FUTRELL, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ANDREW M. SIMPSON, THIRD-PARTY DEFENDANT

No. 785SC898

(Filed 3 April 1979)

1. **Automobiles § 90.10— violation of statute as negligence per se—sudden emergency—instructions proper**

In an action to recover for injuries sustained by plaintiff when her car was struck by a truck driven by one defendant and owned by the other defendant, there was no merit to defendants' contention that the trial court erred in instructing the jury that violation of a safety statute was negligence *per se* without immediately instructing on the sudden emergency doctrine.

2. **Automobiles § 87.3; Rules of Civil Procedure § 14— third-party practice—prior determination of liability unnecessary**

In an action to recover for injuries sustained in an automobile accident where defendants claimed that the negligence of the third-party defendant was a concurring proximate cause of the accident and plaintiff's injuries, the trial court did not err in failing to direct a verdict for the third-party defendant, since defendants could implead parties who might be liable to them, and it was not necessary that the third-party defendant's liability be previously determined.

3. Automobiles § 45.4— circumstances at accident scene—testimony repetitive

The trial court in a personal injury action did not err in permitting an officer to testify concerning the circumstances of the accident based on his observations at the scene since defendants had given similar testimony without objection.

4. Automobiles § 90.2— keeping vehicle under proper control—instructions supported by evidence

Evidence in a personal injury action was sufficient to support the trial court's instruction with regard to the third-party defendant's negligence in failing to keep his vehicle under proper control.

APPEAL by defendants and third-party defendant from *Brown, Judge*. Judgment entered 25 April 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 January 1979.

Plaintiff filed her complaint against defendants for damages sustained as a result of defendant Futrell's alleged negligent driving of a truck owned by defendant Maxwell. Defendants answered, denied negligence, and asserted a third-party claim for contribution against Andrew Simpson, alleging that Simpson's negligence caused the accident. Simpson denied any negligence in his answer.

At trial, plaintiff's evidence tended to show that on 3 June 1976, at 3:45 p.m., in a drizzling rain, her car was struck as it was traveling north on Highway 117 in Burgaw by defendants' southbound truck which had crossed the center line into plaintiff's lane of travel.

William Henry, the only eyewitness, testified that he was in the service station on the corner of Highway 117 and Fremont Street, north of Fremont Street and west of Highway 117, when he heard brakes squealing; he looked up and saw defendants' truck sliding backwards down the highway in the northbound lane until it collided with plaintiff's car; the truck went "zip" by the window and then "smack" when it hit plaintiff's car; prior to the impact, he saw the truck slide past a brown car sitting at the stop sign at the intersection of Fremont Street and Highway 117; the brown car was sitting past the stop sign but did not extend into Highway 117; he did not see the brown car move before the accident; and a written statement which he made after the accident was basically correct but incomplete.

Officer Littleton testified that when he arrived at the scene of the accident, he found defendants' truck in a ditch on the side of Highway 117 with its rear end up in the air; that skid marks indicated that the truck had crossed the center line 20 feet north of where the truck was sitting; that the skid marks indicated that the rear of the truck had swung to the right; that the speed limit in the area was 55 m.p.h.; and that immediately after the accident, defendant Futrell stated that he had turned to the left to avoid hitting a car which was pulling into Highway 117 from Fremont Street. Third-party defendant Simpson denied this statement.

The jury answered the issues submitted as follows:

"1. Was the plaintiff, Estelle Rouse, injured or damaged by the negligence of the defendant, Larry Futrell?

ANSWER: Yes.

2. What amount, if any, is the plaintiff, Estelle Rouse, entitled to recover for personal injuries?

ANSWER: $100,000.00.

3. What amount, if any, is plaintiff, Estelle Rouse, entitled to recover for damages to personal property?

ANSWER: $500.00.

4. Was the plaintiff, Estelle Rouse, injured or damaged by the negligence of the third party defendant, Andrew Simpson, as alleged by the defendant, Larry Futrell?

ANSWER: Yes."

Judgment was entered for plaintiff. Third-party defendant was ordered by the trial court to pay defendants one-half the award to plaintiff. Defendant and third-party defendant appealed.

Smith & Kendrick, by W. G. Smith, for plaintiff appellee.

Crossley & Johnson, by Robert White Johnson, for defendant appellants and third-party plaintiffs.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr. and Lonnie B. Williams, for third-party defendant appellant.

ERWIN, Judge.

Defendants' Appeal

Defendants present one question on appeal, which reads: "Did the Trial Court err in its instructions to the jury, on the issue of the defendants' negligence, with respect to driving on the right-hand side of the road and the alleged failure to yield right-of-way?" The trial court instructed the jury *inter alia* from the North Carolina Pattern Jury Instructions for Motor Vehicle Negligence on the following: (1) violation of a safety statute or motor vehicle traffic laws enacted for the public safety as being negligence *per se*, unless the statute provided to the contrary; (2) the duty of a driver of a motor vehicle to drive as nearly as practical entirely within a single lane whenever any street has been divided into two or more lanes; (3) the duty of a driver to avoid changing lanes until such movement can be made with safety; and (4) the sudden emergency doctrine.

[1] Defendants contend that the trial court's instructions to the jury that violation of a safety statute is negligence *per se*, without immediately instructing the jury on the sudden emergency doctrine, was prejudicial error. We do not agree.

The trial court's charge to the jury was approved by our Supreme Court in *Bullock v. Williams*, 212 N.C. 113, 193 S.E. 170 (1937), in practically the same form. A charge to a jury must be read and considered in its entirety and not in detached fragments. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *McPherson v. Haire*, 262 N.C. 71, 136 S.E. 2d 224 (1964); *Kennedy v. James*, 252 N.C. 434, 113 S.E. 2d 889 (1960). "Error warranting a reversal or a new trial must amount to the denial of some substantial right." *Key v. Woodlief*, 258 N.C. 291, 295, 128 S.E. 2d 567, 570 (1962). "The burden is on the appellant not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him." *Mayberry v. Coach Lines*, 260 N.C. 126, 130, 131 S.E. 2d 671, 675 (1963).

We have considered contextually the entire charge of the trial court and have related the charge to the evidence and the permissible inferences arising therefrom. We conclude that the trial court instructed the jury properly on the law in this case

as it related to the evidence. The defendants' assignment of error is overruled.

Third-Party Defendant's Appeal

[2] Third-party defendant contends that the trial court erred in failing to direct a verdict for him pursuant to G.S. 1A-1, Rule 50(a), and for judgment notwithstanding the verdict pursuant to Rule 50(b), because liability for contribution cannot be invoked except among joint tort-feasors, and defendants denied negligence on their part and thus denied being a joint tort-feasor. We do not find error.

Chief Justice Sharp spoke for our Supreme Court in *Heath v. Board of Commissioners*, 292 N.C. 369, 375-76, 233 S.E. 2d 889, 893 (1977), as follows:

> "However, since the enactment of G.S. 1A-1, Rule 14 (1969), at any time after commencement of an action 'a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is *or may be* liable to him for all or part of the plaintiff's claim against him' (emphasis added). It is, therefore, no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim.
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> * * *
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> These salutary purposes should not be frustrated whenever the defendant indemnitee denies his liability and resists paying the plaintiff's claim. Yet this is precisely what would happen here were the courts to cling to the doctrine that no liability exists in the indemnitor to the indemnitee (and thus no cause of action arises) until the indemnitee had first satisfied the underlying obligation. Accordingly, in order to reconcile Rule 14 practice with the old substantive law of indemnification, the federal courts developed a doctrine of accelerated liability which allows third-party practice without the initial payment of the underlying liability. *Glenn Falls Indemnity Co. v. Atlantic Bldg. Co.*, 199 F. 2d 60, 63 (4th Cir. 1952); *Bosin v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 183 F. Supp. 820, 823 (E. D. Wis. 1960). *See generally*, 3 Moore's Federal Practice, *supra*, ¶ 14.08."

Third-party defendant relies on *Insurance Co. v. Motor Co.*, 18 N.C. App. 689, 198 S.E. 2d 88 (1973). We stated in *Insurance Co. v. Motor Co., Id.* at 693-94, 198 S.E. 2d at 91:

> "[W]here the person seeking contribution takes the position that he is free of negligence, he is not entitled to contribution. Additionally where the party from whom contribution is sought is not a tort-feasor and not jointly liable, there is no right to contribution. Plaintiff here, in order to show a right to contribution, must allege facts tending to show liability of its insured and Weeks-Allen as joint tort-feasors predicated upon negligence of *each* concurring in proximately producing the injuries. *Clemmons v. King*, 265 N.C. 199, 143 S.E. 2d 83 (1965); *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780 (1955). *This plaintiff has not done.*" (Emphasis added.)

The facts, in the present case, are clearly distinguishable from those in *Insurance Co. v. Motor Co., supra.* Here, defendants, in their third-party complaint, specifically alleged:

> "If the defendant, Larry Futrell, was negligent in any respect alleged in the Complaint, which is denied, the negligence of Andrew M. Simpson in driving into the dominant highway from the servient highway in the face of oncoming traffic, and in the other respects hereinabove set out, were concurring proximate causes of the accident and any injuries or damages which the plaintiff sustained, and as such, the said Andrew M. Simpson was a joint tort-feasor."

G.S. 1A-1, Rule 14, allows a party to implead a party or parties that may be liable to him. It is not necessary that the third-party defendant's liability be previously determined.

We hold that the trial court's denial of third-party defendant's motion for a directed verdict was proper.

[3] Third-party defendant contends that the trial court erred in permitting Officer Littleton to testify as follows:

> " 'Q. Now, in your investigation of this accident, and from the tire marks that you saw, could you tell where the rear of the van swung to the right or to the left?
>
> Mr. Williams: Objection.
>
> Court: Overruled. . . .' "

Defendant Futrell and third-party defendant Simpson gave similar testimony to that of Officer Littleton without objection. In view of such additional testimony, we do not find Officer Littleton's testimony prejudicial.

The trial court charged the jury in part:

"[E]vidence has been received tending to show that at an earlier time the witness, William Henry, made a statement which conflicts with his testimony at this trial. * * * You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the truthfulness of the witness in deciding whether you will believe or disbelieve his testimony at this trial.

* * *

Evidence has been received tending to show that at an earlier time the witness, Larry Futrell, made a statement consistent with his testimony at this trial. * * * You must not consider such earlier statement as the truth of what was said because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent with the testimony of the witness at this trial then you may consider this together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his testimony at this trial."

We do not agree that these instructions express an opinion by the trial court. We find no error in the charge.

[4] Finally, third-party defendant contends that the court erred in charging the jury with regard to his negligence in failing to keep his vehicle under proper control when there was no evidence to support the charge. Defendant Futrell testified: "I was traveling about 35 miles per hour when this car [third-party defendant] pulled out in front of me. . . ." Defendant Futrell also testified that he saw third-party defendant Simpson pull up to the stop

sign, and that Simpson paused a second and pulled into the side of the road. A logical inference arises that had third-party defendant had his car under control, he would not have pulled out in front of defendant Futrell. The court properly instructed the jury on this issue.

We hold that the trial judge sufficiently and correctly declared and explained the law arising on the evidence in the case *sub judice*. *See* G.S. 1A-1, Rule 51(a).

We find no error in third-party defendant's case.

In the trial below, we find no error as to the original defendants or the third-party defendant.

No error.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. DALE BAINES

No. 787SC1069

(Filed 3 April 1979)

1. Criminal Law § 143.5— probation revocation hearing—rules of evidence

The trial court was not bound by strict rules of evidence during a probation revocation hearing.

2. Criminal Law § 143.9— probation revocation—incompetent evidence—sufficient competent evidence to support order

Even if incompetent evidence was admitted at defendant's probation revocation hearing, the court's order revoking defendant's probation will be upheld where competent testimony by defendant's probation officers and by defendant himself was sufficient to support the court's determination that defendant violated conditions of his probation in that he willfully and without lawful excuse failed to pay court costs and other amounts required by the probation judgment, failed to report to his probation officer, and departed the State without notifying his probation officer.

3. Criminal Law § 143.1— probation revocation—sufficiency of order of arrest

An order of arrest served on defendant for violation of the conditions of his probation in a breaking and entering and larceny case constituted sufficient notice in writing of his revocation hearing in apt time to afford him a reasonable opportunity to be heard and was not required to inform defendant with particularity of the accusations against him.

State v. Baines

APPEAL by defendant from *Graham, Judge.* Judgment and Order entered 10 August 1978 in Superior Court, NASH County. Heard in the Court of Appeals 28 February 1979.

On 13 August 1975, the defendant entered a plea of guilty upon a charge of felonious breaking and entering and felonious larceny. He was sentenced to a term of imprisonment of not less than four nor more than six years with the sentence suspended upon the usual conditions of probation and the condition that he pay $62.50 in restitution, a $250 fine, and court costs of $74. On 10 January 1977, a probation violation warrant and order for arrest were issued charging that the defendant had failed to pay his indebtedness as directed by the court and had otherwise specifically failed to comply with the terms and conditions of the probation judgment. That order for arrest was apparently never served upon the defendant. A second order of arrest was also issued on 10 January 1977, however, which stated that the defendant had failed to comply with the terms and conditions of the probation judgment. This order for arrest was served on the defendant on 21 July 1978.

At the probation revocation hearing, the trial court heard the defendant's present and former probation officers. Probation Officer Debbie Odom testified that the defendant was placed on probation on 13 August 1975 and that she was assigned to his case approximately one year later. She did not see the defendant on a regular basis after being assigned to the case, as he left his place of residence without permission and she had not been able to locate him. She also stated that the defendant had failed to pay the amount required under the probation judgment with the exception of $28.75. She later discovered that the defendant was in custody in Virginia. An order for arrest and extradition papers were sent to Virginia but were apparently not served before the defendant was released from custody there. The defendant apparently returned to Nashville without reporting to his probation officer, as she discovered on 21 July 1978 that he had been in custody in the Nash County Jail for two weeks under an assumed name.

Probation Officer Tim Kemp testified that he was the probation officer first assigned to the defendant's case. He helped the defendant obtain employment with a tobacco company shortly

after he was first put on probation. At the end of the tobacco season, the defendant was discharged. Kemp stated that he worked with the defendant for several months, but the defendant never obtained further employment. Kemp did not know if the defendant went to any of the places suggested or attempted to locate employment. The defendant never gave any reason why he was not able to obtain employment and never suggested that there was any physical reason why he could not obtain employment. Kemp additionally testified that he saw the defendant on the street in Nashville and asked him to come to his office immediately so that he could be introduced to his new probation officer and receive additional instructions. The defendant then told him that he had to go to one of the stores uptown and would be at Kemp's office in five or ten minutes. The defendant never appeared at Kemp's office. The trial court asked Kemp if work was available in the area, and Kemp replied that it was. The trial court then asked Kemp if he had a recommendation in the case, and he replied that the defendant had wilfully neglected to pay the money or cooperate with the department. No objections were made to these questions, and no motions to strike the answers were made.

The defendant testified that he went to Virginia because attempts had been made on his life and he was afraid. He stated that he did not inform his parole officer that he was leaving because threats had been made against his life. The defendant admitted that he did not go to his probation officer when he returned to Nash County and did not inform her that he had returned. He indicated that he did not go to see his probation officer because he went to work instead. He also stated that he had been working while in Virginia. He indicated that he had not told his probation officer at any time that he had received threats. The defendant stated that he was in good health and was able to work.

At the conclusion of the hearing, the trial court found that the defendant had wilfully and without lawful excuse violated the conditions of the probation judgment by failing to pay the amounts of money required by the judgment, by failing to report to his probation officer on request, and by leaving the State for an address unknown without informing his probation officer. As a result of these findings, the trial court concluded that the defend-

ant's probation should be revoked. The trial court entered an order and a judgment of commitment on 10 August 1978 revoking the defendant's probation and reinstituting the sentence of imprisonment of not less than four nor more than six years. From the order and judgment of the trial court entered on that date, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Benjamin G. Alford, for the State.

Early & Chandler, by John S. Williford, Jr., for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the admission into evidence of several portions of the testimony of his probation officers. He contends in this regard that the trial court committed reversible error by admitting testimony of the probation officers relating to his ability to work during the period of his probation and the availability of work in the area during that period. He also contends that the trial court committed reversible error by admitting the conclusory testimony of one officer with regard to the wilfulness of his failure to abide by the terms of his probation. We do not agree.

[1] The trial court was not bound by strict rules of evidence during the probation revocation hearing. *State v. Pratt*, 21 N.C. App. 538, 204 S.E. 2d 906 (1974). Assuming *arguendo* that the trial court erred in admitting the testimony which gave rise to these contentions by the defendant, however, no reversible error was committed. When the trial court hears a matter without a jury and allows both competent and incompetent evidence to be admitted, it is presumed that the trial court ignores the incompetent evidence and considers only that which is competent and that the findings of fact of the court are in no way influenced by hearing the incompetent evidence. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, *cert. denied*, 358 U.S. 888, 3 L.Ed. 2d 115, 79 S.Ct. 129 (1958); *Bailey v. Matthews*, 36 N.C. App. 316, 244 S.E. 2d 191 (1978). Therefore, the order and judgment of the trial court must be affirmed if competent evidence was before the trial court which was reasonably sufficient to satisfy it in the exercise of sound judicial discretion that the defendant had, without lawful

excuse, wilfully violated one of the valid conditions of his probation. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967); *State v. Morton*, 252 N.C. 482, 114 S.E. 2d 115 (1960); *State v. Pratt*, 21 N.C. App. 538, 204 S.E. 2d 906 (1974).

[2] We find that the competent direct evidence introduced by the State through the testimony of the probation officers in the present case indicated, when taken in the light most favorable to the State, that the defendant absented himself from the State without permission or authority in violation of the terms and conditions of his probation and never attempted to contact his probation officers after his return to North Carolina. The competent direct evidence introduced by the State also indicated that the defendant did not visit or remain in contact with his probation officers before leaving the State or after his return, even though one of the officers specifically asked the defendant to come to his office after a chance meeting with the defendant in a public place. This competent and direct evidence introduced by the State was clearly sufficient to support, if nothing more, the trial court's findings and conclusions that the defendant wilfully and without lawful excuse refused to report to his probation officers during those periods of time during which he was present in the State of North Carolina and that he wilfully and without lawful excuse absented himself from this State on occasion, both being done by him in violation of the terms and conditions of his probation. As the State's evidence is only required to be reasonably sufficient to satisfy the trial court in the exercise of sound judicial discretion that the defendant, without lawful excuse, wilfully violated one valid condition of probation, these portions of the State's evidence were sufficient to support the order and judgment of the trial court from which the defendant has appealed. Therefore, even if it is assumed *arguendo* that the testimony of the probation officers giving rise to the defendant's contentions was incompetent and inadmissible, the competent and admissible evidence elicited from them before the trial court was sufficient to support the findings previously referred to and the conclusion that the defendant's probation should be revoked. These assignments and contentions are overruled.

Additionally, the defendant's testimony was sufficient to support all of the findings and conclusions of the trial court. The defendant took the stand and admitted that he was able to work

and in fact did work during the period of his probation but had not paid the amounts still owed as a condition of that probation. He further admitted that he did not go to his probation officer's office when specifically requested to go there by the officer. His excuse for this was that it had slipped his mind. He also admitted that he left the State during his probationary period without notifying his probation officer. His excuse for this was that he had received threats against his life. He admitted, however, that he had never informed his probation officer even after returning to North Carolina. The testimony by the defendant was more than adequate to support the findings and conclusions of the trial court to the effect that the defendant wilfully and without lawful excuse failed to pay court costs and other amounts owed as required by the probation judgment, that he wilfully and without lawful excuse failed to meet with his probation officer and that he wilfully and without lawful excuse departed the State without notifying his probation officer.

[3] The defendant additionally contends that the order for arrest served upon him in connection with the violation of his probation was not sufficient in that it did not set forth all of the essential elements which the State was required to prove in order to justify revocation of his probation. The arrest order in question instead contained the conclusory direction to law enforcement officers that: "The defendant named above having failed to comply with the terms and conditions of the probation judgment in an actions (sic) charging breaking and entering and larceny YOU ARE DIRECTED TO ARREST THE DEFENDANT. . . ." The defendant contends that this order for his arrest for violation of his probation was insufficient to inform him with particularity of the accusations against him so as to enable him to prepare his defense, inadequate to protect him from subsequent prosecution for the same offenses, and inadequate to enable the trial court to proceed to judgment in the event of his conviction. We find the defendant's contentions without merit.

As probation or suspension of sentence is an act of grace extended to one already convicted of a crime in a trial providing the full protection of due process of law, the rights of an offender in a probation revocation hearing are not those extended by the Constitution of the United States to one on trial in a criminal prosecution. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967). The

charge involved in all such cases is simply that the defendant has wilfully failed, without lawful excuse, to abide by the conditions of probation or suspended sentence. There are no lesser included offenses. If the defendant wishes more specific information concerning the evidence to be introduced by the State at the probation revocation hearing, ample means for obtaining such information are available. A defendant on probation or under suspended sentence must be given notice in writing of the hearing in apt time and an opportunity to be heard before any sentence of imprisonment is put into effect. *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). He is not, however, entitled to the same notice which must be included in a bill of indictment in a criminal case or to many of the other rights of one on trial in a criminal prosecution. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967). We find the order for arrest served upon the defendant constituted sufficient notice in writing of his probation revocation hearing in apt time to afford him a reasonable opportunity to be heard.

The order and judgment of the trial court are

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

SUSANNE JACOBSON v. J. C. PENNEY COMPANY, INC.

No. 7810SC414

(Filed 3 April 1979)

Negligence § 48— entrance to store—fall—no negligence of defendant

In an action to recover for personal injury sustained by plaintiff when she slipped and fell because of defendant's alleged negligence in failing to maintain the entrance to its store in a safe condition, the trial court properly granted defendant's motion for summary judgment where defendant showed that plaintiff could not recover based upon her allegations that defendant allowed water or other foreign substances to accumulate on the floor, that defendant failed to provide adequate lighting at the entrance, that defendant failed to maintain a handrail along the ramp leading into the store, that the presence of the ramp at the entrance to the store was a breach of defendant's duty of care, or that defendant maintained a metal strip along the bottom edge of the ramp.

Jacobson v. Penney Co.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 29 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 7 February 1979.

The plaintiff, Susanne Jacobson, instituted this action by filing a complaint in which she alleged that the defendant, J. C. Penney Co., Inc., negligently failed to maintain the entrance to its North Hills Shopping Center store in Raleigh in a safe condition and thereby caused the plaintiff to slip and fall and to suffer personal injury. Upon the pleadings, a deposition of the plaintiff, an affidavit of the plaintiff, an affidavit of one of the defendant's employees and the arguments of counsel, the trial court granted the defendant's motion for summary judgment. From summary judgment in favor of the defendant, the plaintiff appealed.

In her deposition, the plaintiff indicated that she drove her car to North Hills Shopping Center in Raleigh on 8 May 1976 to do some shopping. It had been raining earlier that day, but the rain had subsided to a drizzle. After leaving her car, the plaintiff walked across an elevated walkway to the entrance of a store operated by the defendant. Upon reaching the entrance to the store, the plaintiff opened the first set of doors, took one or two steps across the carpeted vestibule, then pulled open one of the two inner doors. She then proceeded down a carpeted ramp within. When the plaintiff was just beyond the ramp, she "felt a sensation on my right heel . . . something very slippery. Something like it was oil or wax. But it was a feeling I have in my right heel through that shoe." The plaintiff lost her balance and began to fall. She reached out with her right hand and touched a sheer partition or wall covered with heavy paper which offered her no support. Shortly after her fall, the plaintiff was taken to Rex Hospital in Raleigh where it was discovered that she had a broken hip.

Additional facts pertinent to this appeal are hereinafter set forth.

Emanuel and Thompson, by Robert L. Emanuel, for plaintiff appellant.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander, for defendant appellee.

MITCHELL, Judge.

The plaintiff's sole assignment of error is that the trial court erred in granting the defendant's motion for summary judgment. In order to be entitled to summary judgment in his favor, a claimant must show that there is no genuine issue as to any material fact concerning his entire claim or a defense thereto and that the material facts show as a matter of law that he is entitled to judgment on his claim. A defending party may show as a matter of law that he is entitled to summary judgment in his favor by showing that there is no genuine issue of material fact concerning one essential element of the claimant's claim for relief and that the claimant cannot prove the existence of that element. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Bank v. Evans*, 296 N.C. 374, 250 S.E. 2d 231 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). If the defending party shows that the claimant is unable to prove the existence of an element essential to his claim, the defending party is entitled to judgment as a matter of law, and it would be error not to grant his motion for summary judgment.

Until the defending party has established his right to judgment as a matter of law, the claimant is not required to present any evidence to support his claim for relief. However, once the defending party establishes his right to judgment as a matter of law, the claimant must present a forecast of the evidence which will be available for presentation at trial to support his claim for relief. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Phillips Supp. 1970). If the claimant does not respond at that time with a forecast of evidence sufficient to show that the defending party is not entitled to judgment as a matter of law, then summary judgment should be entered in favor of the defending party.

A party may show that there is no genuine issue as to any material fact by showing that no facts are in dispute. If, however, there are facts in dispute, a party may show that they are not material by showing that they would not affect a determination of the claim for relief. Even if there is an issue as to a material fact, a party may show that it is not genuine by showing that the party with the burden of proof in the action will not be able to pre-

sent substantial evidence which would allow that issue to be resolved in his favor. *See Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Therefore, a party may show that there is no genuine issue as to a material fact by showing either that there are no facts in issue, or that the only facts in issue are not material, or that an issue as to a material fact cannot be resolved in favor of the party with the burden of proof by the presentation of substantial evidence.

In an effort to show that there was no genuine issue as to a material fact, the defendant in the present case introduced a deposition of the plaintiff and an affidavit of one of the defendant's employees. The plaintiff's deposition basically set forth the circumstances surrounding her accident. Neither party contested the facts as set forth in the deposition, except that the affidavit of the defendant's employee indicated that the plaintiff was several paces from the ramp when she fell while the deposition of the plaintiff indicated that she was "one or two feet from the ramp." In opposition to the deposition and affidavit presented by the defendant, the plaintiff presented her own affidavit which contained the same basic information set forth in her deposition.

The plaintiff alleged in her complaint that she was the defendant's business invitee. The defendant did not show otherwise and that fact was not in issue. Therefore, the defendant owed the plaintiff a duty to exercise ordinary care in maintaining the entrance and public areas of its business in a reasonably safe condition. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1978); *Dawson v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831 (1965); *Stoltz v. Hospital Authority*, 38 N.C. App. 103, 247 S.E. 2d 280 (1978).

By her complaint, the plaintiff alleged that the defendant breached its duty of care by allowing an accumulation of water and other foreign matter to remain upon the floor at the entrance of its store. The facts presented in the deposition taken of the plaintiff and not in issue showed that the plaintiff was looking where she was going at the time she fell, that she did not observe any foreign matter on the floor and that she did not recall seeing any water on the floor. The affidavit of the defendant's employee indicated that immediately after the plaintiff fell the only foreign substance on the floor was a few drops of water which had fallen

from the plaintiff's raincoat. The deposition taken of the plaintiff did indicate that at the time of her fall she "felt a sensation on my right heel . . . something very slippery. Something like it was oil or wax. But it was a feeling I have in my right heel through that shoe." This was, however, merely a conclusory statement concerning a sensation felt by the plaintiff and did not overcome the defendant's forecast of evidence which showed, both from the affidavit of the defendant's employee and the deposition taken of the plaintiff, that there was no water or foreign matter on the floor at the point of the plaintiff's fall. The defendant's forecast of evidence showed that the defendant had not permitted water or other foreign matter to accumulate at the time and place of the plaintiff's fall. Therefore, the defendant showed that the plaintiff could not recover on a claim based upon her allegation that the defendant allowed water or other foreign substances to accumulate on the floor.

The plaintiff also alleged that the defendant breached its duty of care by failing to provide adequate lighting at the entrance to its store. The undisputed facts as set forth in the deposition taken of the plaintiff indicate that there were "some dim lights" at the entrance of the defendant's store at the time the plaintiff fell. Additionally, the plaintiff stated that, "There was enough light to see the floor in front of me." She further stated that she was able to observe the floor in front of her and determined that there was no foreign substance present. This forecast of evidence by the defendant was sufficient to show that there was sufficient lighting at the entrance of the store to allow the plaintiff to enter in safety.

Even should it be assumed that there was insufficient lighting in the entrance to the store, this forecast of evidence by the defendant was sufficient to establish that such insufficient lighting was not the proximate cause of the plaintiff's injury, as her fall was not caused by her inability to see where she was going or her inability to determine that the floor was clear of foreign substances. *Cf. Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979) (evidence providing inference of both breach of duty and proximate cause). For this reason also, the defendant presented evidence sufficient to show that the plaintiff could not prevail at trial on a claim for relief based upon the defendant's failure to provide adequate lighting.

The plaintiff further alleged that the defendant breached its duty of care by failing to provide a handrail along the ramp at the entrance to the store. The undisputed facts as set forth in the defendant's forecast of evidence indicate that the plaintiff was beyond the bottom of the ramp and on the level floor beyond at the time of her fall. Absent extraordinary circumstances not presented by this case, the defendant's duty to maintain its business in a reasonably safe condition for the benefit of business invitees did not require the defendant to maintain a handrail for the benefit of those crossing a level floor. As the defendant has shown that the plaintiff fell on the level floor beyond the ramp, a handrail along the ramp would not have aided the plaintiff in preventing her fall, and the absence of a handrail clearly was not the proximate cause of her injury. Thus, the defendant showed that the plaintiff could not recover on a claim based upon negligent failure to maintain a handrail along the ramp.

The plaintiff further alleged that the defendant breached its duty of care by having a ramp at the entrance to its store. The plaintiff made the following statements in the deposition concerning the ramp:

> The fall was on the floor and not actually on the ramp. I just came down the ramp. I was one or two feet from the ramp. It was just immediately after I came off the ramp. I had taken no more than two steps from the end of the ramp onto the floor when I experienced this slipping sensation with my right heel.

The plaintiff's own account of the accident clearly indicates that she was not on the ramp when she fell. Any issue as to whether she was several steps beyond the ramp or one or two feet from the ramp is immaterial, since her account of the fall indicates that she was past the ramp when she fell and that the ramp did not cause her fall. The defendant's forecast of evidence showed that the plaintiff could not prevail on her claim for relief based upon the presence of a ramp at the entrance to the defendant's store.

Finally, the plaintiff alleged that the defendant breached its duty of care as there was a metal strip along the bottom edge of the ramp. The defendant's forecast of evidence clearly showed that the metal strip was not the cause of the plaintiff's fall and that the plaintiff could not prevail on this claim for relief.

As a general rule, issues of negligence are not susceptible of summary adjudication. Since the rule of the prudent man or other applicable standard of care must be applied, summary judgment is appropriate only in exceptional negligence cases and ordinarily the jury should apply the applicable test under appropriate instructions from the court. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Shapiro v. Motor Co.*, 38 N.C. App. 658, 248 S.E. 2d 868 (1978). In the present case, however, the defendant's forecast of evidence established its lack of negligence and entitled it to judgment as a matter of law. The plaintiff's forecast of evidence was not sufficient to forestall the defendant's entitlement to such judgment in its favor. When presented with this situation, the trial court was required to grant the defendant's motion and to enter summary judgment in its favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 171 S.E. 2d 95 (1969).

The trial court's entry of summary judgment in favor of the defendant is hereby

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

EDDIE MARSHALL LYON v. SHELTER RESOURCES CORPORATION, PEACHTREE HOUSING CORPORATION AND GENERAL ELECTRIC CREDIT CORPORATION OF GEORGIA

No. 7814DC375

(Filed 3 April 1979)

1. Rules of Civil Procedure § 8.2— waiver or release—affirmative defense

A defense based on waiver or release is an affirmative defense for which the defendant bears the burden of proof. G.S. 1A-1, Rule 8(c).

2. Sales § 9; Uniform Commercial Code § 12— action for breach of implied warranties—release of manufacturer—no release of retailer

In this action to recover for breach of implied warranties of merchantability and fitness of a mobile home, defendant retailer failed to show that plaintiff's release of the manufacturer operated to release defendant retailer where there was no showing that the manufacturer warranted the mobile home to the retailer and that the retailer passed the *same* warranty on to plaintiff.

3. **Uniform Commercial Code § 25— implied warranties of mobile home—repairs—right to damages**

Although defects in plaintiff's mobile home were repaired by the manufacturer, plaintiff was entitled to recover against the retailer for breach of implied warranties of merchantability and fitness where plaintiff presented evidence that the repairs did not raise the value of the mobile home to the contract price.

4. **Sales § 9; Uniform Commercial Code § 13— implied warranties of mobile home—payment of loan not waiver**

Plaintiff did not waive any breach of implied warranties of a mobile home by paying off the loan on the mobile home and releasing the lender, since plaintiff's acceptance of the home obligated her to pay the contract price but did not prohibit her from recovering damages for breach of warranty. Furthermore, plaintiff's action against the lender was based on an allegation of unfair trade practice, and her release of the lender on that claim would not bar plaintiff's action for breach of warranty.

5. **Uniform Commercial Code § 12— express warranty by manufacturer—implied warranties by retailer**

An express warranty by the manufacturer of a mobile home would not necessarily exclude an implied warranty by the retailer.

6. **Uniform Commercial Code § 26— breach of implied warranties—damages—sufficiency of complaint**

Plaintiff's complaint was sufficient to support an award of general damages for breach of implied warranties of merchantability and fitness of a mobile home.

7. **Uniform Commercial Code § 26— breach of implied warranties—damages—sufficiency of evidence**

In an action to recover damages for breach of warranty of a mobile home, plaintiff's evidence was sufficient to show the value of the home if it had been as warranted and the fair market value of the home in its defective condition where plaintiff testified that the contract price was $10,515 and that the home was worth only $6,000 when delivered.

APPEAL by defendant, Shelter Resources Corporation, from *Read, Judge*. Judgment entered 15 December 1977 in District Court, DURHAM County. Heard in the Court of Appeals 1 February 1979.

Plaintiff instituted this suit to recover damages for breach of warranty. On 22 March 1973, plaintiff purchased a 1973 model Peachtree Mobile Home from defendant, Shelter Resources Corporation (Shelter). Shelter was doing business in Wake County as Colony Mobile Homes. Defendant, Peachtree Housing Corporation (Peachtree), manufactured the mobile home purchased by plaintiff.

The purchase price was $10,515.00. Plaintiff paid $600.00 as a down payment and executed a retail installment contract for the remainder. This contract was assigned to defendant, General Electric Credit Corporation of Georgia (GECC).

The mobile home was delivered to plaintiff's lot in March, 1973, but, due to rain, there was some delay in setting it up and bricking it in. Plaintiff alleged that subsequent to the purchase and delivery, she discovered that the windows and doors leaked, they would not close tightly, the heating system was defective, the bathroom tiles were improperly installed, the roof leaked, there were holes in the walls, and several electrical switches would not work. Plaintiff repeatedly requested repairs of Shelter and Peachtree but the home remained in poor condition. Plaintiff stopped making payments to GECC in 1975 and filed this suit in February, 1976. In August, 1976, Peachtree made repairs to the home and plaintiff filed a voluntary dismissal with prejudice as to Peachtree. Plaintiff refinanced the home, paid off GECC in January, 1977, and dismissed her action against GECC. GECC then dismissed a counterclaim for the default payments.

The case proceeded to trial against Shelter on the issues of implied warranty of merchantability and implied warranty of fitness for a particular purpose. Plaintiff's evidence tended to show that she purchased the home in March, 1973. The home was delivered on a rainy day and could not be set up because of the rain. A tractor and a bulldozer were needed to put the home on the lot and the home had to be rocked back and forth to get it in place. It took three weeks to set up the mobile home. On the first rainy day after she had moved in, plaintiff testified that the rain poured in through the vent over the stove, the windows, the doors and the roof. She testified that the heating system did not work properly for two winters. The windows had no screens for two summers. The dryer was vented into the bedrooms. Plaintiff testified that the value of the home when she bought it could not have been more than $6,000.00. She had not had the home appraised.

Plaintiff called Colony about every two to three weeks about these problems. The repairman from the Colony lot came out twelve or thirteen times but the problems were not corrected. When plaintiff could not get Shelter to make repairs, she called

Peachtree. On 10 August 1976, after this suit was filed, Peachtree repaired the kitchen drain, the heating system, the dryer vent, the plumbing, the electrical wiring and other items. It put on new storm doors. Plaintiff valued these repairs at $1,500.00 based on conversations with friends and relatives.

Shelter presented no evidence. The jury found that Shelter had impliedly warranted that the home would be fit for the ordinary purpose and fit for use as a home. They found that Shelter had breached these warranties and, therefore, plaintiff has sustained $3,015.00 in damages. From this verdict, Shelter appealed.

Powe, Porter, Alphin & Whichard, by Edward L. Embree III, for plaintiff appellee.

Sprinkle, Coffield & Stackhouse, by H. Irwin Coffield, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Shelter first asserts that the repairs made by Peachtree in August, 1976 and plaintiff's release of Peachtree relieves Shelter from liability. Shelter contends that since the defects were repaired, plaintiff has sustained no damages. Furthermore, if plaintiff may recover from Shelter for a breach of warranty, Shelter in turn may recover from Peachtree for any liability to plaintiff. Thus, Shelter argues, the release of Peachtree released Shelter. A defense based on waiver or release is an affirmative defense and, therefore, the defendant bears the burden of proof. Rule 8(c), North Carolina Rules of Civil Procedure; *Price v. Conley*, 21 N.C. App. 326, 204 S.E. 2d 178 (1974). On this issue, Shelter has failed to sustain its burden of proving that the release of Peachtree released Shelter.

[2] In this jurisdiction, in order for a consumer to sue for breach of warranty there must be privity of contract between the plaintiff and the defendant. Generally, therefore, consumers have no cause of action against a manufacturer of a product. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E. 2d 534 (1976); *Byrd v. Star Rubber Co.*, 11 N.C. App. 297, 181 S.E. 2d 227 (1971). *See* Hodge, *Products Liability: the State of the Law in North Carolina*, 8 Wake Forest L. Rev. 481 (1972). Nevertheless, consumers may sue retailers, with whom they have privity, and the

retailers may, in turn, sue the manufacturers on any expressed or implied warranties made to the retailer.

> "Where the retailer purchases personal property from the manufacturer . . . for resale with implied or express warranty of fitness and the retailer resells to the consumer with the *same* warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer." (Emphasis added.) *Wilson v. Chemical Co.*, 281 N.C. 506, 512, 189 S.E. 2d 221 (1972).

Shelter's liability in this case arises from an alleged breach of the implied warranties of merchantability and fitness for a particular purpose. G.S. 25-2-314 and 25-2-315. Shelter does not contend that these implied warranties have been modified or excluded, pursuant to G.S. 25-2-316 and does not contest the jury's finding that Shelter made these warranties in the sale of the mobile home. Shelter has failed to show, however, that Peachtree warranted the home to Shelter, and that Shelter passed this *same* warranty on to plaintiff. Without a showing that Shelter was secondarily liable, it cannot claim that the release of Peachtree operated to release Shelter.

[3] Although the repairs increased the value of the house, the evidence indicated that they did not raise the market value to the contract price. Plaintiff testified that the value of the repairs was $1,500.00 and that the house was worth $4,515.00 less than what she paid. The jury returned a verdict awarding damages of $3,015.00, the difference between the value of the mobile home and the sale price less the value of the repairs. Despite the repairs, plaintiff's house was still not worth the price she paid and, therefore, she was entitled to recover.

[4] Shelter also claims that plaintiff waived any breach of warranty by paying off the loan and releasing GECC. Plaintiff's acceptance of the mobile home barred her from rejecting it and recovering the purchase price. She was, therefore, obligated to pay the contract price. G.S. 25-2-607(1). Nevertheless, she could still maintain an action for breach of warranty. In *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972), the Supreme Court stated that if the buyer "did not reject but accepted the mobile home . . . she is obligated to pay the balance due on the contract price, and she is limited . . . to recovery of

damages for breach of implied warranty of fitness." *Performance Motors, Inc. v. Allen, supra,* at 396. The Court implied, therefore, that even though plaintiff must pay, she may still recover damages for any breach of warranty. This holding comports with decisions in other jurisdictions. *See* 67 Am. Jur. 2d *Sales* § 725 (1973) and cases cited therein.

Furthermore, plaintiff's release of GECC in no way operated to release Shelter. Plaintiff's action against GECC was based on an allegation of unfair trade practice. Plaintiff's release of GECC on that cause of action would not bar plaintiff's action for breach of warranty.

[5] Plaintiff's evidence was sufficient to establish a cause of action for breach of implied warranties of merchantability and fitness for a particular purpose. Shelter claims, however, that since no implied warranties could run between Peachtree and plaintiff, plaintiff's release of Peachtree must have been based on an express warranty given by Peachtree. Thus, Shelter argues, this express warranty would exclude any implied warranties. We first note that there was no evidence presented to show that the release was based on the existence of an express warranty. Furthermore, G.S. 25-2-317 provides that warranties, express and implied, should be construed as consistent with each other and as cummulative. Thus, if Peachtree had given an express warranty, it would not necessarily exclude an implied warranty given by Shelter. Shelter's argument, therefore, is groundless.

[6] Shelter also contends that plaintiff failed to allege damages based on the difference between the value of the home and the value it would have if it had been as warranted. Thus, under plaintiff's allegations, the damages recoverable must be special damages. Shelter argues that since plaintiff has failed to prove special damages, she is not entitled to recover. This argument is without merit. In *Rodd v. Drug Co.*, 30 N.C. App. 564, 228 S.E. 2d 35 (1976), the Court held that plaintiff was entitled to recover general damages for breach of warranty under a general allegation of damages. We find that plaintiff's complaint was sufficient to support an award of general damages.

[7] Shelter also contends that a directed verdict should have been granted because plaintiff failed to prove damages. For

breach of warranty, plaintiff is entitled to recover the difference between the value of the goods accepted and the value they would have if they had been as warranted, at the time and place of acceptance. G.S. 25-2-714(2). Plaintiff must present evidence tending to show the value of the home if it had been as warranted and the fair market value of the home in its defective condition. *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E. 2d 188 (1974). Plaintiff testified that the contract price was $10,515.00. The contract price will serve as strong evidence of the value of the mobile home as warranted. *HPS, Inc. v. All Wood Turning Corp., supra.* Plaintiff's testimony to the effect that the home was worth $6,000.00 is competent to establish the value of the home in its defective condition. "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner." *Highway Commission v. Helderman*, 285 N.C. 645, 652, 207 S.E. 2d 720 (1974). The weight to be given the owner's testimony is for the jury to determine. *Highway Commission v. Helderman, supra.* We, therefore, find that plaintiff presented sufficient evidence to establish the value of the home and the damages could easily be calculated from these figures.

We have reviewed all of Shelter's assignments of error. No prejudicial error has been shown.

No error.

Judges HEDRICK and CLARK concur.

RUTH LEIGH DURHAM v. LOUIS L. VINE D/B/A VINE'S VETERINARY HOSPITAL

No. 7815SC337

(Filed 3 April 1979)

Negligence § 48— fall in entranceway—allegation of negligence not refuted—summary judgment improper

In an action to recover for personal injuries sustained by plaintiff when she fell in the entranceway of defendant's veterinary hospital, the trial court erred in granting defendant's motion for summary judgment where plaintiff had alleged that her fall was caused by the slippery floor surface which defendant negligently allowed to exist; defendant offered no evidence to refute the allegation; and plaintiff was therefore under no duty to come forward with proof of the allegation at the summary judgment stage.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 6 March 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 January 1979.

Plaintiff appeals from the entry of summary judgment in favor of defendant. She instituted this action to recover damages for personal injuries sustained when she fell in the entranceway of defendant's veterinary hospital waiting room. Plaintiff alleged that on 1 December 1973, she, as a business invitee, entered defendant's building with her dog. Ceramic tile covered the floor at the entrance level. The area was lighted with a low, indirect artificial light. She turned immediately to her right in order to enter the waiting room. The waiting area was lower than the entranceway and required her to step down several inches onto the asphalt tile floor of the waiting room. As she made this step, she slipped and fell, injuring her left foot. Plaintiff alleged that her injury was caused by the defendant's negligence in failing to provide a safe entranceway, failing to instruct his employees to warn persons about the step, failing to provide warning signs, failing to warn of the slippery nature of the floor, failing to provide sufficient lighting, and failing to use surface materials that were not slippery.

Defendant answered, denying negligence and alleging contributory negligence. Upon request, plaintiff admitted making a statement to defendant's insurance company that she was stepping down into the waiting room when her left foot slipped and

she fell forward. In that statement, she admitted that she was aware of the presence of the step because she had been to Vine's previously and that the area was sufficiently lighted.

Defendant filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of this motion, he submitted his own affidavit and three photographs of the area in question. His affidavit indicated that the photographs accurately depicted the conditions in the area as they existed when plaintiff fell. The photographs indicated the presence of handrails and warning signs on each side of the step-down.

In response to defendant's motion, plaintiff filed the affidavit of Rena Vaeth, an employee of the defendant, who was present at the time of the accident. The affidavit, in part, is as follows.

> "[S]he had been employed as a receptionist at Vine's Veterinary Hospital in Chapel Hill for nine and one-half (9½) years ending on January 9, 1976; that she witnessed the fall of Mrs. Ruth Durham on December 1, 1973, at Vine's Veterinary Hospital in Chapel Hill as Mrs. Durham was entering the waiting room at Vine's Veterinary Hospital; that Mrs. Durham fell into the lobby when she entered and the affiant assisted her in getting up as she appeared to be in pain from the fall; that the step on which Mrs. Durham fell was approximately seven inches in height; that the top of said step was a brick tile and the bottom floor was vinyl like material; that the lighting in said entranceway was provided by a very dim ceiling light, which, for people coming in from the sunshine, resulted in a blinding glare upon entering said entrance way; that, to her knowledge there was only one handrail at said entrance way which was placed where most persons entering the waiting room could not use it in stepping into the waiting room; that she could not remember any warning signs in said entrance way that would warn persons entering of the presence of the step down; that many persons fell or lost their balance at this entrance way when stepping into the waiting room and that the age and physical condition of these persons who fell were variable; that prior to December 1, 1973, she told Dr. Vine many times that many persons had fallen at this step down into said waiting room and that said step down was dangerous and should be altered."

Upon consideration of the pleadings, affidavits, admissions and answers to interrogatories, the trial judge found that there were no material issues of fact presented and that the defendant was entitled to summary judgment as a matter of law. From this judgment, plaintiff appealed.

Levine and Stewart, by Samuel M. Streit, for plaintiff appellant.

Spears, Barnes, Baker and Hoof, by Alexander H. Barnes, for defendant appellee.

VAUGHN, Judge.

The question presented is whether the trial judge erred in granting defendant's motion for summary judgment. In general, summary judgment is appropriate when the pleadings, answers to interrogatories, affidavits and admissions show that no material issue of fact exists and the movant is entitled to summary judgment as a matter of law. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973).

In order for the defendant to prevail on his motion, he must establish the absence of any material issue of fact. He may meet this burden by showing the nonexistence of an essential element of the plaintiff's cause of action or by showing, through discovery, that plaintiff cannot provide evidence to support an essential element. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). On a motion for summary judgment, all pleadings, affidavits, answers to interrogatories, and other materials offered must be viewed in the light most favorable to the party against whom summary judgment is sought. *Dickerson, Inc. v. Board of Transportation*, 26 N.C. App. 319, 215 S.E. 2d 870 (1975).

Summary judgment is rarely appropriate in a negligence action.

> " '[I]t is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied.' . . . It is only in the exceptional negligence case that the rule should be invoked . . . . This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually re-

> mains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay . . . ." (Citations omitted.) *Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E. 2d 147, *cert. den.*, 279 N.C. 395, 183 S.E. 2d 243 (1971).

In negligence actions, therefore, the court should be particularly careful to remember that the purpose of summary judgment is not to provide a quick and easy method for clearing the docket. Indeed, a review of the reported negligence cases, wherein the trial courts have granted an early termination of the litigation by the entry of summary judgment, indicates that the opposite result is usually produced. After enduring the expensive and time-consuming effort involved in obtaining appellate review, the litigants usually find their cases returned for trial before the fact-finding body, where, but for the inappropriate entry of summary judgment, they might well have received a final disposition of the matter months earlier.

We were recently required to reverse a summary judgment in another premises liability case somewhat similar to the one at hand in *Gladstein v. South Square Associates*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978). Plaintiff slipped at defendants' mall and injured herself. She alleged that a terrazzo floor covering was slick when wet and, therefore, was unsafe. Plaintiff also alleged that the mat provided was insufficient to dry patrons' shoes and that other persons had fallen under similar circumstances. Defendants moved for summary judgment and supported this motion with the affidavit of their general manager. The manager only stated that the terrazzo flooring was used in other malls; he did not deny that the flooring was slick when wet. The defendants also failed to contradict the allegations that the mats were insufficient to dry shoes. This Court said that although the material facts in the record were not in dispute, there was evidence upon which reasonable men could differ as to whether the defendants exercised reasonable care. Summary judgment was, therefore, held to be inappropriate.

In the case at bar, defendant appears to take the position that the judgment must be affirmed unless plaintiff has offered *evidence* that she was injured as a result of his negligence. The

plaintiff has no such burden when the case is being considered on defendant's motion for summary judgment. At this stage of the proceeding, defendant has the burden of showing that plaintiff was *not* injured as a result of his negligence. Plaintiff has alleged, among other things, that her fall was caused by the slippery surface defendant negligently allowed to exist. Defendant has offered no evidence to refute this allegation. That allegation, standing uncontradicted by evidence, is sufficient to require the denial of defendant's motion for summary judgment. Since defendant offered no evidence to refute the allegation, plaintiff was under no duty to come forward with proof of the allegation at the summary judgment stage. On a motion for summary judgment, the nonmovant is not required to come forward and make a *prima facie* case for the jury as he would on a motion for directed verdict at trial. He is only required to show that he has evidence to contest such evidentiary matters as the movant may have produced in support of the motion that would, standing alone, defeat the action. In *Tolbert v. Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974), the defendant, in support of its motion for summary judgment, filed plaintiff's deposition. Plaintiff's deposition revealed that, while pushing a grocery cart in defendant's store, he slipped and fell. After he fell he saw that he had slipped on strawberries that were on the floor. Defendant's motion for summary judgment was allowed. On appeal defendant argued that the summary judgment was proper because plaintiff had failed to show how the strawberries got on the floor or how long they had been there. This Court reversed the summary judgment saying:

> "Defendant, moving for summary judgment, assumes the burden of producing evidence, of the necessary certitude, which negatives plaintiff's claim.
>
> Plaintiff, opposing defendant's motion for summary judgment, does not have the burden of coming forward with the evidence until defendant, as movant, has produced his evidentiary material tending to show that he is entitled to judgment as a matter of law.
>
> It was defendant's duty to produce evidence that the unsafe condition was not caused by its failure to exercise reasonable care. It was defendant who left the record silent, if it is, concerning its exercise of reasonable care to prevent

or to discover and remove the peril to plaintiff and others invited to shop on its premises.

Where, as here, the movant for summary judgment does not offer evidence to establish the absence of a genuine issue as to any material fact, summary judgment should be denied even though no opposing evidence is presented." *Tolbert v. Tea Co., supra,* at 494.

At trial, in order to survive a motion for directed verdict, plaintiff will have the burden of offering proof of every material fact. On this motion for summary judgment, however, defendant had the burden of showing the absence of a genuine issue as to any material fact. When the movant fails to carry this burden, summary judgment should be denied even though no opposing evidence is presented.

On a motion for summary judgment, it is only when the movant's evidence, considered alone, is sufficient to establish his right to judgment as a matter of law that the nonmovant must come forward with a forecast of his own evidence. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). Moreover, if different material conclusions can be drawn from the evidence, summary judgment should be denied even though the evidence is uncontradicted.

Defendant's motion for summary judgment should have been denied. The judgment, therefore, is reversed, and the case is remanded.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

GODLEY AUCTION COMPANY, INC. v. WILLIAM EDWARD MYERS

No. 7820SC516

(Filed 3 April 1979)

1. **Appeal and Error § 6.6— denial of motions to dismiss—no immediate appeal**

No substantial right of defendant was impaired by the trial court's denial of his motion to dismiss under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim for relief and denial of his motion to dismiss under G.S. 1A-1, Rule 12(b)(7) for failure to join a necessary party, and defendant's purported appeal from the denial of his motions is dismissed as premature.

2. **Appeal and Error § 6.11— denial of motion to cancel notice of lis pendens—no immediate appeal**

An order denying a motion to cancel a notice of *lis pendens* is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired.

APPEAL by defendant from *Walker, Judge.* Orders entered 18 April 1978 in Superior Court, UNION County. Heard in the Court of Appeals 6 March 1979.

Plaintiff filed a complaint alleging that it does business as "a firm of auctioneers" and that it entered into a contract with defendant in which it agreed to sell for defendant certain real property in Union County. The approximately 40 acres of land were to be sold in 5 separate parcels. On 6 August 1977 the plaintiff conducted an auction sale and defendant was present. The five parcels were sold at the auction to separate purchasers for a total sales price of $71,160.50 and each purchaser made a 10% deposit towards the purchase price. The balances were due in 30 days upon delivery of deed by defendant.

Plaintiff further alleged that deeds conveying the parcels were prepared and tendered to defendant for execution and all of the purchasers were ready to pay the balance of the purchase price to the defendant. The defendant refused to execute the deeds and convey the property. Under the terms of the contract between plaintiff and defendant, the defendant agreed to sell the property to the highest bidder and to deliver title to the purchaser free of all liens and encumbrances.

In the first count of the complaint, plaintiff alleged that its reputation as an auction business had been irreparably damaged

by defendant's refusal to sell because of a loss of public confidence. Such damage cannot be monetarily calculated; therefore, plaintiff prayed that defendant be required to specifically perform his contract.

In the second count of the complaint, plaintiff alleged that defendant agreed to pay plaintiff for services rendered a commission of 10% of the gross receipts of all sales made under the contract. The contract provided that the commission would be payable immediately following the sale. Defendant refused to pay and therefore is indebted to plaintiff for $7,116.05.

On 9 January 1978 plaintiff filed a notice of *lis pendens*, pursuant to G.S. 1-116, with respect to the land involved.

Defendant moved to dismiss the complaint for failure to state a claim for which relief can be granted under G.S. 1A-1, Rule 12(b)(6) and for failure to join a necessary party under the provisions of G.S. 1A-1, Rule 12(b)(7).

Defendant also moved to cancel the notice of *lis pendens* on the ground that it is unauthorized by statute.

Both motions were denied by the trial court. Defendant appealed.

Griffin, Caldwell & Helder, by C. Frank Griffin and Sanford L. Steelman, Jr., for plaintiff appellee.

Wesley B. Grant, for defendant appellant.

CARLTON, Judge.

Defendant assigns as error the denial of his motions to dismiss pursuant to G.S. 1A-1, Rules 12(b)(6) and 12(b)(7) and the denial of his motion for an order to cancel the notice of *lis pendens*. He argues, *praecipue*, that G.S. 1-116 does not authorize the filing of *lis pendens* in a suit by an auctioneer to recover his commission or to seek specific performance to compel the owner to convey, and that an auctioneer cannot enforce the sale of real property by an action for specific performance against his principal. We are unable to address the merits of defendant's contentions because his appeal is premature. The action must first run its course in the trial court.

Judicial judgments, orders and decrees are "either interlocutory or the final determination of the rights of the parties." G.S. 1A-1, Rule 54(a). The difference between the two was stated in *Veazey v. Durham*, 231 N.C. 357, 361, 57 S.E. 2d 377, 381 (1950):

> A final judgment is one which disposes of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court . . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. (Citations omitted.)

Justice Ervin then set out the rules regarding appeals, *id.* at 362, 57 S.E. 2d at 381-82:

> 1. An appeal lies . . . from a final judgment . . . .
>
> 2. An appeal does not lie . . . from an interlocutory order . . . unless such order affects some *substantial right* claimed by the appellant and *will work an injury to him* if not corrected before an appeal from the final judgment.
>
> 3. A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause . . . . An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. (Emphasis added.)

These rules derive in part from G.S. 1-277 and are embodied in part in the more recently enacted G.S. 7A-27.

"The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E. 2d 338, 343 (1978). "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E. 2d 669, 671 (1951).

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court

piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. Durham, supra,* 231 N.C. at 363, 57 S.E. 2d at 382. *See also Industries, Inc. v. Insurance Co.,* 296 N.C. 486, 251 S.E. 2d 443 (1979).

[1] With the foregoing general rules in mind, we turn to defendant's contention that the trial court erred in denying his motions to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) and Rule 12(b)(7).

Ordinarily, there is no right of appeal from the refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. 1 Strong, N.C. Index 3d, Appeal and Error, § 6.6, p. 200; *North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 206 S.E. 2d 178 (1974).

The trial court's refusal to allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to G.S. 1A-1, Rule 12(b)(6) did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment.

Moreover, we do not find that any substantial right of the defendant has been impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party pursuant to G.S. 1A-1, Rule 12(b)(7). G.S. 1A-1, Rule 12(h)(2) provides that this defense may be made at various stages up to and including "at the trial on the merits." The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be *dismissed* for that purpose. Defendant still has adequate opportunity in the trial court for a determination on the question of joinder of parties.

We do note, however, that in considering a motion under Rule 12(b)(7), the court should determine if the absent party (ies) should be joined. If it decides in the affirmative, the court should order them brought into the action. *See, Carding Developments v. Gunter & Cooke,* 12 N.C. App. 448, 183 S.E. 2d 834 (1971); 5 Wright and Miller, Federal Practice and Procedure, § 1359, pp. 628, 631; Shuford, North Carolina Civil Practice and Procedure, § 12-11, p. 109.

[2] Finally, we hold that defendant has failed to show that any substantial right of his has been impaired by the trial court's refusal to cancel the notice of *lis pendens*. He certainly has not shown that the trial court's interlocutory order "will work an injury to him if not corrected before an appeal from the final judgment." *Veazey v. Durham, supra* at 362, 57 S.E. 2d at 381. Therefore, appeal from this order is also premature.

If the record before us disclosed that defendant was seeking to sell the property, or, perhaps attempting to borrow money with the property serving as collateral, then we might be persuaded that the notice of *lis pendens* deprived him of a substantial right. The record however is barren of any such showing. The record does not indicate that the notice of *lis pendens* is harmful to defendant in any manner pending final determination of this action. Indeed, not only is there no indication that defendant desires to sell his property, but it is his very *refusal* to sell which constitutes the basis for the lawsuit.

Our research discloses no decision in any jurisdiction on the appealability of an order *denying* a motion to cancel a notice of *lis pendens*. For the reasons discussed above, we do not believe such an order to be immediately appealable where the property owner fails to show that a substantial right of his has been impaired.

> Admittedly, the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. *Waters v. Personnel, Inc., supra* at 208, 240 S.E. 2d at 343.

We hold that the interlocutory orders of the trial court affect no substantial right of the defendant and will work no injury to him before an appeal from the final judgment. Defendant's appeal is therefore fragmentary and premature and is

Dismissed.

Judges VAUGHN and HEDRICK concur.

Howard v. Williams

PAUL HOWARD, PLAINTIFF APPELLANT v. JERRY R. WILLIAMS T/D/B/A COMMERCIAL PACKAGE & DELIVERY SERVICE, INC. AND COMMERCIAL & PACKAGE DELIVERY SERVICE, INC. A/K/A COMMERCIAL PACKAGE & DELIVERY SERVICE AND A/K/A COMMERCIAL PACKAGE & DELIVERY SERVICE, INC., DEFENDANT APPELLEES

No. 785DC474

(Filed 3 April 1979)

Rules of Civil Procedure § 60.2— attorney's neglect imputed to defendant—no excusable neglect—judgment improperly set aside

The trial court erred in setting aside default judgment against the individual defendant on the ground of excusable neglect where the evidence tended to show that defendant turned the matter over to an attorney and thereafter made little, if any, inquiry as to whether anything had been done, and the neglect of the attorney was therefore imputed to defendant.

APPEAL by plaintiff from *Barefoot, Judge.* Order entered 10 April 1978 in District Court, NEW HANOVER County. Heard in the Court of Appeals 1 March 1979.

This action was initiated on 13 December 1977 when plaintiff filed a complaint against the individual and corporate defendants to collect the $1,500 balance due on a $3,000 promissory note. Plaintiff alleged that the note was executed by Jerry R. Williams as president of Commercial Package *and* Delivery Service, Inc. when, in fact, Williams was president of Commercial *and* Package Delivery Service, Inc. Further, plaintiff alleged that the corporation did not hold itself out as a corporation in its telephone listing for Wilmington, North Carolina. The business is listed therein as "Commercial and Package Delivery Service". Plaintiff further alleged that if Williams knew there was no corporation known as Commercial Package and Delivery Service, Inc. when the note was executed, then defendant Williams is personally liable to plaintiff. Alternatively, plaintiff alleged that if Williams was somehow merely mistaken as to the correct corporate name of the business of which he purported to be president, then Commercial and Package Delivery Service, Inc. was indebted to plaintiff "in addition to the personal liability owing to the plaintiff from the defendant Jerry R. Williams". No such corporation as that appearing on the note exists in North Carolina.

The complaint was served on Williams individually and as agent for the corporation on 15 December 1977. On 17 January

1978 default judgment pursuant to G.S. 1A-1, Rule 55(a) was entered against both defendants. The expiration of the 10-day automatic stay provisions governing the issuing of execution under G.S. 1A-1, Rule 62(a), and expiration of the 10-day time for giving notice of appeal expired on 28 January 1978. Neither defendant took any action during that period to file notice of appeal from the default judgment.

On 31 January 1978, the corporate defendant filed a petition in bankruptcy.

Execution against Williams was issued on 1 February 1978 resulting in a levy on a camper trailer owned by him.

On 15 February 1978 Williams moved to set aside the default judgment on grounds of excusable neglect and meritorious defense.

At a hearing on the motion, Williams testified that, upon being served with the summons and complaint in the action, he took them to his attorney, Mr. Granville Ryals, and asked him to handle the matter. Thereafter, he found that Ryals stayed in South Carolina four or five days a week. He assumed that Ryals took appropriate action. Toward the end of January, Williams consulted with his new attorney about the financial difficulties of Commercial and Package Delivery Service, Inc. The complaint in this action and several other complaints against the corporate defendant were then forwarded to his new attorney and the default judgment was discovered. Williams had not realized that the present action was against him personally when he first received the complaint because he had not signed the note in a personal capacity. The transaction behind the note consisted of a redemption of company stock from plaintiff, a former employee. The corporation had made one $1,500 payment on the note to plaintiff.

The trial court made findings of fact and concluded that the individual defendant had shown excusable neglect and meritorious defense and set aside the default judgment. Default judgment against the corporate defendant was found to be "valid". The plaintiff appealed.

Parker, Rice & Myles, by Charles E. Rice III, for plaintiff appellant.

Burney, Burney, Barefoot & Bain, by R. C. Bain, for defendant appellee.

CARLTON, Judge.

Plaintiff's primary contention is that the facts found by the trial court are insufficient to support its conclusion that there was excusable neglect on the part of the individual defendant, and that the evidence is insufficient to support such findings.

G.S. 1A-1, Rule 55(d) provides: "For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."

The judgment entered by the clerk was not a mere entry of default, but was a final judgment which may be set aside only for the reasons stated in Rule 60(b) which provides in part as follows:

> (b) —On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertance, surprise, or excusable neglect;
>
> . . . .

Rule 60(b)(1) replaces former G.S. 1-220 and the cases interpreting it are still applicable. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971).

In order to have a judgment set aside, the movant must show excusable neglect and a meritorious defense. 8 Strong, N.C. Index 3d, Judgments, § 24, p. 55; *Whitaker v. Raines*, 226 N.C. 526, 39 S.E. 2d 266 (1946).

Defendant contends that he turned the matter over to an attorney and thereafter relied on the attorney to do whatever needed to be done to protect him, asserting that the neglect of the attorney is not chargeable to him.

Numerous decisions of the Supreme Court and this Court have been based on evaluations of situations similar to that

presented in the case at bar. *See especially Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148 (1976); *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507 (1954).

We think this case is controlled by the principles enunciated in *Jones v. Statesville Ice & Fuel Co.*, 259 N.C. 206, 209, 130 S.E. 2d 324, 326 (1963), in which the Supreme Court stated:

> It is generally held under the above statute [G.S. 1-220] that "(p)arties who have been duly served with summons are required to give their defense that attention which *a man of ordinary prudence usually gives his important business*, and failure to do so is not excusable." (Citations omitted, emphasis added.)
>
> Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. *If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable.* (Citations omitted, emphasis added.)

The trial court, to support its conclusion that defendant's neglect was excusable, found as a fact "That Granville A. Ryals, even though a member of the New Hanover County Bar, spends as much as four days out of every week in South Carolina and was unable to be contacted by the Defendant Jerry R. Williams." No finding was made as to what attempts, if any, defendant made to contact his attorney or otherwise attend to the business of defending the suit against him.

Moreover, the evidence presented to the trial court does not reflect that defendant gave his defense that attention which "a man of ordinary prudence usually gives his important business." *Jones v. Statesville Ice & Fuel Co., supra.* On direct examination, the defendant was asked if he made an effort "to get [the] papers from Mr. Ryals." He replied, "Yes, Sir. Mr. Ryals, I found out, was in South Carolina more than he is here in Wilmington. He spends about four or five days a week somewhere in South Carolina." Here, there is no indication of the nature or extent of defendant's efforts to contact his attorney.

However, on cross-examination, the following exchange took place:

Q. When you got the Complaint, you took it to Mr. Ryals and said: "Mr. Ryals, handle this". Is that right?

A. When I got the note from the Sheriff's Department?

Q. Yeah. This Complaint.

A. Yes, Sir.

Q. And you said "Mr. Ryals, handle this." And then you had Mr. Ryals give it to Mr. Bain and you said "Mr. Bain, handle this." Right?

A. Yes, Sir.

Q. And you didn't do anything else about it until there was the execution, is that right?

A. I didn't do anything about it; no, Sir.

Q. You left it up to your Attorneys?

A. Yes, Sir.

Q. And you didn't specifically go to them and say "Now, look, take care of this thing right here, right now?"

A. That's what I did when I carried it to Granville Ryals originally.

Q. But after that you didn't do that?

A. No, I just assumed that he had.

Q. Ok.

A. I assumed he was a reputable Attorney.

Q. Of course. And you just thought it would go through the process of whatever it was and come out ok?

A. Right.

In our opinion, when the defendant Williams turned the matter over to attorney Ryals and thereafter made little, if any, inquiry as to whether anything had been done, the neglect of the attorney is imputable to him. He has shown no excusable neglect.

We note also that this transpired during a period when, according to the record, other lawsuits were being served against the defendants and the corporate defendant was preparing for bankruptcy proceedings—a period when properly and diligently attending to business and legal matters would be uppermost in the mind of the man of ordinary prudence in conducting his important business.

We agree with the general view that provisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have the case disposed of on the merits to the end that justice be done. Any doubt should be resolved in favor of setting aside defaults so that the merits of the action may be reached. However, statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored. *See generally*, 49 C.J.S., Judgments, § 334, p. 612; *Alopari v. O'Leary*, 154 F. Supp. 78 (E.D. Pa. 1957).

In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial. *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849 (1952) and cases there cited. We, therefore, do not discuss plaintiff's argument with respect to meritorious defense.

The order of the trial court is

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN T. PATE

No. 7815SC1084

(Filed 3 April 1979)

1. Embezzlement § 1— elements of offense

In order to convict a defendant of embezzlement under G.S. 14-90, the State must prove three distinct elements: (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for this principal; (2) that he received money or valuable property of his principal in the course of

his employment and by virtue of his fiduciary relationship; and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal.

2. Embezzlement § 6— sufficiency of evidence

The State's evidence was sufficient to permit the jury to find that defendant either fraudulently or knowingly and willfully misapplied his employer's funds in violation of G.S. 14-90 where it tended to show that defendant was employed as the manager of a finance company branch office; defendant offered to pay a State's witness $50.00 for sending customers to the company, stated that the customer would not have to repay the loan, and promised that the customer would receive $25.00; a customer sent by the State's witness told defendant that she could not repay a loan, but defendant nevertheless filled out the standard loan documents, approved a loan to the customer, and told her she would not have to repay the loan; the proceeds of the check for the loan were given to defendant; and defendant gave the witness $75.00, $25.00 of which the witness gave to the customer.

3. Criminal Law § 86.5; Embezzlement § 5— cross-examination of defendant— other transactions—personal financial obligations

In this prosecution for embezzlement, cross-examination of defendant about other transactions which were similar to the one in question was competent to impeach defendant's claim that the transaction in question was proper and to establish that defendant acted with a particular fraudulent intent, and cross-examination of defendant about his personal financial obligations was competent to show motive.

4. Embezzlement § 6.1— fraudulent intent—sufficiency of instructions

The trial court in an embezzlement case adequately instructed on fraudulent intent when it instructed the jury that in order to convict defendant it would have to find "that the defendant fraudulently and dishonestly used the moneys of Provident Finance Company of North Carolina, Inc., for some purpose other than that for which he had received it."

APPEAL by defendant from *Farmer, Judge*. Judgment entered 28 June 1978 in Superior Court, CHATHAM County. Heard in the Court of Appeals on 1 March 1979.

Defendant was charged in a proper indictment with embezzling $405.66 from the Provident Finance Company of North Carolina, Inc. Upon his plea of not guilty, the State presented evidence tending to show the following:

On 23 April 1977, the defendant was employed by the Provident Finance Company of North Carolina, Inc., as the office manager of the Siler City branch. On that day, the defendant asked Mrs. Zelphia Dark to bring in customers to the company and stated to her that he would give her $50.00 and the customer

$25.00 for doing so and that the customer would not have to repay the loan. Mrs. Dark then got Mrs. Queen Wiley to go to the office and talk to the defendant about a loan. Mrs. Wiley told the defendant that she could not repay a loan because she was not working and her husband was not working and that she did not have any credit anywhere. The defendant told her that she would not be getting into trouble and she would not have to pay back any money, that it would be just like using her name. Mrs. Wiley signed a note and financing statement for a loan and the defendant subsequently filled out these signed forms. The defendant drew a check in the amount of $485.59 payable to Mrs. Wiley from Provident Finance Company funds. He gave the check to Mrs. Dark who took it to Mrs. Wiley to endorse it. After Mrs. Wiley endorsed the check, Mrs. Dark took it to a store and cashed it and took the proceeds to the defendant. The defendant gave Mrs. Dark $75.00 of which she kept $50.00 for herself and gave $25.00 to Mrs. Queen Wiley.

As manager, the defendant had charge and control of his employer's funds on deposit with Planters National Bank and Trust Company. The defendant was authorized to make loans from company funds up to an amount of $600.00 without receiving prior authority from his supervisor. It was against company policy for Provident Finance to make loans to its employees and the defendant knew of this policy. The defendant resigned from his job with Provident Finance on 28 April 1977. The loan to Mrs. Wiley was charged off as a loss on 31 December 1977.

The defendant testified in his own behalf. His evidence tended to show the following:

The defendant, as manager, was responsible for all outstanding loans and he was required to approve all loans made by the Siler City office. He was acquainted with Mrs. Zelphia Dark and when he saw her on 23 April 1977 she wanted him to renew her loan. He advised her that he could not renew her loan because a 91 day waiting period had not expired. He told her that it was company policy to pay customers for bringing in new customers. He told her that he needed money and asked her if she would consider loaning him some money and she agreed that she would. Later in the day Mrs. Queen Wiley went into the office of Provident Finance and applied for a loan. The defendant took her loan

application, completed all loan papers and necessary documents, and approved the loan. No conversation was had between the defendant and Mrs. Wiley relative to the defendant keeping any of the loan proceeds. Prior to completing all the documents, Mrs. Wiley told defendant to give the loan check to Mrs. Dark because she had to leave. Later that day, Mrs. Dark returned to the office and gave money to the defendant, which he later learned was part of the proceeds of the loan to Mrs. Wiley.

The defendant was found guilty as charged. From a judgment imposing a sentence of three years, four months of which was active, and two years, eight months suspended, defendant appealed.

Attorney General Edmisten, by Associate Attorney R. W. Newsom III, for the State.

L. T. Dark, Jr., for the defendant appellant.

HEDRICK, Judge.

Defendant first contends the trial court erred in denying his motion to dismiss made at the close of plaintiff's evidence and renewed at the close of all the evidence. Defendant argues that there was insufficient evidence of a fraudulent intent to embezzle and insufficient evidence that the defendant converted the funds of his employer.

[1] In order to convict a defendant of embezzlement under G.S. § 14-90, the State must prove three distinct elements: (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity. G.S. § 14-90; *State v. Helsabeck*, 258 N.C. 107, 128 S.E. 2d 205 (1962); *State v. Block*, 245 N.C. 661, 97 S.E. 2d 243 (1957); *State v. Buzzelli*, 11 N.C. App. 52, 180 S.E. 2d 472 (1971). It is not necessary to show that the agent converted his principal's property to his own use so long as it is shown that the agent fradulently or knowingly and willfully misapplied it. *State v. Smithey*, 15 N.C. App. 427, 190 S.E. 2d 369 (1972). The fraudulent intent required under G.S. § 14-90 is the in-

tent to willfully or corruptly use or misapply the property of another for purposes other than for which the agent or fiduciary received it in the course of his employment. *State v. Gentry*, 228 N.C. 643, 46 S.E. 2d 863 (1948). It is not necessary, however, that the State offer direct proof of fradulent intent, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. *State v. McLean*, 209 N.C. 38, 182 S.E. 700 (1935); *State v. Smithey, supra.*

[2] In the present case we think the evidence, when viewed in the light most favorable to the State, was sufficient to allow a reasonable inference to be drawn that the defendant either fraudulently or knowingly and willfully misapplied his employer's funds. Mrs. Queen Wiley testified that the defendant was told that she could not repay a loan and that he nevertheless filled out the standard loan documents, approved a loan to her, and reassured her that she would not have to repay the loan, that it would be just like using her name. There was also evidence that the defendant knew of the company policy prohibiting loans to employees. This evidence would permit an inference that the defendant, with full knowledge of the circumstances, used Mrs. Wiley as a conduit for diverting or misapplying the funds of his employer for his own benefit. We hold there was sufficient evidence to take the case to the jury and to support a verdict that the defendant violated G.S. § 14-90, and the trial judge properly denied defendant's motion to dismiss.

[3] By assignments of error two and three, defendant contends the trial court committed prejudicial error by allowing the State, over objection, to cross-examine the defendant with regard to other unrelated transactions and as to his personal financial obligations. When a defendant in a criminal case elects to testify in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his credibility. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sent. vacated*, 429 U.S. 912, 97 S.Ct. 301, 50 L.Ed. 2d 278 (1976); *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); 1 Stansbury's N.C. Evidence § 111 (Brandis rev. 1973). The cross-examination of defendant with regard to other loan transactions that were similar to the one involved was relevant to impeach the defendant's claim that the transaction at issue was proper. The cross-examination was also relevant in establishing that the defendant acted with a particular

fraudulent intent. *See* 1 Stansbury's N.C. Evidence § 92, at 294-95 (Brandis rev. 1973); *State v. Hight*, 150 N.C. 817, 63 S.E. 1043 (1909). With regard to the cross-examination of the defendant as to his personal financial obligations, the defendant argues only that these matters were irrelevant. It is a well-known rule that evidence is relevant if it has any logical tendency to prove a fact at issue in a case. In a criminal case every circumstance calculated to throw light on the supposed crime is admissible. It is not necessary that the evidence bear directly on the question; it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). We think that evidence of the defendant's financial condition was relevant to show a motive for embezzlement. This assignment of error has no merit.

[4] Defendant finally contends that the trial judge committed prejudicial error in his charge to the jury by failing to adequately define and charge as to the element of fraudulent intent. Defendant argues that nowhere in its instructions did the court use the word "intent." The intent to fraudulently or willfully misapply the principal's property for purposes other than that for which it was received is an essential element of embezzlement that the State must prove beyond a reasonable doubt. *State v. Gentry, supra*; *State v. McLean, supra*; *State v. Smithey, supra*. With regard to this element, the court charged that the jury would have to find "that the defendant fraudulently and dishonestly used the moneys of Provident Finance Company of North Carolina, Inc., for some purpose other than that for which he had received it." We think that this charge does require the jury to find that the defendant acted with a fraudulent intent. This assignment of error has no merit.

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

No error.

Judges PARKER and CARLTON concur.

GENERAL ELECTRIC CREDIT CORPORATION OF GEORGIA, INC., PLAINTIFF v. JOSEPHINE CHAPMAN BALL, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DURHAM LIFE INSURANCE CO., THIRD-PARTY DEFENDANT

No. 7828SC449

(Filed 3 April 1979)

Uniform Commercial Code § 22— sale of mobile home—action by assignee—defenses against original seller not waived

In an action by the assignee of a seller of a mobile home to recover the balance allegedly remaining on a retail installment sales contract, the trial court erred in entering summary judgment for plaintiff since the recital in the consumer credit sales contract that the assignee would not be responsible to the buyer for any breach of the contract was clearly superceded by the provisions of G.S. 25A-25(b), part of the Retail Installment Sales Act, which provided that a buyer could assert against an assignee of seller any defenses available against the original seller; there was nothing in the record to establish that the assignee gave the buyer the notice required in G.S. 25A-25(b) so as to come under the exception contained therein; and the evidence thus did not establish that defendant waived her right to assert against the plaintiff's claim her defense of breach of the contract by the seller with respect to credit life insurance.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 15 November 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals on 27 February 1979.

This is a civil action instituted on 16 January 1976 wherein plaintiff as the assignee of United Mobile Homes of America, Inc., a retail seller of mobile homes, seeks to recover $20,614.50, the amount allegedly remaining on a retail installment sales contract for the sale of a mobile home after defendant ceased making payments on the contract. The defendant answered, denying the material allegations of the complaint, and alleging as a "further answer and defense" that at the time defendant purchased the mobile home on 30 April 1974, she "executed a Retail Installment Contract Vehicle Security Agreement, said Contract including a charge in the amount of $1,087.50 for Credit Life Insurance payable on the death of Defendant's husband;" that on 15 March 1975, defendant's husband and co-signer of the retail installment contract died, and that she has made demand upon the plaintiff for a title to the mobile home but that plaintiff has refused to give her the title.

On 11 May 1976, plaintiff, pursuant to G.S. § 1A-1, Rule 56, moved for summary judgment. In support of its motion, plaintiff offered into evidence the retail installment sales contract, various exhibits, and defendant's answers to interrogatories, and requests for admission. In opposition to the motion for summary judgment, defendant offered affidavits and plaintiff's answers to interrogatories. All of these materials offered in support of and in opposition to the motion tended to show the following:

On 30 April 1974, the defendant accompanied by her husband, Leonard Lee Ball, his mother, and his brother, went to the trailer lot of United Mobile Homes for the purpose of buying a mobile home. During the negotiations for the purchase of a mobile home, the defendant's husband related to the salesman "certain facts surrounding his heart condition and stated that under no circumstances would they purchase a mobile home unless credit life insurance was available." The salesman responded that "credit life insurance was available and had been approved." The defendant and her husband, relying "upon these further assurances, particularly the assurances that credit life insurance was now in full force and effect" executed the sales contract.

The contract contained a cash price for the mobile home of $10,536.60, and the defendant made a cash down payment of $2,000.00. A charge of $1,072.75 for property insurance and $1,087.50 for credit life insurance was included, bringing the total amount financed to $10,696.85. A finance charge of $11,444.65 was added, making the total of the payments required under the contract $22,141.50.

With regard to insurance coverage, the contract contained the following provisions:

4. Other Charges

A. Insurance Charges (Note: Coverage expires on date shown under "Expiration Date". No coverage unless box is checked and cost is included in Total Other Charges).	Expiration Date (mo, day, year)

(1) Property Insurance		
_X_ Fire, Theft and Combined additional coverage.	$ _____	4/30/81
_X_ or Comprehensive.....	$ 761.25	4/30/81
____ Mobile Homeowners Coverage	$ _____	_____
____ Vendor's Single Interest Protection	$ 70.00	4/30/81
(2) _X_ $3,000	$ 241.50	4/30/81
(3) Total Property Insurance (1) plus (2)...	$1,072.75	
(4) _X_ Credit Life*...	$1,087.50	5/30/86

*CREDIT LIFE INSURANCE OPTION: The Buyer whose signature appears in this box elects decreasing term life insurance on the life of the person designated as the proposed insured (initial coverage in the amount of the Total Payments hereunder or, if less, in the amount of $ . . . . in either instance in proportion with the indebtedness hereunder). Buyer understands and acknowledges that such insurance was not required as a condition of the extension of credit by the Seller and Buyer's decision to purchase such insurance was voluntarily made after the disclosure of its cost of $1,087.50 for the term shown below.

PERSON DESIGNATED AS PROPOSED INSURED Leonard Lee Ball
AGE 36 Date 4/30/74 Signature of Buyer Leonard Lee Ball

The retail installment contract was thereafter assigned to the plaintiff, and when it accepted assignment of the contract, the plaintiff paid $1,087.50 to Durham Life Insurance Company, which represented the premium for credit life insurance for defendant's husband. The plaintiff "has received a refund of $1,087.50 and is presently holding the same for the benefit of the defendant."

On 29 August 1974, United Mobile Homes sent a letter to the defendant's husband, which stated in pertinent part:

Dear Mr. Ball:

This letter is to confirm our telephone conversation of August 1974, at which time I informed you of the following:

1. Due to the reason of your disability (heart condition) Credit Life Insurance coverage cannot be written.

2. The premium of $1,087.50 charged to you on the conditional sales contract is being credited to your account with General Electric Credit Corp. This does not release you from your monthly payment obligation; it simply means that your contract will pay out early, providing you maintain a current payment status.

Mr. Ball, in order to keep the contract intact, I would appreciate your indication of acknowledgement and acceptance of the above by signing your name on the dotted line.

Plaintiff requested that defendant admit that the signature which appeared on the letter was that of her husband. Defendant responded that she was "not qualified to express an expert opinion as to the genuineness of the purported signature of Leonard Lee Ball" appearing on the letter. The defendant did not know that her husband had mailed this letter to United Mobile Homes.

After a hearing on plaintiff's motion, the court entered summary judgment on 15 November 1977 in favor of the plaintiff "in the amount of $12,632.02 which represents the payoff to the plaintiff after all the applicable credits have been made on behalf of the defendant." Defendant appealed.

McLean, Leake, Talman, Stevenson & Parker, by Joel B. Stevenson, for the defendant appellant.

Richard M. Pearman, Jr., for plaintiff appellee.

HEDRICK, Judge.

At the outset, we note that this case involves a "consumer credit sale" within the meaning of G.S. § 25A-2, and thus the provisions of Chapter 25A entitled "Retail Installment Sales Act" are applicable.

The provisions of G.S. § 25A-25(b) in effect when the transactions giving rise to this case occurred, are as follows:

(b) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any defenses available against the original seller, and the buyer may not waive these defenses in connection with a consumer credit sale transaction, except that in a consumer credit sale of personal property, the buyer shall be considered to have waived his defenses against an assignee of the seller who acquires the instrument or instruments of indebtedness in good faith and for value, if the buyer, following delivery of the property and after receiving from the assignee separate written notice of the waiver and the assignment containing the name and address of the assignee, fails for 30 days to notify the assignee of any defense against the seller; provided, however, a buyer may not waive defenses for fraud in the inducement or for failure of consideration.

With regard to the assignment in the present case, the retail installment contract contains the following printed form provisions at the top of the first page:

"*NOTE*: It is anticipated that this contract, when fully completed and signed, will be submitted to *General Electric Credit Corporation of Georgia*; 88 Johnson Ferry Road, Atlanta, Georgia 30324 (GECC), or its local branch office for purchase and, if approved, that it will be assigned to GECC."

At the bottom of the first page, next to the buyer's signatures, the contract states: "ACCEPTED: The foregoing contract is hereby assigned under the terms of the Assignment on the reverse side. United Mobile Homes of America, Inc. (seller)." The signature of James L. Cavenaugh, as Treasurer of United Mobile Homes, appears beneath the above provision. The reverse side of the contract contains the following provision: "If Seller assigns this agreement, he shall not be assignee's agent for any purpose. Buyer agrees that acceptance of an assignment of this contract shall not impose upon assignee any obligation or any liability for breach of this contract."

The recital in the consumer credit sales contract that the assignee shall not be responsible to the buyer for any breach of the contract is clearly superceded by the provisions of G.S. § 25A-25(b). There is nothing in this record to establish that the

assignee gave the buyer the notice required in G.S. § 25A-25(b) so as to come under the exception contained therein. Thus, the evidence does not establish that defendant waived her right to assert against the plaintiff's claim any defenses that she could assert against the seller. Indeed, the defendant has attempted to assert against plaintiff's claim seller's breach of the contract with respect to credit life insurance. At this stage of the proceedings, we are unable to forecast what course the case will take when the evidence regarding the buyer's defenses is more fully developed and is considered in light of the legal principles set out in G.S. § 25A-25(b). From this record, however, we are unable to say that the plaintiff, as the movant for summary judgment, has met its burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.

Reversed and remanded.

Judges PARKER and CARLTON concur.

STATE OF NORTH CAROLINA v. ROY ALEXANDER SPELLMAN, NOS. 78CRS1598, 1599, 1600 AND MARTHA BROOKS, NOS. 78CRS1601, 1601A, 1601B, 1601C, 1601D

No. 781SC1066

(Filed 3 April 1979)

Assault and Battery § 14.1; Arrest and Bail § 6.2; Automobiles § 117.1 — speeding to elude arrest — resisting arrest — assaulting officer — sufficiency of evidence

In a prosecution for resisting arrest, speeding, speeding to elude arrest and assault with a deadly weapon inflicting serious injury, evidence was sufficient to be submitted to the jury where it tended to show that the male defendant left an officer on the highway while the officer was attempting to issue a citation for speeding; defendant drove at a high rate of speed to the female defendant's yard; once there he grabbed an officer's flashlight and struck him with it, causing injuries that required stitches; and the female defendant tried to intervene in the arrest of the male defendant by going into her house, getting a gun, coming out onto the porch, firing the weapon, and then pointing it at officers.

APPEAL by defendants from *Fountain, Judge.* Judgments entered 21 June 1978 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 27 February 1979.

State v. Spellman

Defendant Spellman was convicted in district court of resisting arrest, speeding 48 m.p.h. in a 35 m.p.h. zone, and speeding to elude arrest. From these convictions, he appealed for trial *de novo* to superior court. Additionally, he was indicted for assault with a deadly weapon inflicting serious injury. Defendant Brooks was indicted on five counts of assaulting an officer with a deadly weapon. Upon a joint trial of all charges in superior court, defendants were convicted.

From judgments entered, defendants appeal.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

William J. Bentley, Sr. for defendant appellants.

MARTIN (Harry C.), Judge.

Defendants raise two assignments of error on appeal. The first assignment challenges the denial of defendants' motions for judgment as of nonsuit at conclusion of all evidence. In the defendants' second assignment of error, they contend remarks of the trial judge were an expression of opinion on the evidence in contravention of N.C.G.S. 1-180. We find no merit in defendants' contentions.

To withstand a motion to dismiss, there must be substantial evidence of all material elements of the offense. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed. 2d 281 (1977); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). On a motion for nonsuit, all the evidence is to be considered in the light most favorable to the state and any inconsistencies resolved in its favor. *State v. Atwood*, 290 N.C. 266, 225 S.E. 2d 543 (1976). "Defendant's evidence rebutting the inference of guilt may be considered only insofar as it explains or clarifies evidence offered by the state or is not inconsistent with the state's evidence." *State v. Furr, supra* at 715, 235 S.E. 2d at 196. A question of variance between indictment and proof is a ground for nonsuit only if the variance is material. *State v. Furr, supra; State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967).

Applying these guidelines, the evidence is sufficient to allow the jury to find the following facts:

Officer Bray stopped defendant Spellman on the highway for speeding 48 m.p.h. in a 35 m.p.h. zone. Although officer Bray told him that he could bring his small child to the patrol car, Spellman did not do so. While Spellman sat in the patrol car and was advised that he had been speeding, he became belligerent, left the patrol car and said he was going to get his son. He got into his car and left the scene at a high speed. Officer Bray gave pursuit. Spellman drove in a reckless manner and at a high rate of speed into the driveway of defendant Brook's yard, where officer Bray got out of his car and informed Spellman that he was under arrest. Spellman grabbed officer Bray's flashlight and struck him with it, causing injuries that required stitches on his lip and head. As Spellman and officer Bray engaged in an affray, Lieutenant Cox, officers Brothers, Williams, Adams, and Freshwater arrived to assist officer Bray. Defendant Brooks tried to intervene in the arrest of Spellman by going into her house, getting a gun, coming onto the porch, firing the weapon, and then pointing it at the officers.

In order to convict defendant Spellman of the felonious assault charge, the State must offer evidence of an assault, with a deadly weapon, inflicting serious injury. *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975); *State v. Curie*, 19 N.C. App. 17, 198 S.E. 2d 28 (1973). There is evidence to clearly establish these elements.

To prove a speeding violation, there must be evidence to show defendant was operating a motor vehicle upon the highways of the state at a rate greater than the designated speed limit. N.C. Gen. Stat. 20-141. To prove speeding to elude arrest, the State must offer evidence tending to show defendant operated a motor vehicle on a street or highway in excess of 55 m.p.h. and at least 15 m.p.h. over the speed limit, while fleeing or attempting to elude arrest or apprehension by a law enforcement officer with authority to enforce motor vehicle laws. N.C. Gen. Stat. 20-141(j). The testimony of officer Bray established the elements of speeding, and speeding to elude arrest.

The evidence that defendant Spellman left the officer on the highway while he was attempting to issue a citation for speeding is sufficient to take the case to the twelve on the charge of resisting or delaying an officer in discharging a duty of his office. N.C. Gen. Stat. 14-223.

The State offered sufficient evidence on all charges against defendant Spellman to withstand a motion for nonsuit at the close of all the evidence.

In order to convict defendant Brooks of assault upon a law enforcement officer with a firearm or deadly weapon, the State must offer evidence of an assault, with a firearm, upon an officer while the officer is in the performance of his duties. N.C. Gen. Stat. 14-34.2. There was sufficient evidence offered by the State to establish all of these propositions. The denial of defendant Brooks' motion for nonsuit at the close of all evidence was proper.

In the defendants' remaining assignment of error, they contend various remarks of the trial judge in the course of the trial amounted to an expression of opinion on the evidence in contravention of N.C.G.S. 1-180. The statute forbids " 'the expression of any opinion or even an intimation by the judge, at any time during the course of the trial, which might be calculated to prejudice either party.' " *State v. Staley*, 292 N.C. 160, 161, 232 S.E. 2d 680, 682 (1977). To determine whether remarks were prejudicial, they must be considered in light of the circumstances when made, *State v. Byrd*, 10 N.C. App. 56, 177 S.E. 2d 738 (1970), and in the context of the entire record. *State v. Staley, supra.* Considering the remarks raised on appeal in light of the circumstances and context of the record, the trial judge in no way prejudiced the rights of defendants by expressing an opinion on the evidence or by speaking to defendants so as to belittle or humiliate them.

No error.

Judges VAUGHN and ERWIN concur.

LULA CONRAD HOOTS MEMORIAL HOSPITAL, PLAINTIFF v. BOBBY GRAY HOOTS, JR., DEFENDANT

No. 7823DC471

(Filed 3 April 1979)

Hospitals § 3— action to recover for hospital services—defense of negligence in providing services

Any claim that defendant's wife might have against plaintiff hospital for negligence in providing hospital services for her is not a defense in the hospital's separate action against defendant husband for the value of such services absent evidence that such negligence related directly to a particular service in such a manner as to nullify or diminish the value of such service.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 16 March 1978 in District Court, YADKIN County. Heard in the Court of Appeals on 1 March 1979.

This is a civil action wherein the plaintiff seeks to recover $433.35 from the defendant for hospital services rendered to the defendant's wife. In its complaint, plaintiff alleged, among other things, that "[o]n or about March 21, 1976, the defendant contracted with the plaintiff hospital whereby the defendant agreed to be the party responsible for medical expenses due to plaintiff and incurred during his wife's admission and stay in the said hospital for delivery of their child." The defendant answered, admitting the above quoted allegation, but denying that he owed the hospital any money. As a further defense, the defendant alleged:

> 3. That on or about the 21st day of March, 1976 the defendant signed "Conditions of Admission" on behalf of his wife, Connie Sue Hoots.
>
> 4. That impliedly in his agreement with the hospital, part of the consideration was that the plaintiff hospital would treat his wife adequately and within the existing standard of care for similar patients.
>
> 5. That the hospital did not treat the wife of the defendant adquately and, in fact, were negligent in her treatment and thereby breached the agreement between the plaintiff and the defendant.

6. Specifically, the hospital breached the agreement by providing nursing care which was inadequate, by not checking the defendant's wife's progress adequately, and by providing nurses who were negligent in their performing medical services for the defendant's wife, thereby breaching the agreement between the plaintiff and the defendant.

Defendant did not allege any damages, but merely prayed "that the complaint of the plaintiff be dismissed and the cost of this action be taxed against the plaintiff."

On 17 February 1978, plaintiff, pursuant to G.S. § 1A-1, Rule 56, moved for summary judgment and supported its motion by introducing two affidavits. In the first affidavit, Henry T. Agee, Hospital Administrator for the plaintiff, stated that the "services rendered by plaintiff and the charges therefor were as follows: Room and board for four days for Mrs. Hoots, $212.00; nursery room for four days for defendant's child, $96.00; laboratory services, $98.00; drugs, $10.10; delivery room services, $47.00; anesthesia, $47.00; and, medical and surgical supplies, $23.25;" that the defendant has made a partial payment of $100.00 on the total bill of $533.35; and that the hospital has made demand on the defendant for payment of the balance owed, but that defendant has not made any further payments. In the second affidavit, Dr. William L. Wood, the physician who delivered the child of Connie Sue Hoots, wife of defendant, stated:

During the delivery of Mrs. Hoots' child, the procedures employed by plaintiff's staff were normal, adequate and within the existing standard of care for similar patients, and no complications were encountered during delivery of the child. The baby was delivered in good health, and both the child and mother were in good health following the delivery.

The treatment and procedures used by plaintiff's staff during Mrs. Hoots' post-operative care were normal, adequate and within the existing standard of care for similar patients, and no complications were encountered during this period. Mrs. Hoots made no complaints following the delivery, and was released by me on March 25, 1976, with a discharge diagnosis of "improved."

> The consequence of leaving a sponge or gauze inside the woman is simply that it will pass naturally from her vaginal tract sometime thereafter with no harmful effects. Such sponge or gauze can be easily and safely removed by a physician at a routine checkup subsequent to the patient's discharge from the hospital, if it has not passed prior to that time.

The defendant did not rest on its pleadings, but introduced the affidavit of Connie Sue Hoots in opposition to plaintiff's motion. This affidavit contained the following:

> 2. That on or about the 21st day of March, 1976 I was admitted to the Lula Conrad Hoots Memorial Hospital for delivery of a child and that my attending physician was Dr. William L. Wood.
>
> 3. That some weeks after the delivery of my child I began to have an elevated temperature, headaches, and I and others noticed a fetid odor about my person. That some days later I passed what appeared to be a surgical sponge and some days after that I passed more matter which appeared to be gauze. Dr. Paul Grant, who worked in the same office with Dr. Wood, kept the last matter I passed.
>
> 4. That before the gauze was passed I felt sick for some weeks and the odor was extremely embarrassing, and I do not want to have any more children because of this incident.
>
> 5. That furthermore, before the delivery the hospital did not check my progress and Dr. Wood was late in arriving in the delivery room and he only arrived five to ten minutes before my child was born.
>
> 6. That no nurse or other hospital personnel to my knowledge checked for gauze or sponges after delivery.

On 16 March 1978, summary judgment was entered for plaintiff against the defendant for $433.35. Defendant appealed.

Deal, Hutchins and Minor, by Richard D. Ramsey for plaintiff appellee.

Page and Greeson, by Michael R. Greeson, Jr., for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the court's entry of summary judgment in favor of the plaintiff. Under Rule 56(c), summary judgment shall be entered "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); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). When the party moving for summary judgment supports his motion as provided in this rule, the party opposing the motion

> may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

G.S. § 1A-1, Rule 56(e); *Kidd v. Early, supra; Cameron-Brown Capital Corp. v. Spencer*, 31 N.C. App. 499, 229 S.E. 2d 711 (1976). Summary judgment is proper for the party with the burden of proof on the basis of affidavits offered in support of his motion "(1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f), and (3) when summary judgment is otherwise appropriate." *Taylor v. City of Raleigh*, 290 N.C. 608, 625-26, 227 S.E. 2d 576, 586 (1976); *Kidd v. Early, supra.*

In the present case, the defendant unequivocally admitted that he contracted with the plaintiff to pay for hospital services rendered to his wife on the occasion of the birth of their child. In his answer, the defendant denied generally that he owed the bill, and alleged particularly that plaintiff breached its contract "by providing nursing care which was inadequate . . . and by providing nurses who were negligent in their performing medical

services for the defendant's wife." In support of its motion for summary judgment the plaintiff offered a detailed itemized account of the services rendered to the defendant's wife in furtherance of the contract. In opposition to the plaintiff's motion for summary judgment and in support of his general denial and allegations of negligence on the part of the plaintiff, the defendant offered only the affidavit of his wife that the plaintiff breached the contract by providing inadequate service. The affidavit in opposition to the motion for summary judgment did not challenge any of the specific items of service and charges enumerated in plaintiff's supporting affidavit. The defendant did not allege, and has offered no evidence that he was damaged in any way by the plaintiff's alleged breach of its contract to provide services for his wife.

Assuming arguendo that the defendant's allegations of plaintiff's negligent breach of the contract in the wife's affidavit are sufficient to raise an issue as to plaintiff's negligence in the treatment of the wife, we are of the opinion that such an issue is not material in plaintiff's claim against the husband for hospital services rendered. We hold that any claim the wife might have against the hospital for negligence in providing hospital services for her is not a defense in the hospital's separate action against the husband for the value of such services, absent evidence that such negligence related directly to a particular service in such a manner as to nullify or diminish the value of such service. In our opinion, defendant has failed in the face of plaintiff's motion for summary judgment and the evidence offered in support thereof to show that a genuine issue of *material* fact exists. The summary judgment in favor of plaintiff is affirmed.

Affirmed.

Judges PARKER and CARLTON concur.

STATE OF NORTH CAROLINA v. ARTHUR LEROY SOLOMAN

No. 7818SC1125

(Filed 3 April 1979)

1. **Bastards § 2; Indictment and Warrant § 6— willful nonsupport—allegations in warrant sufficient—time of service**

Defendant's contentions that the criminal summons did not allege all the essential elements of G.S. 49-2 and that it was not served within the time mandated by G.S. 15A-301(d)(2) were without merit, since the warrant did charge the two essential elements of the crime of willful nonsupport of an illegitimate child, and service made after the period specified does not invalidate the process.

2. **Bastards § 6— willful nonsupport—sufficiency of evidence**

In a prosecution for willful nonsupport of an illegitimate child, evidence was sufficient to be submitted to the jury where it tended to show that, after the child was born, the mother repeatedly requested defendant to aid in the support of the child and that defendant did provide support for a substantial period of time.

3. **Criminal Law § 102.8— jury argument—defendant's failure to testify—judge out of courtroom—refusal to reconstruct argument**

In a prosecution for willful nonsupport of an illegitimate child, defendant is entitled to a new trial where, during the trial judge's absence from the courtroom, defendant objected to argument by the district attorney with respect to defendant's failure to testify; the trial judge returned to the courtroom, overruled defendant's objection, denied his motion, and admonished defense counsel; and the judge refused to reconstruct the jury argument so that he could not fairly consider defendant's objection and defendant was thereby effectively denied meaningful appellate review.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 14 July 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 6 March 1979.

Defendant was charged in a proper warrant with willful nonsupport of his illegitimate child born on 29 May 1975. Upon his plea of not guilty, the State presented evidence tending to show the following:

The prosecuting witness testified that she was the mother of the minor child; that defendant was the father of the child; that she had asked the defendant to provide certain personal items the child needed as well as food and clothing; and that the defendant always responded and provided various things for the child, but

that since 27 August 1977, he has not provided any support for the child. Mary Ellen Pennington, an employee of the 4-D Child Support Enforcement Unit with the Guilford County Attorney's Office testified that she talked with the defendant over the telephone about establishing an amount of child support, and that during the conversation he stated that he would see the prosecuting witness and they would make an appointment and come to her office.

The defendant presented no evidence.

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

1. Is the defendant, Arthur Leroy Soloman, the father is [sic] Regina Crawford, born of the body of Belinda Crawford on May 29, 1975?

Answer: Yes

2. After the birth of Regina Crawford, did Belinda Crawford, give notice to Arthur Soloman, demanding that he adequately support Regina Crawford?

Answer: Yes

3. Did the defendant wilfully neglect or refuse to maintain or provide support for Regina Crawford?

Answer: Yes

4. Is the defendant, Arthur Soloman, guilty of wilful neglect or refusal to provide adequate support and maintain his illegitimate child?

Answer: Yes.

From a judgment imposing a six months prison sentence suspended on conditions that he provide support in the amount of $15.00 per week, defendant appealed.

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

Pell, Pell, Weston & John, by Joseph R. John, for defendant appellant.

HEDRICK, Judge.

[1] By assignment of error number two, defendant contends the court committed error by denying his motions to quash the warrant, to dismiss the charges against him and his motion in arrest of judgment. Defendant argues that the criminal summons does not allege all the essential elements of G.S. § 49-2 and it was not served within the time mandated by G.S. § 15A-301(d)(2). The two essential elements of G.S. § 49-2 that must be proved by the State are (1) that the defendant is the parent of the illegitimate minor child in question, and (2) that the defendant has willfully neglected or refused to support and maintain such illegitimate child. *State v. Green*, 8 N.C. App. 234, 174 S.E. 2d 8 (1970); *State v. Coffey*, 3 N.C. App. 133, 164 S.E. 2d 39 (1968). The warrant in the present case charged both of these elements. The criminal summons in the present case contained an issuance date of 12 July 1977 and originally contained an appearance date of 1 August 1977 which was crossed out and an appearance date of 21 November 1977 substituted therefor. The warrant further indicates that it was served on 8 November 1977. Although the warrant contains some technical irregularities with regard to service within the times prescribed by G.S. §§ 15A-301(d)(2) and -303(d), this is not fatal, since G.S. § 15A-301(d)(3) provides that service made after the period specified does not invalidate the process. This assignment of error has no merit.

[2] By assignment of error number seven, defendant contends the Court erred in denying his motion for judgment as of nonsuit made at the close of the State's evidence. Defendant argues that there was insufficient evidence of demand to submit the case to the jury. The record is replete, however, with evidence that after the child was born the mother repeatedly requested the defendant to aid in the support of the child and that the defendant did provide support for a substantial period of time. The mother also testified that she received no further support for the child from the defendant after 27 August 1977. We hold sufficient evidence was introduced to permit the jury to find that the defendant *willfully* failed to support his illegitimate child. This assignment of error has no merit.

[3] By assignment of error number eight, defendant contends the trial court committed prejudicial error by refusing to

reconstruct the jury argument of the assistant district attorney. We agree. The record discloses that the trial judge was not present in the courtroom during the arguments to the jury; that defendant nevertheless immediately objected to the argument of the prosecutor and moved for a mistrial on the grounds that the assistant district attorney had allegedly made comments to the jury on the failure of the defendant to offer evidence or testify in his own behalf; that the trial judge was then brought back into the courtroom where he overruled the defendant's objection, denied his motion, and admonished defense counsel. After the jury had returned its verdict, defendant renewed his motion for a mistrial and moved to have the trial judge reconstruct the jury argument. The trial judge denied both of these motions.

It is a well-established rule that neither the district attorney nor counsel for the defendant may comment on the defendant's failure to testify. G.S. § 8-54; *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951); *State v. Artis*, 9 N.C. App. 46, 175 S.E. 2d 301 (1970). In many cases, the impropriety of the solicitor's comments on the failure of the defendant to testify will be cured where the court categorically instructs the jury to disregard the improper remarks or instructs that the defendant's failure to testify creates no presumption against him. *See, e.g., State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568 (1976). When there is an objection to such prohibited statements, however, it is "the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. [If] no proper curative instruction [is] given, the prejudicial effect of the argument requires a new trial." *State v. Monk*, 286 N.C. 509, 518, 212 S.E. 2d 125, 132 (1975). *See also State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975).

Under G.S. § 15A-1241(c), "[w]hen a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge *must* reconstruct for the record, as accurately as possible, the matter to which objection was made." (Emphasis added.) In the present case, the defense counsel promptly objected to the alleged improper argu-

ment, and the trial judge, when he returned to the courtroom, overruled the objection and even admonished defense counsel. Generally, the motion to reconstruct the argument should be made at the time the objectionable argument is made so that the judge can have a reasonable opportunity to reconstruct what was said while it is still fresh in his mind. Here, however, not only was the judge not in the courtroom when the argument was made, he also refused to make an effort to ascertain what had been argued so that he could fairly consider defendant's objection and motion for a mistrial. The trial judge's actions precluded the defendant from showing that an error was committed that was prejudicial to him. The result is that defendant has been effectively denied meaningful appellate review. Although the trial judge did instruct the jury that defendant's failure to testify creates no presumption against him, we are unable to determine whether such an instruction was sufficient to cure the error since the district attorney's argument was not reconstructed for the record. In one case, it was held that since the solicitor's comments were "obviously calculated to mislead the jury into the belief that they should consider defendant's silence at trial as a circumstance indicating guilt," a later instruction was not sufficient "to cure the prejudicial effect of the argument and render it harmless, especially since the court did not instruct the jury that the argument they had just heard was improper and that it should be disregarded." *State v. Jones*, 19 N.C. App. 395, 396, 198 S.E. 2d 744, 745 (1973).

Because of our disposition of this case, it is unnecessary for us to discuss defendant's remaining assignments of error since they are unlikely to recur at a new trial.

New trial.

Judges VAUGHN and CARLTON concur.

GODLEY CONSTRUCTION CO., INC. v. L. BRUCE McDANIEL AND SHELDON L. FOGEL D/B/A McDANIEL AND FOGEL, ATTORNEYS AT LAW

No. 7826SC581

(Filed 3 April 1979)

1. **Venue § 9— motion for change of venue—court's belief or disbelief of affidavits**

In ruling upon a motion for a change of venue, the trial court is entirely free to either believe or disbelieve affidavits presented by the movant without regard to whether they were controverted by evidence of the opposing party.

2. **Venue § 8— motion for change of venue—convenience of witnesses—ends of justice—most witnesses in another county**

Affidavits showing that only one witness and one party reside in Mecklenburg County where the action was instituted while the other parties and witnesses reside in Wake County did not necessarily require the court to find that a change of venue to Wake County would promote the convenience of the witnesses and the ends of justice.

3. **Venue § 8— convenience of witnesses—ends of justice—discretion to change venue**

G.S. 1-83(2) permits but does not require the trial court to order a change of venue when the court finds that the convenience of witnesses and the ends of justice would be promoted by a change of venue.

4. **Venue § 8— convenience of witnesses—ends of justice—refusal to change venue—when abuse of discretion**

A trial court has not manifestly abused its discretion in refusing to change the venue for trial of an action pursuant to G.S. 1-83(2) unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue (G.S. 1-85) or that failure to grant the change of venue will deny the movant a fair trial (G.S. 1-84).

APPEAL by defendants from *Griffin, Judge.* Order entered 17 April 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1979.

The plaintiff initiated this action by filing a complaint in Mecklenburg County in which it alleged that it is a North Carolina corporation with its principal office in Mecklenburg County and that the defendants are attorneys at law practicing in Wake County. The plaintiff further alleged that it had contracted with Lemon Tree Inn of Raleigh, Inc. [hereinafter "Lemon Tree"] for construction of a motel in Raleigh, that the defendants represented Lemon Tree in the closing of a permanent construc-

tion loan in Raleigh and that Lemon Tree subsequently became bankrupt. The plaintiff additionally alleged that the defendants negligently violated their fiduciary duty and breached their contract as escrow agents thereby causing the plaintiff to be damaged.

The defendants answered and thereafter moved pursuant to G.S. 1-83(2) for a change of venue to Wake County for trial. In their motion, the defendants alleged that all transactions in question took place in Wake County, that the plaintiff had previously brought an action in Wake County against Lemon Tree which resulted in extensive discovery and voluminous exhibits which "would be readily available for use if the present case is tried in Wake County." The defendants also alleged that most of the witnesses involved were residents of Wake County.

In support of their motion, the defendants offered seven affidavits tending to show among other things that they will call eight witnesses at trial, that six of these witnesses live in Wake County and the other two live east of Wake County, that trial in Mecklenburg County will impose great expense and hardship upon these witnesses and that the voluminous exhibits arising from plaintiff's prior action in Wake County against Lemon Tree will be inconvenient to reproduce and transport to Mecklenburg County. The defendant's affidavits also tended to show that only one resident of Mecklenburg County will be a material witness in this action.

The trial court entered an order indicating that it had considered the defendants' motion together with the arguments presented by counsel and the affidavits and pleadings filed in this action and was of the opinion that the motion should be denied. From the order of the trial court denying their motion for a change of venue to Wake County, the defendants appealed.

Bailey, Brackett & Brackett, P. A., by Martin L. Brackett, Jr., for plaintiff appellee.

Boyce, Mitchell, Burns & Smith, by Robert E. Smith, for defendant appellants.

MITCHELL, Judge.

The defendants assign as error the trial court's denial of their motion for a change of venue to promote the convenience of witnesses and the ends of justice and contend that it constituted an abuse of discretion. The defendants made their motion for change of venue pursuant to G.S. 1-83(2) after they had filed their answer. Unlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to G.S. 1-83(2) are properly made only after an answer has been filed. *Compare Thompson v. Horrell,* 272 N.C. 503, 158 S.E. 2d 633 (1968) *with, Swift and Co. v. Dan-Cleve Corp.,* 26 N.C. App. 494, 216 S.E. 2d 464 (1975). As the defendants had filed their answer in the present case prior to making their motion for change of venue pursuant to G.S. 1-83(2), the trial court had authority to entertain the motion. *Poteat v. Railway Co.,* 33 N.C. App. 220, 234 S.E. 2d 447 (1977).

The defendants' motion for change of venue pursuant to G.S. 1-83(2) to promote the convenience of witnesses and the ends of justice presented a question of venue and not jurisdiction. Rulings on such questions are within the sound discretion of the trial court and are not subject to reversal except for manifest abuse of such discretion. *Cooperative Exchange v. Trull,* 255 N.C. 202, 120 S.E. 2d 438 (1961).

The defendants contend that the ruling of the trial court constituted a manifest abuse of discretion, as their affidavits presented overwhelming evidence clearly indicating that both the convenience of the witnesses and the ends of justice would be promoted by a change of venue to Wake County. The defendants further contend that their affidavits made out a *prima facie* showing that these interests would be promoted and shifted the burden to the plaintiff to go forward with evidence to the contrary. The plaintiff having introduced no affidavits or other evidence tending to contradict the affidavits of the defendants, the defendants argue that the trial court was compelled to find that both the convenience of witnesses and the ends of justice would be promoted by the requested change of venue. We do not agree.

[1, 2] We find that the rule which has been long followed in this jurisdiction still prevails and that the trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits such as those filed by the defendants without regard to whether they have been controverted by evidence introduced by the opposing party. *See State v. Smarr*, 121 N.C. 669, 28 S.E. 549 (1897). *But see, e.g., Harper v. Insurance Co.*, 244 S.C. 282, 136 S.E. 2d 711 (1964). Further, we do not think the defendants' affidavits showing that one witness and one party reside in Mecklenburg County, while the other parties and witnesses reside in Wake County, necessarily required a finding that a change of venue in the present case would promote the convenience of witnesses and the ends of justice. Even if the affidavits should be construed in the manner the defendants wish, we would remain unable to determine whether other facts brought to the court's attention or otherwise available indicated that the hardship to the witness and the party residing in Mecklenburg County arising from a change of venue would outweigh any hardship to the defendants and the witnesses from Wake County arising from denial of the change of venue.

[3, 4] Additionally, had the trial court been compelled to accept as facts all of the matters asserted in the defendants' affidavits and to find that the convenience of witnesses and the ends of justice would be promoted by a change of venue, we do not think it would have been required to order a change of venue. In our view, when the trial court finds that the convenience of witnesses and the ends of justice would be promoted by a change of venue, G.S. 1-83(2) permits but does not require the trial court in its discretion to order such a change of venue. *See Craven v. Munger*, 170 N.C. 424, 87 S.E. 216 (1915). The long-standing rule in this jurisdiction remains undiminished and, in such situations, the trial court's decision to deny the motion for change of venue in its discretion still may be reversed only upon a showing of a manifest abuse of such discretion. *Cooperative Exchange v. Trull*, 255 N.C. 202, 120 S.E. 2d 438 (1961). The existing case precedent tends to indicate that the trial court has not manifestly abused its discretion in refusing to change the venue for trial of an action pursuant to G.S. 1-83(2) unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the

change of venue (G.S. 1-85) or that failure to grant the change of venue will deny the movant a fair trial (G.S. 1-84).

It may well be that the prevailing rules applying to motions for change of venue, as previously set forth herein, are not the best which could be devised. *See generally, e.g.*, Annot., 74 A.L.R. 2d 16 (1960). Nevertheless, we believe them to apply in this jurisdiction. The fact that our research does not readily lead to any case in which a trial court in this jurisdiction ever has been reversed in the exercise of the discretion conferred upon it by G.S. 1-83(2) tends to offer additional support to the view that the former rules remain unchanged. Unlike the Supreme Court of North Carolina and the General Assembly of North Carolina, we are never free to alter or reject rules which have been established in cases previously decided by the supreme judicial authority of this State.

The order of the trial court denying the defendant's motion for change of venue is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

BARBOUR FUR COMPANY, INC., N. C. HIDE & FUR COMPANY, INC., WARD FUR COMPANY, INC., KENNETH CUTHBERTSON, D/B/A WESTERN N. C. FUR COMPANY, ARTHUR C. LOWE, D/B/A LOWE FUR & HERB COMPANY AND JOSEPH DUPREE, D/B/A DUPREE INSURANCE AGENCY AND FUR DEALER v. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; WILLIAM C. BOYD, EDDIE C. BRIDGES, WALLACE E. CASE, POLIE Q. CLONINGER, JR., J. ROBERT GORDON, ROY A. HONEYCUTT, HENRY E. MOORE, JR., LEE L. POWERS, M. WOODROW PRICE, EDWARD RENFROW, DEWEY W. WELLS, V. E. WILSON, III AND W. STANFORD WHITE, MEMBERS OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; AND ROBERT B. HAZEL, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION

No. 7810SC492

(Filed 3 April 1979)

Hunting § 1— sale of fox furs—county open season—no permit for sale

The buying and selling of fox furs is legal in N. C. during open season for foxes in the county where the sale takes place, and there is no requirement in

the Game Law that a permit be issued for such transactions. G.S. 113-103; G.S. 113-104; G.S. 113-100.

APPEAL by defendant from *McClelland, Judge.* Judgment entered 7 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 5 March 1979.

Plaintiff fur dealers seek a declaratory judgment (1) that defendant North Carolina Wildlife Resources Commission (Wildlife Commission) has authority to issue permits allowing the plaintiffs to sell legally-taken fox pelts, and (2) that plaintiffs may legally possess, process and sell fox pelts lawfully taken and purchased in other states. Plaintiffs were granted a preliminary injunction ordering defendant to issue permits upon appropriate application.

At trial the plaintiffs presented evidence that prior to 1935, and from the enactment of the North Carolina Game Law in 1935 to 1975, plaintiffs, and other fur dealers, traded in fox pelts without the necessity of a permit. Plaintiffs were only required to furnish certain information, *e.g.,* the number and kind of game animals taken and from whom they were purchased. Between 1975 and the fall of 1977, permits to trade in fox furs were routinely issued by the Wildlife Commission, but in 1977, due to the issuance of an Attorney General's opinion, the Wildlife Commission refused to issue permits.

Defendants presented evidence that in 1975 it was decided that G.S. 113-106 was authority for the Commission to issue permits for trading in fox furs. By an opinion of September, 1977, the Attorney General determined that the fox is a game animal, and that game animals cannot be bought and sold in North Carolina. No permits were voluntarily issued by the Commission after the receipt of this opinion.

The trial court found that G.S. 113-106 gives the Wildlife Commission authority to issue permits to sell fox furs and that G.S. 113-102 does not prohibit commercial transactions in fox furs. The preliminary injunction was made permanent, and the Commission was ordered to issue permits upon proper application. The defendants appeal.

Broughton, Wilkins, Ross & Crampton, by Melville Broughton, Jr. and Charles P. Wilkins, for plaintiff appellees.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for defendant appellants.

ARNOLD, Judge.

Defendants take exception to the trial court's construction of the North Carolina Game Law, ch. 113, Subch. III, Art. 7. (By Session Laws 1977, c. 712, s. 4, this Article is repealed effective July 1, 1983.) "In the interpretation of statutes the legislative will is the controlling factor," *State v. Hart*, 287 N.C. 76, 80, 213 S.E. 2d 291, 294 (1975), so our function on this appeal is to determine whether the trial court correctly discerned the legislative intent.

G.S. 113-104 provides that "No person shall at any time of the year . . . possess, buy, sell, offer or expose for sale, . . . any [wild] . . . animal, or part thereof, . . . except as permitted by this Article. . . ." The fox has been held to be a wild animal, *State v. Sizemore*, 199 N.C. 687, 155 S.E. 724 (1930), so it falls within the protection of the Article, and we begin from the premise that no commercial transactions in fox furs are legal unless they are permitted by the Game Law.

For the purposes of the Game Law, the fox is defined as a "game animal," and not as a "fur-bearing animal." G.S. 113-83. Thus the trial court's conclusion "that it was the legislative intent to regard the fox in the traditional manner as a game animal to be hunted for sport and as a fur-bearing animal when lawfully taken" is clearly in conflict with G.S. 113-83. "Where the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition." *Vogel v. Reed Supply Co.*, 277 N.C. 119, 130-31, 177 S.E. 2d 273, 280 (1970). Provisions of the Game Law referring to "fur-bearing animals" do not apply to foxes.

The trial court concluded that G.S. 113-106 authorizes the Commission to issue permits allowing the purchase and sale of fox furs. That statute provides in pertinent part: "A person may buy and sell at any time the mounted specimens of heads, antlers, hides and feet of game animals, . . . [p]rovided, the person selling

such specimens has a written permit issued by the Executive Director of the North Carolina Wildlife Resources Commission, authorizing him to do so." We do not accept the plaintiff's suggested interpretation that the word "mounted" applies only to "heads," and that antlers, hides and feet of game animals may be sold by a seller with a permit at any time. We find, at best, that this would be a strained interpretation of the statute, and we conclude instead that this portion of the statute refers only to the buying and selling of *mounted* heads, antlers, hides and feet, and so is not applicable to the issue before us.

The trial court further concluded "that G.S. 113-102 does not prohibit commercial transactions involving buying and selling fox furs." This conclusion is literally true, since G.S. 113-102 makes only one reference to foxes, with regard to the permitted manner of taking them. G.S. 113-102(d) ("Foxes may be taken with dogs only, *except during* the open season, when they may be taken in any manner." (Emphasis added.)) This does not lead to the conclusion that commercial transactions in fox furs are permitted without restriction, however, since G.S. 113-104 clearly states that the purchase or sale of any wild animal is forbidden except as permitted by the Game Law.

We find that G.S. 113-103 is determinative of the issue plaintiffs have raised by this action. G.S. 113-103 makes it unlawful to possess, transport, purchase or sell any dead game animals or parts thereof during the *closed* season in North Carolina. As the fox is by statutory definition a game animal, this statute clearly applies to the buying and selling of fox furs. G.S. 113-100 leaves open season for foxes to county regulations, so there is no period which is necessarily open season for foxes statewide. (As provided in G.S. 113-111, certain counties have no closed season for foxes.) Construing G.S. 113-100 and -103 together, we find that county regulations will determine when the buying and selling of fox furs is legal.

In summary: G.S. 113-104 prohibits the buying and selling of wild animals, or their parts, except as permitted by the Game Law. The fox is a wild animal, and a game animal by statutory definition. G.S. 113-103 makes it unlawful to buy or sell game animals during closed season, and G.S. 113-100 allows for county regulation of open season on foxes. We conclude that the buying

and selling of fox furs is legal in North Carolina during open season for foxes in the county where the sale takes place. In short, if there is open season to hunt foxes then it is lawful to buy and sell fox furs. Moreover, we find no requirement in the Game Law that a permit be issued for such transactions.

The judgment of the trial court is vacated, and the case is remanded for entry of judgment consistent with this opinion.

Vacated and remanded.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. BOBBY GENE MOORE

No. 7826SC1023

(Filed 3 April 1979)

Narcotics §§ 4.3, 4.4— constructive possession of narcotics—intent to sell—sufficiency of evidence

The State's evidence was insufficient to show that defendant had constructive possession of cocaine found in a woman's coat in the bedroom closet of an apartment leased to a female friend of defendant where it tended to show only that defendant paid the apartment rent and that he was in the kitchen of the apartment when officers searched the apartment and discovered the cocaine, but there was no evidence that any men's clothing or any of defendant's personal possessions were found in the apartment, the evidence showed that no key to the apartment was found on defendant, and no other evidence showed that defendant had control of the apartment. However, the evidence was sufficient for the jury to find that defendant had possession of marijuana found in a shoe box on the kitchen table where it tended to show that defendant opened the kitchen door to officers, defendant sat down at the kitchen table after admitting the officers, and defendant told the officers that he and a friend who was seated at the kitchen table were playing a TV video game located in the kitchen, but a charge of possession of marijuana with intent to sell should have been nonsuited where there was no evidence of the amount of marijuana or other evidence to support an inference of intent to sell.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 7 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 February 1979.

Defendant was indicted for possession of cocaine with intent to sell and possession of marijuana with intent to sell; without objection the cases were consolidated for trial. Defendant was found guilty and sentenced to 20 years on each count, to run concurrently. He appeals.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Grant Smithson for defendant appellant.

ARNOLD, Judge.

Defendant contends that the court improperly denied his motion for judgment as of nonsuit, as there was insufficient evidence of his constructive possession of the controlled substances to take the case to the jury. On a motion for nonsuit the evidence must be considered in the light most favorable to the State, and all reasonable inferences must be drawn therefrom. 4 Strong's N.C. Index 3d, Criminal Law § 104. The defendant's evidence may be considered for the purpose of explaining the State's evidence, as long as there is no conflict. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). The State's evidence, viewed in this light, is as follows:

On 4 February 1978 Charlotte police officers obtained a search warrant for Apt. #2 at 600 West Boulevard and for a woman named Joanne Ferguson, on the strength of information from a confidential informant that there were drugs in the apartment. The back door of the apartment was opened to the officers by defendant "just a short time" after they knocked. Inside, they found another man seated at the kitchen table. Defendant indicated that this man "was a friend of his and had come to play a TV video game." The search of the apartment revealed 12 glassine bags of cocaine in what appeared to be a woman's coat in a bedroom closet, 10 manila envelopes of marijuana among woman's clothing in a bedroom closet and 16 inside the dust bag of the vacuum cleaner, a marijuana cigarette in a watch case on a living room shelf, and a shoe box holding containers of marijuana on the kitchen table. Defendant was searched, and no drugs or keys to the apartment were found on his person. No clothing identifiable as a man's was found in the apartment except for the jacket defendant put on when he left with the officers. Defendant's baby was in one of the bedrooms.

A year prior to the search, defendant's car was seen parked outside the apartment a number of times. Officer Furr testified that as defendant left with the officers after he had been arrested, he "turned and asked me could he leave some money with the person inside, and I said, 'Sure.' We walked back to the apartment door. Just as we got to the apartment door, he said, 'Never mind, forget it. I'm not going to leave it. I'm not going to pay the rent. They can set the furniture out in the street.' "

Defendant's evidence which does not conflict with that of the State indicates that the apartment the officers searched was leased to Joanne Ferguson, the mother of defendant's baby. The utilities are billed in Ferguson's name. Defendant maintains a separate apartment in his name at 409-C Hilo Drive, and his next door neighbor sees him there every day. Defendant has lived in the West Boulevard apartment with Ferguson, but not in the 15 months since their baby was born. Defendant was at the apartment the night of 4 February to see the baby; he gives Ferguson financial support for the baby. Ferguson had the cocaine in the apartment for a party she was giving, and the marijuana to sell. Ferguson gave 600 West Boulevard as defendant's address to the police when defendant's car was stolen in November 1977, and to defendant's bail bondsman because she felt she could keep track of where he was. The defense introduced a warrant for defendant's arrest on another charge, dated two days before the search, which listed defendant's address as 409-C Hilo Drive. The warrant to search 600 West Boulevard did not list defendant's name.

A person may be guilty of possession without actual physical dominion over the material; constructive possession exists when the material is found on premises under the control of the defendant, *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971); *State v. Wells*, 27 N.C. App. 144, 218 S.E. 2d 225 (1975), or otherwise under his control. Defendant argues that there can be no constructive possession here because the facts set out above do not show that he was in control of the premises where the controlled substances were found. With regard to possession of cocaine, defendant is correct.

The cocaine was not in plain view, but was found in a coat pocket in the bedroom closet. Although there is an inference from

the evidence that defendant paid the rent, no men's clothing, except for what he was wearing, or personal possessions of his were found in the apartment, and no keys to the apartment were found on his person. The facts relied on by the State in its brief simply do not support the inference that defendant had control of the premises. This fact situation is easily distinguishable from those in which our courts have found constructive possession. See *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974) (defendant and his wife were the only ones living in the apartment and marijuana was found among man's clothing in the apartment); *State v. Allen, supra* (utilities for the dwelling were listed in defendant's name and his personal papers were found there; also there was testimony that the heroin found belonged to defendant and was being sold at his direction); *State v. Wells, supra.* Defendant's motion for nonsuit on the charge of possession of cocaine with intent to sell was improperly denied.

With regard to the charge relating to marijuana, the evidence is that a shoe box of marijuana was in plain view on the kitchen table when the kitchen door was opened to the officers by defendant; that defendant's friend was seated at the kitchen table; and that the TV video game defendant told the officers he and his friend were playing was located in the kitchen. After admitting the officers, defendant sat down at the kitchen table.

This is sufficient evidence from which the jury could find that the marijuana was under defendant's control. However, the record contains no evidence of how much marijuana was found in the shoe box, of any sales or attempted sales by defendant at any time, or any other evidence to support an inference of an intent to sell. Therefore, defendant's motion should have been allowed as to the charge of possession of marijuana with intent to sell.

The judgment appealed from in case No. 78CR2459 (cocaine) is vacated and the indictment is dismissed. In case No. 78CR2462 (marijuana) the judgment is vacated and the case is remanded. If the State so elects, the district attorney may try defendant upon the lesser included offense of possession of marijuana.

Vacated and remanded in part.

Chief Judge MORRIS and Judge CLARK concur.

DOROTHY H. LOVE v. BACHE & CO., INC.

No. 7826SC537

(Filed 3 April 1979)

1. **Banks and Banking § 13; Guaranty § 2; Pledges § 2— guaranty of loan—securities as collateral for loan—sale of securities—application to loans—consent by owner of securities not necessary**

Under the terms of a guaranty by which plaintiff's testator became a primary obligor on any indebtedness of a corporation to a bank, and under the terms of hypothecation agreements authorizing an individual to pledge certain securities owned by plaintiff's testator as collateral for any indebtedness of the individual to the bank, plaintiff's consent was unnecessary to extensions of time for payment of the secured debts or for payment of the proceeds from the sale of the testator's securities held by the bank to satisfy the debts of the corporation and the individual to the bank.

2. **Guaranty § 1— death of guarantor—no revocation of guaranty**

Guaranty agreements were not revoked by the death of the guarantor.

APPEAL by plaintiff from *D. I. Smith, Judge.* Judgment entered 22 February 1978 and order denying relief entered 6 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1979.

On 1 October 1970, plaintiff's testator, Hal J. Love, executed a Guaranty to defendant American Bank & Trust Company (American) by the terms of which he became a primary obligor on any indebtedness to American incurred by International Speedways, Inc. (Speedways). On 25 March 1973 and 23 January 1975 Love executed Hypothecation Agreements authorizing one Ernest L. Harris to pledge named securities belonging to Love (including 3200 shares of Holiday Inns, Inc. common stock and an $11,000 debenture) as collateral for any indebtedness to American incurred by Harris. Love died on 7 February 1975, and, according to American, a few days later

> Mr. Ray [attorney for the estate] was informed that the bank was not calling the various loans, that the bank would cooperate with the estate in the orderly settlements of its affairs, and that, if interest payments could be kept current, principal payments would be waived for at least six months.

The renewals of which plaintiff complains were accomplished in the same way: "simply by accepting interest due on all outstand-

ing loans. No new instruments were required of the borrower, and the original note was retained." Subsequently defendant Bache & Co., Inc. (Bache), a stock brokerage firm, sold the 3200 shares of Holiday Inns, Inc. stock and the $11,000 debenture owned by Love. The net proceeds of this sale, $39,150.54, were paid by Bache to American and used by it to satisfy the Harris and Speedways debts.

Plaintiff seeks to recover the sale proceeds from either defendant. The actions against the separate defendants were consolidated on defendant Bache's motion. The trial court granted summary judgment for the defendants, and plaintiff gave notice of appeal and then moved to have the judgment set aside. The court determined that because of plaintiff's notice of appeal jurisdiction was then in the Court of Appeals, and that if jurisdiction was in the trial court the motion was denied. From the entry of summary judgment and the denial of her motion plaintiff appeals.

Charles T. Myers for plaintiff appellant.

Fleming, Robinson & Bradshaw, by Richard A. Vinroot, for defendant appellee Bache & Co., Inc.; Robert L. Holland for defendant appellee American Bank & Trust Company.

ARNOLD, Judge.

[1] Summary judgment must not be granted if there exists a genuine issue of material fact. G.S. 1A-1, Rule 56(c). Plaintiff contends that the issues of material fact here are (1) whether she consented to extensions of time for payment of the secured debts, and (2) whether she agreed that the proceeds of the sale of the securities would be paid to American to satisfy the debts. Defendants contend that these issues of fact are not material, since the effect of extensions and the disposition of collateral are controlled by the terms of the Guaranty and Hypothecation Agreements.

We find defendants' position correct. The Guaranty by its terms made Love primarily liable on any indebtedness of Speedways to American, "including all renewals, extensions and modifications." The Guaranty allows for revocation by Love, but provides that such revocation shall not release Love as guarantor from liability for any debts guaranteed at the time of revocation,

or renewals or extensions of the guaranteed debts, "whether such renewals or extensions are made before or after such revocation." Plaintiff's argument that her consent to renewals or extensions of guaranteed Speedways obligations was required at the time of the extension or renewal is negatived by the terms of the Guaranty itself. Thus the issue of whether she actually gave such consent is immaterial.

Likewise, the Hypothecation Agreements offered Love's named securities as collateral for "any present or future indebtedness" of Harris, "or any extension or renewal thereof," Love "hereby consenting to the extension or renewal . . . of any such indebtedness . . . and waiving any notice of any such . . . extension or renewal." No further consent by plaintiff was required. "A guarantor is bound by an agreement in the guaranty contract which permits extensions of time. . . . [A]n extension of time within the intent of the agreement does not discharge the guarantor." 38 Am. Jur. 2d, Guaranty § 94 at 1100.

We also find immaterial the issue of whether plaintiff consented to the use of the sale proceeds to satisfy the Harris and Speedways debts. The Guaranty gave American a lien on "all . . . securities of the [guarantor] at any time in [American's] possession," allowing American to hold, administer and dispose of the securities as collateral. It is undisputed that American held the stocks and debenture, so they were under lien, and their disposition with regard to the Speedways debt was controlled by the Guaranty. See G.S. 25-9-201, 25-9-207(4). No consent by plaintiff was necessary. Similarly, by the Hypothecation Agreement Love agreed that the named securities (the 3200 shares of Holiday Inns and the $11,000 debenture) "shall be subject to disposition in accordance with the terms and conditions of the instruments evidencing [Harris'] indebtedness." The Harris note, in turn, gave the Bank full authority, in case of default, to sell the collateral at public or private sale and apply the proceeds to the payment of the secured liability. Thus American was clearly within its rights under the Agreement in applying the proceeds of sale to the Harris debt, and whether plaintiff consented is not a material question.

Plaintiff's argument that defendants have failed to establish that the securities which were sold had actually been pledged to

secure the Harris debt does not prevail. J. W. Adams, an officer of American, in answer to plaintiff's interrogatories filed 17 November 1976, indicated that "[t]he [Hypothecation Agreements] were in connection with a loan to Ernest Harris of $25,000.00," and that the named securities "were pledged as security for said loan by the decedent."

[2] We find no merit in plaintiff's contention that Love's death somehow affected the validity of the agreements. The Guaranty explicitly states that it binds Love's "heirs, executors, legal representatives, successors and assigns." Love's liability on both the Harris and Speedways debts was already fixed at the time of his death, and a guaranty contract, as opposed to an offer of guaranty, is not revoked by the death of the guarantor. See generally 38 Am. Jur. 2d, Guaranty § 69.

We have considered plaintiff's other assignments of error and we find that they are groundless. Summary judgment for defendant is

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. SAM McCULLOUGH

No. 788SC772

(Filed 3 April 1979)

1. Larceny § 7.8— cans moved from pantry to kitchen—asportation—sufficiency of evidence

In a prosecution for felonious breaking or entering and felonious larceny where the evidence tended to show that defendant entered a school through a window and removed several cans and a box from the school pantry to a table in the kitchen, such evidence was sufficient to support a finding that defendant carried away the property, since it was not necessary that the personal property be removed from the premises in order to support a finding of asportation.

2. Larceny § 8— taking of property—instructions proper

In a prosecution for felonious breaking or entering or felonious larceny, the trial court properly charged the jury on the State's burden of proof as to

the taking after a breaking or entering, properly charged that there had to be a severance from the possession of the owner by charging that the property had to be "under the control" of defendant, and properly read for the jury a second time the charge as to what constituted asportation of the property.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 6 April 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 November 1978.

The defendant has appealed from a conviction of felonious breaking or entering and felonious larceny. The State's evidence showed that the defendant entered the cafeteria of the Goldsboro Middle School South by raising a window at some time in the early morning of 12 February 1978. A police officer who was on a stakeout inside the school observed the defendant enter. He saw the defendant go into the pantry and return with a box which he placed on a table in the kitchen. The defendant then made several trips into the pantry, returning each time with several cans which he placed in the box. The defendant was arrested while inside the building. The defendant testified that he entered the building because he was cold and hungry with no place to stay. He said he did not have any intention of stealing anything. He testified further that he moved the box with the canned goods in it in order to have a place to lie down to sleep.

Attorney General Edmisten, by Associate Attorney Jean Winborne Boyles, for the State.

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

WEBB, Judge.

[1] The defendant's first two assignments of error deal with the failure of the court to grant his motions for nonsuit. He argues that the evidence shows that his only reason for entering the building was to find shelter from the inclement weather and that the moving of the canned goods was insufficient to establish asportation. In order to support a finding of asportation it is not necessary that the personal property be removed from the premises. "The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation." *State v. Walker,* 6 N.C.

App. 740, 743, 171 S.E. 2d 91 (1969). We hold there was sufficient evidence in the light most favorable to the State for the jury to find the defendant carried away the property. This being so, there was sufficient evidence for the jury to find that at the time of the entering the defendant intended to commit larceny. The motions for nonsuit were properly overruled in both cases.

[2] The defendant's next assignments of error are to the charge. In the charge as to larceny after a breaking or entering, Judge Allsbrook charged the jury that they must be satisfied of five things beyond a reasonable doubt in order to convict the defendant of felonious larceny. He enumerated five elements of the crime and then said the sixth thing the jury must find is that the property was taken from a building after a breaking or entering. The defendant contends the court failed to charge the jury that they must be satisfied beyond a reasonable doubt that the property was taken after a breaking or entering in order to convict the defendant of felonious larceny. In his final mandate, Judge Allsbrook charged the jury they must be satisfied beyond a reasonable doubt that the property was taken after a breaking or entering to find the defendant guilty. At another place in the charge Judge Allsbrook instructed the jury that they must be satisfied beyond a reasonable doubt as to every element of the crime in order to find the defendant guilty. Reading the charge as a whole, we believe Judge Allsbrook properly charged the jury as to the State's burden of proof as to the taking after a breaking or entering.

After the jury had retired they returned to the courtroom and the foreman asked whether the defendant had to remove any of the property from the building to be found guilty. Judge Allsbrook then read the instructions on this element of the offense including an instruction that the "least removal of an article from the actual or constructive possession of the owner so as to be under the control of the defendant is a sufficient asportation." The defendant contends this instruction is in error for that in order for the jury to find the defendant guilty they must find that the possession of the property by the defendant is "such as would constitute a complete severance from the possession of the owner." *State v. Walker, supra,* at 743. We hold that when the jury was charged that the property had to be "under the control"

of the defendant this charged them that there had to be a "severance from the possession of the owner."

The jury asked the court to read to them for a second time the charge as to what constituted asportation of the property. The court complied with this request. The defendant contends this was error. He argues that this "double barrel supplemental instructions of the Court did not present the matter to the jury fairly to the defendant." It seems obvious the jury was having trouble understanding the evidence necessary to make a finding on this point. The instructions given by the court were correct. We find no error in repeating them for the benefit of the jury.

No error.

Judges MORRIS (now Chief Judge) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JOHNNIE EVANS

No. 7814SC748

(Filed 3 April 1979)

Criminal Law § 89.8— cross-examination of State's witness—pending criminal charges—competency to show bias

The trial court should have permitted defense counsel to cross-examine a State's witness as to whether criminal charges were pending against him for the purpose of showing bias of the witness in that he might have been testifying in order to receive a lighter sentence in the case in which he was charged.

APPEAL by defendant from *Martin (John C.), Judge.* Judgment entered 12 April 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 November 1978.

The defendant was convicted of non-felonious breaking or entering and felonious larceny. He has appealed to this Court.

Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.

Loflin, Loflin, Galloway, Leary and Acker, by Thomas F. Loflin III, for defendant appellant.

WEBB, Judge.

Defendant has brought forward several assignments of error. We shall consider one of them. The State called as a witness John Thomas Minga who testified he was a security guard at the building at which the break-in occurred and that he observed the break-in. On the cross-examination of John Minga the record shows the following colloquy:

> "Q. Do you have criminal charges pending against you . . . at this time?
>
> OBJECTION. SUSTAINED.
>
> [Witness would have answered he was then under indictment in Durham Superior Court for possession and sale of marijuana.]"

The appellant contends it was prejudicial error not to allow the answer to this question to show the bias of the witness. We hold that it was prejudicial error requiring a new trial.

We note at the outset that the United States Supreme Court has had a similar question before it in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). That case involved an Alaskan statute which provided that the criminal records of juveniles were to be confidential. On cross-examination, the attorney for a person on trial for burglary asked a State's witness if he were not then on probation for a similar offense. The Alaska court sustained an objection to the question on the ground the Alaskan statute prohibited revealing this information. The United States Supreme Court held that sustaining this objection deprived the defendant of his Sixth Amendment right to confront a witness against him. The Supreme Court said the United States Constitution required that defendant be allowed to have this question answered to show bias on the part of the witness. In *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277 (1939) it was held reversible error to exclude testimony on cross-examination that the witness was testifying after a nol pros had been taken in his case and that he was still under a suspended sentence. The court also excluded testimony from other witnesses as to the nol pros and would not let the defendant's counsel argue this to the jury. The Supreme Court said at 787:

> "While latitude is allowed in showing the bias, hostility, corruption, prejudice and interest or misconduct of the witness with respect to the case or other facts tending to prove that his testimony is unworthy of credit, . . . the question as to the extent to which the cross-examination may extend is to be determined with a view to the discretion of the trial judge. Nevertheless, if the latter has excluded testimony which would clearly show bias, interest, the promise, or the hope of reward on the part of the witness, it is error and may be ground for a new trial. (Citations omitted.) The discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness' testimony."

In *State v. Alston*, 17 N.C. App. 712, 195 S.E. 2d 314 (1973), the trial court was reversed for ruling out questions designed to elicit testimony from a State's witness as to the possibility that he might expect leniency in a case in which he was under indictment. In *State v. Coxe*, 16 N.C. App. 301, 191 S.E. 2d 923, *cert. denied*, 282 N.C. 427 (1972), the superior court was affirmed in sustaining an objection to a question of a witness as to what indictment was then against him. The court in that case treated the question as one for impeaching the witness. It did not consider it as one to show bias of the witness in that he might be led to testify for the State in the hope of reward. For further cases and discussion, *see* 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 45, p. 123.

We hold that the question asked the witness in this case and the answer which would have been elicited could show bias on the part of the witness in that he could be testifying in order to receive a lighter sentence in the case in which he was indicted. It was prejudicial error to exclude this answer. We do not discuss the defendant's other assignments of error as the questions raised by them might not arise on a new trial.

New trial.

Judges CLARK and MITCHELL concur.

STATE OF NORTH CAROLINA v. RONALD LEE MAYO

No. 7812SC997

(Filed 3 April 1979)

Constitutional Law § 30— discovery order—refusal to prohibit evidence not disclosed

Where it became evident at trial that the State had not complied with a discovery order by failing to advise defendant of tests performed on the alleged murder weapon, it was not error for the trial court to declare a recess and give defendant's attorney an opportunity to question the witness rather than to prohibit the State from introducing the evidence not disclosed. G.S. 15A-910.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 17 August 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 February 1979.

The defendant was indicted for murder. The evidence for the State and the defendant was to the effect that defendant shot his wife three times with a .32 caliber pistol. The defendant contended it was an accident. The defendant made a request for voluntary discovery in March 1978 which was complied with by the State at that time. On 31 March the State requested reciprocal discovery of the defendant. The defendant complied with the State's request, including furnishing the State with the results of tests performed on the alleged murder weapon by an expert. The defendant's expert witness testified at the trial that in his opinion the gun could have discharged three times by accident. After the defendant had rested his case, the State called in rebuttal a witness to testify as to certain tests he had made on the pistol. These tests showed the pistol would not fire accidentally as contended by the defendant. It was then revealed to the defendant for the first time that the State had an expert perform tests on the pistol a few days before the trial. The defendant objected to the admission of the testimony. The court then took a 45-minute recess and allowed the defendant's attorney to examine the witness in private. After this examination, the court made the following inquiry of the defendant's attorney:

> "COURT: All right. Given the limitation of the witness testifying this morning, do you feel that the time that you had with the witness was adequate?

MR. GEIMER: Yes."

The defendant objected to any testimony by the State's expert witness as to the results of his tests with the pistol. The court allowed this testimony over the objection of the defendant.

The defendant was convicted of involuntary manslaughter.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Assistant Public Defenders Gregory A. Weeks and John Britt for defendant appellant.

WEBB, Judge.

The defendant's one assignment of error is to the court's allowing the State's witness to testify as to the results of his tests with the pistol. The defendant contends the State did not comply with the rules as to discovery and this testimony should have been excluded. The statute governing the options of a trial court when a party does not comply with the discovery procedure is G.S. 15A-910 which says:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (4) Enter other appropriate orders.

When it became evident to the trial court that the State had not complied with the rule as to discovery, it had the power to do one of the above four things. The defendant argues the court erred in not using the third sanction, that is, to have excluded the evidence. We cannot hold it was error not to use any one of the sanctions available to the court. This statute has been before the appellate courts in several cases. *See State v. Hill*, 294 N.C. 320,

240 S.E. 2d 794 (1978); *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977); *State v. Kessack*, 32 N.C. App. 536, 232 S.E. 2d 859 (1977) and *State v. Morrow*, 31 N.C. App. 654, 230 S.E. 2d 568 (1976). In each of these cases, the Court affirmed the trial court in admitting the evidence and said it had not abused its discretion in doing so. In this case, the appellant contends that the State has acted in bad faith by not disclosing the evidence which it had for several days before the trial. The appellant argues that for this reason, we should hold it was an abuse of discretion for the court not to exclude the evidence. When the question was raised in the trial court, it was in the discretion of the trial judge as to which, if any, of the alternatives provided in the statute he would use. He determined that he would declare a recess and give the defendant's attorney an opportunity to question the witness. This was one of the options given the court under section 2 of G.S. 15A-910 and we hold it was not error for the court to use this provision of the statute rather than section 3.

No error.

Judges PARKER and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 APRIL 1979

CAROLINA BUILDERS CORP. v. CLAYTON No. 7818DC486	Guilford (76CVD4994)	Affirmed
COX v. MAXWELL No. 7811DC527	Lee (77CVD0268)	Affirmed
DAVIS v. WILSON No. 7821SC448	Forsyth (76CVS1493)	No Error
KROON v. DEPT. OF TRANSPORTATION No. 7810IC545	Indust. Comm. (TA-5706)	Affirmed
PAUL v. MARTIN No. 7826SC465	Mecklenburg (77CVS3133)	Affirmed
SAWYER v. COX No. 7817SC170	Stokes (76SP105)	Affirmed
SCOTT DRUG CO. v. R.E.L., INC. No. 7826SC91	Mecklenburg (76CVS2318)	Reversed and Remanded
SIMPSON v. McMAHON No. 7810SC536	Wake (77CVS5166)	Affirmed
STATE v. BROOKS No. 7823SC1060	Wilkes (78CR2252)	No Error
STATE v. BUCKNER No. 785SC1091	New Hanover (77CRS8978) (77CRS8977)	No Error Vacated
STATE v. CHAPMAN No. 783SC1076	Craven (78CRS1806)	No Error
STATE v. DAYBERRY No. 7829SC1119	Rutherford (77CR3191)	Review Denied
STATE v. HENLEY No. 7826SC920	Mecklenburg (77CR47768) (77CR47769) (77CR47770)	No Error
STATE v. REEP No. 7825SC1158	Catawba (78CRS4801)	No Error
STATE v. SCOTT No. 7823SC1048	Wilkes (78CRS3066)	No Error
STATE v. SIFFORD No. 7819SC1078	Rowan (78CRS4636) (77CRS13031)	No Error
STATE v. SPENCER No. 7826SC1127	Mecklenburg (77CRS69638)	No Error

CLEVELAND ALLEN PARTIN v. CAROLINA POWER AND LIGHT COMPANY

No. 7810SC419

(Filed 17 April 1979)

1. **Electricity § 7.1; Negligence § 29.1— exposed high voltage wires—sufficiency of evidence of negligence**

In an action to recover for personal injuries sustained as a result of an electrical charge from defendant's high voltage line while plaintiff was on or near the roof decking of his restaurant building then in the process of construction, evidence of defendant's negligence was sufficient to withstand its motion for directed verdict where such evidence tended to show that the high voltage exposed wires were sagging; plaintiff notified defendant first in August 1968 and several times thereafter before the date of injury on 29 March 1969 that he was constructing a building near the line; and defendant had promised when first notified and several times thereafter to move the power line but failed to do so.

2. **Electricity § 9; Negligence § 10.1— son's touching of wire—father's attempted rescue—son's conduct not intervening negligence**

Where plaintiff's son, who was on the roof decking of plaintiff's restaurant, touched defendant's high voltage wire with a metal rod, and plaintiff was severely burned when he came in contact with the roof decking while going to the aid of his son, the evidence did not disclose as a matter of law that the conduct of the son in touching the line intervened to insulate the negligence of defendant.

3. **Negligence §§ 17, 19; Electricity § 8— electrocution of son—rescue—no agency—no contributory negligence as matter of law**

Where plaintiff was severely burned when he came into contact with the roof decking of his restaurant while going to the aid of his son who, while working on the roof decking, had touched defendant's high voltage wire with a metal rod, the rescue doctrine was applicable to negate contributory negligence by plaintiff as a matter of law in attempting to rescue his son; moreover, the evidence did not disclose as a matter of law the agency of the son so that his negligence would be imputed to plaintiff, nor did the evidence disclose negligence by the son as a matter of law.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 10 October 1977, and order denying plaintiff's motion to set aside the judgment entered 6 December 1977, in Superior Court, WAKE County. Heard in the Court of Appeals 26 February 1979.

Plaintiff seeks to recover for personal injuries sustained on 29 March 1969, as a result of an electrical charge from defendant's high voltage line while on or near the roof decking of his restaurant building then in the process of construction.

The evidence for plaintiff tended to show that his son, Ben Partin, a college student, came to the building site on this Saturday morning to "help out" by doing odd jobs, as he had done on several occasions before. He went to the roof and began placing metal reinforcing rods in the wall cavity. He picked up a rod about 30 feet long, lifted it over his head, lost his balance, tilted backward, and the rod struck defendant's electric wire carrying 7200 volts. He screamed and fell to the roof decking. Plaintiff, on the ground below, saw his son fall and heard him scream. He climbed up the steel pipe scaffold and came in contact with the metal roof decking which was energized by electricity from defendant's wire down the reinforcing rod. Both of plaintiff's arms were severely burned and had to be amputated six inches below the shoulders.

In August 1968 plaintiff advised defendant of his plan to construct a restaurant on his property, and defendant promised to move the line. Plaintiff immediately began construction. He thereafter requested defendant weekly to move the line and defendant promised but failed to do so. The electric wires were sagging to within a few feet over the roof deck of the building.

At the close of plaintiff's evidence, defendant moved for a directed verdict. In allowing the motion Judge Herring stated that plaintiff's son, Ben Partin, was contributorily negligent as a matter of law and that Ben Partin's negligence was imputed to plaintiff. Plaintiff appealed. Plaintiff withdrew the appeal and moved to set aside the judgment under G.S. 1A-1, Rule 59. The motion was denied. Plaintiff, at the hearing, appealed from the judgment and the order as provided by G.S. 1-279.

James B. Maxwell; Vann & Vann by Arthur Vann for plaintiff appellant.

Manning, Fulton & Skinner by Howard E. Manning and John B. McMillan; and Fred D. Poisson, Attorney for Carolina Power & Light Company, for defendant appellee.

CLARK, Judge.

The defendant's motion for directed verdict under G.S. 1A-1, Rule 50, raises the question of whether plaintiff's evidence was sufficient to go to the jury. The appeal from the granting of de-

fendant's motion by the trial court presents for determination the issue of whether plaintiff's evidence was sufficient on the issue of defendant's negligence, and, if so, whether plaintiff's evidence established his contributory negligence as a matter of law.

I. NEGLIGENCE OF DEFENDANT

It has been established as a general principle of law that one who maintains a high voltage electric line at places where people may be reasonably expected to go for work, business or pleasure has the duty to guard against contact by insulating the wires or removing them to a place where human beings will not likely come in contact with them. *Williams v. Carolina Power and Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *Philyaw v. Kinston*, 246 N.C. 534, 98 S.E. 2d 791 (1957); *Ellis v. Carolina Power and Light Co.*, 193 N.C. 357, 137 S.E. 163 (1927); *Graham v. Sandhill Power Co.*, 189 N.C. 381, 127 S.E. 429 (1925); *Haynes v. Raleigh Gas Co.*, 114 N.C. 203, 19 S.E. 344 (1894); *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied* 289 N.C. 296, 222 S.E. 2d 695 (1976); *see Davis v. Carolina Power and Light Co.*, 238 N.C. 106, 76 S.E. 2d 378 (1953); 29 C.J.S. Electricity § 42 (1965).

Where the high voltage line is located in a place of reasonable safety, a place where contact with them by human beings might not ordinarily be anticipated, the electric company is not negligent if there is contact and injury in the absence of adequate notice that such contact is likely. In *Philyaw v. Kinston, supra*, the judgment of nonsuit was affirmed because the evidence was insufficient to charge the defendant with notice that someone might erect a building under and up to its transmission lines. In *Davis v. Carolina Power and Light Co., supra*, judgment of nonsuit was affirmed because defendant had no notice that plaintiff's intestate was moving his house under its line.

[1] In the case *sub judice*, the plaintiff offered evidence that the high voltage, exposed wires were sagging, that plaintiff notified defendant first in August 1968, and several times thereafter before the date of injury on 29 March 1969, that he was constructing a building near the line, and that defendant had promised when first notified and several times thereafter to move the power line but failed to do so. We conclude that there was sufficient evidence of negligence to withstand the directed verdict motion.

[2] Whether defendant's negligence was a proximate cause of plaintiff's injury poses a more difficult problem. The defendant contends that the intervening conduct of plaintiff's son, Ben Partin, was not foreseeable and this insulated the primary negligence of the defendant.

It is not required that the defendant foresee the precise injury, (*Hart v. Curry*, 238 N.C. 448, 78 S.E. 2d 170 (1953)); the particular consequences it produces, (*Green v. Isenhour Brick & Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538 (1965)); nor the exact manner in which it occurs, (*Taney v. Brown*, 262 N.C. 438, 137 S.E. 2d 827 (1964)). All that is required is that defendant "in, the exercise of the reasonable care of an ordinarily prudent person, should have foreseen that some injury would result from her negligence, or that consequences of a generally injurious nature should have been expected . . . ." *Hamilton v. McCash*, 257 N.C. 611, 618-619, 127 S.E. 2d 214, 219 (1962).

> "Although earlier decisions of the North Carolina Supreme Court indicated that intervening acts had to be gross and palpable to relieve a defendant of liability, it now seems well-settled that foreseeability is the principle applied by the court to determine the extent of defendant's liability in these cases as well as in cases in which no intervening cause is involved. Defendant must take into account matters within the realm of common knowledge and is to be held liable when the intervening cause is a part of the risk he has created."

Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C.L. Rev. 951, 966 (1973).

The cases in North Carolina do not support the broad generality that misconduct of others is unforeseeable. *See Rowe v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474 (1959), (unforeseeable that negligent driver will collide with defendant's car negligently parked on the highway); *Alford v. Washington*, 238 N.C. 694, 78 S.E. 2d 915 (1953), (unforeseeable that negligent motorist will collide with pole and cause uninsulated wires to fall). The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates, or even if it arises independently of defendant's action, may be one against which he is under a duty to safeguard. *Benton v. North Carolina Public-Service Corp.*, 165

N.C. 354, 81 S.E. 448 (1914), (twelve-year-old climbed tree in populous residential area and came into contact with defendant's uninsulated electric wires). In *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1965), the defendant drove his vehicle into a garage to get the turn signal repaired. He left the motor running, the gear lever on "drive," and set the brake. The garage mechanic, Buchanan, lay on the floor under the steering column and depressed the accelerator, causing the car to leap forward and strike plaintiff. Sharp, J., (now Chief Justice), for the Court, stated:

> "In this case defendant's primary negligence depends upon whether *he should reasonably have foreseen and expected that Buchanan might depress the accelerator*, thereby causing the car to leap forward with resulting injury to plaintiff or others. If he is negligent, it is because he should have reasonably foreseen this development and guarded against it. And, under the test, *supra*, if it was thus foreseeable it could not afford him insulation. It is entirely possible that defendant and Buchanan might be joint tort-feasors, but it is not possible under the facts of this case that Buchanan's alleged negligence could insulate defendant's conduct."

Id. at 211, 146 S.E. 2d at 28-29.

The foreseeability limitation has been extended to hold the wrongdoer liable to a third party who is injured while attempting to aid the person endangered by his negligence. The "rescue doctrine" is stated and explained subsequently in dealing with the contributory negligence issue, but the doctrine is relevant on the proximate cause question because the doctrine has stretched the foreseeability limitation to hold the defendant liable to the plaintiff who is injured while attempting to aid the person endangered by his own negligence, even though the negligent party placed himself in a position of peril. *Britt v. Mangum*, 261 N.C. 250, 134 S.E. 2d 235 (1964); *Norris v. Atlantic Coast Line R.R.*, 152 N.C. 505, 67 S.E. 1017 (1910).

Applying these principles of the law of proximate cause to the case *sub judice*, we find that there was sufficient evidence of proximate cause to withstand the directed verdict motion because it did not establish as a matter of law that the conduct of Ben Partin in contacting defendant's electric line intervened to in-

sulate the negligence of the defendant. Further, if on retrial, the evidence is substantially the same, the jury should be instructed that the negligence of the defendant did not have to be the sole proximate cause; that if the conduct of Ben Partin in contacting the wire with the metal rod, though he was negligent in so doing, was also a proximate cause which concurred with the negligence of defendant to produce the injury to plaintiff, then the negligence of defendant would not be insulated by such conduct on the part of Ben Partin.

On retrial the trial judge for the purpose of clarity may find it desirable to separate the usual actionable negligence first issue into two issues: first, negligence of the defendant, and second, proximate cause.

II. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF

[3] In determining whether the trial court erred in granting defendant's motion for directed verdict, we must decide whether the evidence established as a matter of law (1) plaintiff's own primary negligence, (2) whether Ben Partin was an agent of plaintiff, and, if so, (3) the negligence of plaintiff's son, Ben Partin.

Relevant to the first two of these questions is the "rescue doctrine" which has been established in North Carolina. *See Britt v. Mangum, supra; Bumgarner v. Southern Ry.*, 247 N.C. 374, 100 S.E. 2d 830 (1957); *Norris v. Atlantic Coast Line R.R., supra.* Under this doctrine, one who sees a person in imminent peril through the negligence of another cannot be charged with contributory negligence as a matter of law in risking his own life, or serious injury, in attempting to effect a rescue, provided the attempt is not recklessly or rashly made. The doctrine does not apply where the rescuer has himself brought about the danger. *See* Annot., 19 A.L.R. 4 (1922).

1. Plaintiff's Primary Negligence

It appears that the rescue doctrine applies in this case, which would negate contributory negligence by plaintiff as a matter of law in attempting to rescue his son, provided that his negligence preceding the rescue attempt did not bring about the danger. Defendant makes the argument that plaintiff was negligent in continuing construction under the exposed electric line, in failing to

warn his son of the danger, and in permitting him to handle lengthy metal rods near the high voltage wires. The evidence of such negligence, however, does not establish contributory negligence as a matter of law by plaintiff and thus does not establish as a matter of law that the rescue doctrine is inapplicable.

We find that the evidence of contributory negligence by plaintiff, either during or preceding the rescue attempt, was not sufficient to constitute contributory negligence as a matter of law and, therefore, not sufficient to support the directed verdict.

2. Agency

We now turn to the question of whether the negligence of Ben Partin as agent is imputed to the plaintiff, and for the purpose of this discussion only, we assume negligence by Ben Partin. The rescue doctrine is based on the policy that the law has a high regard for human life and will not impute negligence in an effort to preserve it. *Norris v. Atlantic Coast Line R.R., supra.* By the weight of authority, in case of an injury in attempting to rescue another, the antecedent negligence of the person rescued is not imputable to the rescuer. Annot., 5 A.L.R. 206 (1920). The foregoing annotation cites the *Norris* case, *supra,* in support of this principle of law because the court stated the following: "[N]or should contributory negligence on the part of the imperiled person be allowed, as a rule, to affect the question." *Norris v. Atlantic Coast Line R.R.*, at 513, 67 S.E. at 1021. It noted, however, that in *Norris* the imperiled person was a companion of plaintiff, and the evidence did not disclose any agency relationship. The other cases referred to in the foregoing annotation do not involve a master-servant or other agency relationship between the imperiled person and the rescuer at the time of the rescue attempt.

The rescue doctrine is not extended to protect the master in his rescue attempt from the negligence of his imperiled servant, and the negligence of the servant is imputed to the master. *See* 65A C.J.S. Negligence § 166 (1966).

On the agency question, plaintiff contends that it was for the jury, and defendant contends that the evidence established agency or joint venture as a matter of law. Briefly stated, the evidence on the agency issue tended to show that plaintiff and his

wife owned the property on which the restaurant was being built. Plaintiff kept the books and paid the construction workers. Plaintiff's elder son, Elbert Partin, worked on the project and ordered some of the materials. On 29 March 1969, the day of the injury, Ben Partin was 21 years of age. He was a pharmacy student. On that day, a Saturday, he went to the site to "help out." He had helped several times before, but never a full day and his total time on the job did not exceed eight hours. Plaintiff had not asked him to work. He took Elbert's position on the roof decking when Elbert left to get breakfast. Neither Elbert nor plaintiff told him how to put the support rods in the wall cavity. Plaintiff was at the site but on the ground. Ben was not paid for his work on the day in question or any other time.

Mere relationship or family ties, unaccompanied by any other facts or circumstances, will not justify an inference of agency, but such relationship is entitled to great weight, when considered with other circumstances, as tending to establish agency. *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E. 2d 222 (1968); 2A C.J.S. Agency § 53 (1972). The test is the right of one person, the principal, to control the conduct of another, the agent, or the actual exercise of such control. 8 Strong's N.C. Index 3d Master and Servant § 3; 65A C.J.S. Negligence § 160 (1966). *See Reaves v. Catawba Manufacturing and Electric Power Co.*, 206 N.C. 523, 174 S.E. 413 (1934).

It is proper to submit the question of agency to the jury where there is evidence tending to prove it, even though the evidence is undisputed, and reasonable men may differ in the inferences to be drawn therefrom. The question is for the court to determine as a matter of law if only one conclusion can be drawn from the facts in the case. *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); 3 C.J.S. Agency § 547 (1973). Counsel for plaintiff and counsel for defendant differ in the inferences to be drawn from the evidence. We conclude that counsel are reasonable men and that the evidence was not sufficient to establish agency as a matter of law.

We further find that there was not sufficient evidence of a joint venture between plaintiff and his son, Ben. In a joint venture the parties combine their property, money, skill or knowl-

edge in some undertaking. *See Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968).

3. Negligence of Ben Partin

While it is not negligence *per se* to work near a high voltage line, a person working near the line must exercise reasonable care to avoid coming into contact with it. An ordinary person is held to know the danger attending contact with electric wires, and if he heedlessly brings himself in contact with them, he is contributorily negligent. In *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966), plaintiff's intestate was delivering feed into a storage tank, which he had been servicing several times a week for six months, and was killed when he raised the blower pipe three feet above the top of the tank and contacted the line, though it was not necessary to raise the blower pipe more than three or four inches above the top of the tank. It was held that the intestate was contributorily negligent as a matter of law. For other cases in which it was held the evidence established contributory negligence as a matter of law, *see Gibbs v. Carolina Power and Light Co.*, 268 N.C. 186, 150 S.E. 2d 207 (1966); *Baker v. Lumberton*, 239 N.C. 401, 79 S.E. 2d 886 (1954); *Deaton v. Board of Trustees of Elon College*, 226 N.C. 433, 38 S.E. 2d 561 (1946); *King v. Manetta Mills Co.*, 210 N.C. 204, 185 S.E. 647 (1936); *Stanley v. Tidewater Power Co.*, 209 N.C. 829, 185 S.E. 5 (1936); *Rushing v. Southern Public Utilities Co.*, 203 N.C. 434, 166 S.E. 300 (1932); *Bogle v. Power Co.*, *supra*; *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied* 292 N.C. 265, 233 S.E. 2d 392 (1977).

Other North Carolina cases have held that the evidence was not sufficient to establish contributory negligence as a matter of law. In *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973), plaintiff's intestate was electrocuted when a crane cable came in contact with a power line, and the evidence tended to show that deceased had been given only general warnings of the danger of working near power lines, his place of duty was under the power line, and twelve sections of pipe had already been removed from under the lines with no incident suggestive of danger. In *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966), plaintiff was on a ladder assisting in

placing a steel joist on the roof of a building under construction when the end of the joist contacted the line which was located about seven or eight feet over the wall. In *Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220 (1951), the electric line was four feet above a tramway being constructed over a street with the knowledge and permission of the defendant, and plaintiff's intestate was electrocuted when a strip of metal he was using to cap the top of the roof came into contact with the wires. But the holding in *Essick* was disapproved by the Supreme Court in *Floyd v. Nash, supra.* In *Williams v. Carolina Power and Light Co., supra*, plaintiff had repaired a house gutter and was injured when the ladder, balanced straight up in the air ready to be "walked down" came in contact with electrical wires running near the roof of the house. The court stated:

> "Furthermore, there is an inference raised by this plaintiff's evidence that the ladder hit the wires due to an unavoidable accident. . . .
>
> Plaintiff testified through his deposition that the land behind Mr. Tucker's house was sloping. The plaintiff, his assistant and Mr. Tucker were all balancing the ladder away from the house when Mr. Tucker was called away to answer a telephone call.
>
> Defendant presented evidence to the contrary. Thus, a question of fact is raised which must be resolved by the jury. . . ."

296 N.C. at 404-405, 250 S.E. 2d at 258-259.

Further, in *Williams*, the court noted that *Floyd v. Nash, supra*, was not controlling because in *Williams* "there was . . . evidence of due care taken by plaintiff's intestate to avoid the wires." *Id.*

Between those cases holding contributory negligence as a matter of law and those cases holding the evidence was for the jury, the line is thin and at some places obscure or nebulous.

Whether a particular case is placed on one or the other side of this line is dependent upon all the circumstances of the case. The knowledge and experience of the injured party, the nature of his work, and the need for working in the vicinity of the line, whether the contact with the wires was the result of an inadvertent slip or other unexpected mishap, are factors which the appellate courts have considered as relevant and material in determining whether the worker was or was not guilty of contributory negligence as a matter of law. The *Bowen* and *Williams* cases, *supra*, are indicative of a trend by the Supreme Court of North Carolina to place on the defendant a heavier burden in establishing contributory negligence as a matter of law in cases of this kind. In light of this trend it may be advisable for the trial court, in such cases where the line is not clear, to reserve its ruling on a motion for directed verdict until the jury has returned a verdict and then allow or deny a motion for a judgment notwithstanding that verdict under Rule 50(b), which on appeal may obviate the need for a new trial if the appellate court reverses the judgment notwithstanding the verdict.

Applying these principles of law to the evidence in the case *sub judice*, we conclude that the evidence was not sufficient to establish negligence as a matter of law on the part of Ben Partin, that the trial court erred in allowing the directed verdict for defendant, and that we must vacate the judgment directing a verdict and order a retrial.

On retrial the trial court will be required to instruct the jury on many principles of law and to apply the law to the evidence. In doing so the trial judge may find it desirable for clarity to submit, rather than the usual three issues commonly used in personal injury cases, the following issues:

1. Was plaintiff injured by the negligence of the defendant?

2. Was the negligence of the defendant a proximate cause of the injury to the plaintiff?

3. Did plaintiff by his own negligence contribute to his injury?

4. Was Ben Partin the agent of the plaintiff?

5. Did Ben Partin by his negligence contribute to the injury of the plaintiff?

6. What amount, if any, is plaintiff entitled to recover for his personal injuries?

The judgment directing verdict for defendant is vacated and this cause is remanded for a

New trial.

Chief Judge MORRIS and Judge ARNOLD concur.

JAMES N. KINLAW v. LONG MFG. N. C., INC.

No. 7813SC629

(Filed 17 April 1979)

Sales § 8; Uniform Commercial Code § 11 — breach of express warranty — privity of contract required

Plaintiff's complaint stated no claim for relief against defendant manufacturer for breach of an express warranty of a tractor purchased by plaintiff from defendant's authorized dealer since there was no privity of contract between plaintiff purchaser and defendant manufacturer, and only a person in privity with the warrantor may recover on a warranty for mechanical devices.

Judge PARKER dissenting.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 14 March 1978 in Superior Court, BLADEN County. Heard in the Court of Appeals 29 March 1979.

This is a civil action for an alleged breach of an express warranty. Plaintiff alleged that he purchased a new "Long 900" tractor and attachments from an authorized dealer of defendant-manufacturer. The "Owners Manual" delivered with the tractor contained the following language: "[E]ach new farm or agricultural tractor sold by it [the defendant] and its authorized dealers will be free from defects in material and workmanship under normal use and service for a period of one year or one thousand (1,000) hours of operation; whichever occurs first from date of purchase . . . ."

Plaintiff alleged that immediately after delivery of the tractor, and upon being put to farm use by him, the tractor began "breaking down and giving trouble." He alleged several defective, inoperative and missing parts. The tractor was taken to the dealer for service "repeatedly" and various parts were returned to defendant for repair or replacement within the warranty period. All such efforts were unsuccessful in placing the tractor in "first class working order."

Plaintiff alleged that the tractor has been and is useless and that he lost a portion of his crops as a result of the breach of warranty. He further alleged that he made numerous demands on defendant and the dealer to correct the defective conditions and to perform defendant's duties as set out in the warranty, all to no avail.

Defendant timely filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12 "for failure to state a claim upon which relief can be granted in that the plaintiff alleges the breach of an express warranty by the defendant in the sale of a Long 900 tractor . . . and fails to allege facts to establish privity of contract between the plaintiff and the defendant manufacturer." The parties waived presentation of evidence and the trial court, after reviewing the pleadings and hearing arguments of counsel, allowed the motion. Plaintiff appeals.

R. C. Soles, Jr., for plaintiff appellant.

Hester, Hester and Johnson, by Worth H. Hester and Biggs, Meadows, Batts, Etheridge and Winberry, by William D. Etheridge and Auley M. Crouch III, for defendant appellee.

CARLTON, Judge.

The sole question prsented by this appeal is whether the trial court properly allowed the motion to dismiss under G.S. 1A-1, Rule 12(b)(6) for failure of the complaint to state a claim upon which relief can be granted. We agree with the trial court's ruling.

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 12, p. 294. A complaint may be dismissed on motion filed under

Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

We now turn to the question of whether the complaint states a claim upon which relief can be granted for alleged breach of an express warranty in a situation where no privity exists between plaintiff-purchaser and defendant-manufacturer. We do not have before us the question of whether there was privity between plaintiff and defendant; the parties stipulated that no privity existed. All transactions leading to the purchase took place between plaintiff and defendant's authorized dealer.

The well-established rule in North Carolina requiring privity in breach of warranty actions is periodically assailed and is often a subject of serious debate. Unquestionably, it is a rule which should stand reexamination in light of modern merchandising techniques. However, we cannot do what plaintiff, by this appeal, requests of us; it is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court. The North Carolina rule was stated by Justice Moore in *Perfecting Service Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 668, 136 S.E. 2d 56, 62 (1964):

> A warranty is an element in a contract of sale and, whether express or implied, is contractual in nature. Only a person in privity with the warrantor may recover on the warranty; the warranty extends only to parties to the contract of sale. *Murray v. Aircraft Corp.*, 259 N.C. 638, 131 S.E. 2d 367; *Prince v. Smith*, 254 N.C. 768, 119 S.E. 2d 923; *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21. A manufacturer is not liable to an ultimate consumer or subvendee upon a warranty of quality or merchantability of goods which the ultimate consumer or subvendee has purchased from a retailer or dealer to whom the manufacturer has sold, for there is no contractual relation between the manufacturer and such consumer or subvendee. *Rabb v. Covington*, 215

N.C. 572, 2 S.E. 2d 705; *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30. There is an exception to this rule where the warranty is addressed to the ultimate consumer, and this exception has been limited to cases involving sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon. *Simpson v. Oil Company*, 217 N.C. 542, 8 S.E. 2d 813.

Plaintiff contends that if the express warranty is directed to the ultimate consumer it runs with the product to the consumer, and therefore falls within an exception to the general rule and privity is not required. He relies primarily on the Court's language in *Simpson v. Oil Company, supra.*

The language of several decisions does seem to lay the basis for further erosion of the privity requirement. Some believe the requirement should be eliminated completely. "If any court wishes to drop the requirement of privity, there is now ample and respectable authority to justify its decision to the legal world." Spruill, Privity of Contract As a Prerequisite for Recovery on Warranty, 19 N.C.L.R. 551, 565 (1941). *See generally* the concurring opinion of Justice (now Chief Justice) Sharp in *Terry v. Double Cola Bottling Company*, 263 N.C. 1, 138 S.E. 2d 753 (1964) for a thorough survey of the law in other jurisdictions. Indeed, our Supreme Court has eliminated the privity requirement in tort actions for *negligence* against a manufacturer. *Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967).

We cannot, however, find a total abandonment of the rule in situations similar to the one at bar. Nor do we believe that *Simpson* creates such an exception. The Supreme Court clearly considered the *Simpson* rule to be limited to cases involving sales of goods intended for human consumption, as indicated in the language quoted above from *Perfecting Service Co. v. Product Dev. & Sales Co., supra. See also Terry v. Double Cola Bottling Company, supra; Byrd v. Star Rubber Company*, 11 N.C. App. 297, 181 S.E. 2d 227 (1971); *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E. 2d 534 (1976). Professor Hodge wrote, "In short, this case seems to stand for the proposition that any relaxation of the privity requirement in warranty cases can apply only in isolated sales of articles for human consumption." Hodge,

"Products Liability: The State of the Law in North Carolina." 8 W.F.L. Rev. 481, 489 (1972).

Whether the rationale for abandoning the requirement in negligence actions applies with equal force to breach of warranty actions is not for us to say. There are obvious and valid distinctions between goods intended for human consumption and defective mechanical products. In the former, the item is usually consumed very soon after being removed from a sealed container. There is little, if any, opportunity for anyone to alter the contents between the time the product leaves the manufacturer and reaches the ultimate consumer. Mechanical gadgets, however, are normally used over a considerable period of time and are more subject to misuse by intermediate and ultimate handlers. *See* Green, "Should the Manufacturer of General Products be Liable Without Negligence?", 24 Tenn. L. Rev. 928 (1957). On the other hand, modern advertising techniques by manufacturers are obviously designed to reach the ultimate consumer. But these are considerations for another day. For now, our law requires that only a person in privity with the warrantor may recover on the warranty for mechanical devices. For that reason the order of the trial court is

Affirmed.

Judge HEDRICK concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

Plaintiff purchased from one of defendant's authorized dealers a new "Long 900" farm tractor manufactured by defendant. He alleges that he paid $15,970.26 for the tractor with certain accessory equipment and that, because of defective and missing parts, the tractor "for all practical purposes was, has been, and still is worthless and useless." He brings this action against the manufacturer to recover damages for breach of an express written warranty of the tractor. The trial court allowed defendant's Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that the plaintiff "fails to allege facts to establish privity of contract be-

tween the plaintiff and the defendant manufacturer." The majority opinion affirms the dismissal on the same grounds. Because I think the result comports neither with reason nor controlling authority, I dissent.

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears to a certainty that plaintiff is entitled to no relief upon any state of facts which could be proved in support of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). No such certainty appears in the present case. On the contrary, it appears to me that if plaintiff proves his allegations as to the defective condition of the tractor, he may be entitled to recover damages from the defendant for breach of its express written promissory warranty. In my view this would result simply from application of traditional notions of contract law without the necessity of making any further assault upon the crumbling citadel of privity. *See* concurring opinion by Sharp, J. (now C.J.) in *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964).

A copy of the written warranty upon which plaintiff sues was attached as an exhibit to plaintiff's complaint. In its answer defendant admitted that "the printed document marked Exhibit A and attached to the Complaint as amended, is the Long Mfg. N.C., Inc. warranty, applicable to Model 900 tractors manufactured by the defendant Long." The printed warranty is as follows:

LONG MFG. N. C. INC. TRACTOR WARRANTY

> Long Mfg. N.C. Inc., warrants that (except as set forth in the third paragraph) each new farm or agricultural tractor sold by it and its authorized dealers will be free from defects in material and workmanship under normal use and service for a period of one year or one-thousand (1,000) hours of operation, whichever occurs first from date of purchase. Long's obligation under this warranty is limited to repairing or replacing at its option in an authorized Long Tractor Dealer's place of business any part or parts that, which within the applicable period previously stated, are returned to its factory in Tarboro, North Carolina, or one of its distributing branches in Tifton, Georgia; Carrollton, Texas; Memphis, Tennessee, or Davenport, Iowa, with transportation charges prepaid. Long's examination must show that the

returned part or parts to have been defective at time of manufacture. Replacements made pursuant to this warranty shall be warranted only for the remainder of the period applicable to the tractor.

The warranty becomes effective upon receipt by Long Mfg. N.C. Inc. of a properly completed Pre-Delivery Inspection Report. Continued warranty is dependent upon the receipt by Long of properly completed Warranty Continuation cards at the times specified on the card. It is the Owner's responsibility to notify his Long Dealer when these mandatory inspections are due and can be performed.

Long makes no warranty with respect to tires, tubes or batteries since such products are warranted separately by the respective manufacturers. This warranty shall not apply to any tractor or part that has been repaired or altered outside of Long's factory or an authorized dealer's shop.

This warranty does not apply if said equipment has been subjected to misuse, negligence on the part of the owner or operator, or accident. This warranty does not extend to expendable items that within normal usage may be replaced within the warranty period including such items as air filters, engine and hydraulic oil, oil filters and light blubs. (sic). The warranty does not cover normal maintenance, services such as engine tune-up, cleaning or minor adjustments.

No other warranty whether of merchantability, fitness or otherwise, expressed or implied, in fact or by law, is given by Long with respect to any new tractor or part and no other or further obligation or liability shall be incurred by Long by reason of the manufacture or sale of any new tractor or part whether for breach of any warranty, negligence of manufacture or otherwise.

* IMPORTANT *

The obligations of Long set forth in the first paragraph above shall be the exclusive remedy for any breach of warranty hereunder. In no event shall Long be liable for any general, consequential, or incidental damages including, without limitations, any damages for loss of use or loss of profits.

No distributor, dealer, agent or employee of Long is authorized to extend any other or further warranty or incur any additional obligation on Long's behalf in connection with the sale of its products.

Long reserves the right to make changes in its products at any time and without prior notice. When such changes are made, neither Long nor its Dealers assume any obligation to change, modify or update products previously manufactured.

That defendant's written warranty was directed to the ultimate purchaser seems obvious from its language, for only the ultimate purchaser would have occasion to subject the tractor to "normal use and service for a period of one year or one-thousand (1,000) hours of operation." The copy of the printed warranty filed with this court as an exhibit discloses that the warranty appears on the inside cover of an attractively printed booklet entitled "Owner's Manual—Long 900 Tractor." This booklet was obviously designed to provide the ultimate purchaser of the tractor with detailed information as to its proper operation, servicing, and maintenance. That the warranty occupies such a conspicuous position in the owner's manual further confirms that it was intended to be seen and relied upon by the ultimate purchaser of the tractor.

In my view the promulgation of such a warranty by the manufacturer constitutes a continuing offer addressed to anyone considering purchase of the manufacturer's product from an authorized dealer, an offer open to acceptance by completion of the purchase. When plaintiff purchased the new tractor from one of defendant's authorized dealers, he accepted defendant's outstanding offer to warranty its condition. The offer and acceptance resulted in the creation of a separate contract of warranty made directly between plaintiff and defendant, the consideration for which was plaintiff's act in purchasing the tractor, an act which obviously benefited the defendant. This is the contract which plaintiff seeks to enforce in this action, and as to this contract there is privity between plaintiff and defendant.

Courts applying traditionally accepted concepts concerning the formation of express contracts have long ago found no difficulty in enforcing the written promises of a manufacturer made to the ultimate purchaser of its product from an independent dealer.

Timberland Lumber Co. v. Climax Mfg. Co., 61 F. 2d 391 (3rd Cir. 1932); *Studebaker Corp. v. Nail*, 82 Ga. App. 779, 62 S.E. 2d 198 (1950); *see* Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. Rev. 551, 553-54 (1941). The following from the opinion in *Studebaker v. Nail, supra*, is particularly pertinent to the present case:

> In this day of progressive and highly competitive business, a warranty of his product by a manufacturer to the ultimate purchaser of his product may be intended by the manufacturer as an added inducement to the ultimate purchaser to buy the product of that manufacturer rather than that of his competitor. The consideration for such a warranty would be the purchase by the ultimate purchaser of that manufacturers product, which is in effect a direct purchase as it would have been if the purchaser had bought from an agent of the manufacturer instead of an independent dealer or contractor. There are many products sold today where the manufacturer warrants to the ultimate purchaser the virtues of his product and intends to bind himself by such warranties. See: "Business Practice Regarding Warranties in the Sale of Goods" by Bogert and Fink, 25 Ill. L. Rev. 400. Certainly it would be a great injustice to the buying public not to hold enforceable a warranty made by a manufacturer and relied upon by the purchasers. It is the ultimate purchaser that makes the manufacture of the product possible, the purchase by intermediate distributors and dealers being merely a means of distribution to the ultimate purchaser. This decision deals only with express warranties where a manufacturer expressly and directly warrants his products to the ultimate purchaser. We recognize the principle that implied warranties of law are imposed only as between parties in privity of contract but they are rules of law which the law imposes on contracting parties. Generally the law does not bridge the gap between the manufacturer and ultimate purchasers by implying warranties, but it throws up no barrier preventing a manufacturer from itself bridging the gap. There is no obstacle preventing a manufacturer from making a contract with an ultimate consumer to guarantee an article sold to the latter, directly or indirectly, if the elements of intention to contract and consideration are present, as they are in this case.

Studebaker Corp. v. Nail, 82 Ga. App. 779, 783-84, 62 S.E. 2d 198, 201-02 (1950).

Our own Supreme Court in *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813 (1940) recognized the right of an ultimate purchaser to maintain an action against the original manufacturer based on the manufacturer's express warranty of its product, even though the purchase was not made from the manufacturer but from an independent retailer. In that case plaintiff purchased from a drug company a can of insecticide which bore directions for use and a legend asserting its harmlessness to human beings. Upon use of the product, plaintiff suffered a severe skin reaction. She sued the manufacturer. In recognizing her right to maintain the suit, Seawell, J., speaking for our Supreme Court, said:

> Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer, since they are intermingled with instructions as to the use of the product; and the defendant was so anxious that they should reach the eye of the consumer that it had them printed upon the package in which the product was distributed. The assurances that the product as used in a spray was harmless to human beings while deadly to insects was an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended.

Simpson v. Oil Co., 217 N.C. 542, 546, 8 S.E. 2d 813, 815-16 (1940).

I am, of course, advertent to the language in *Service Co. v. Sales Co.*, 261 N.C. 660, 668, 136 S.E. 2d 56, 62-3 (1964):

> There is an exception to this rule [requiring privity] where the warranty is addressed to the ultimate consumer, and this exception has been limited to cases involving sales of goods, intended for human consumption, in sealed pack-

> ages prepared by the manufacturer and having labels with representations to consumers inscribed thereon.

That case, however, did not involve the situation which is presented in the present case of a continuing offer of warranty held out by the manufacturer for acceptance by those it hoped would ultimately buy its product. On the contrary, the *Service Co.* case arose out of a complex series of negotiations and renegotiations of contracts among the plaintiff manufacturer and the two defendants which ended with one of the defendants being in the position of a purchaser from the manufacturer and the other being a sub-purchaser. Moreover, the only authority cited for the proposition above quoted from the *Service Co.* case was *Simpson v. American Oil Co., supra,* which most definitely did *not* involve goods "intended for human consumption." Under the circumstances, I fail to see either such logic or precedential authority in the above quoted language from *Service Co.* as would compel dismissing plaintiff's action in the present case.

Every purchaser of a new car from an automobile dealer is, or should be, familiar with the carefully restricted printed warranty customarily issued by the manufacturer and usually contained in the "owners manual" delivered by the authorized dealer to the purchaser on completion of the purchase. Just such a warranty is involved in the present case. The very limited obligation which the manufacturer assumes, to repair or replace defective parts, may ultimately prove of small value to the purchaser. Nevertheless, it would doubtless come as an unpleasant surprise to him to be told, as the plaintiff has been told in this case, that the courts of this State will not hear him when he complains because the manufacturer refused to do even those few small things which it expressly promised him it would do. I do not believe either logic or precedent requires that the citizens of this State be treated so shabbily. Accordingly, I vote to reverse the order dismissing plaintiff's complaint.

CITY OF DURHAM, PLAINTIFF v. MARJORIE S. KEEN AND SPOUSE, THE COUNTY OF DURHAM, ORIGINAL DEFENDANTS AND ROBERT C. KNOTT AND WIFE, PATRICIA P. KNOTT, ADDITIONAL DEFENDANTS

No. 7814SC511

(Filed 17 April 1979)

1. **Taxation § 41.2— tax foreclosure sale—notice at courthouse door**

Notice of a tax foreclosure sale was posted at the courthouse door for thirty days immediately preceding the sale as required by G.S. 1-339.17(a)(1) where notice was posted on 19 September 1977 and the sale was held at 12:00 noon on 19 October 1977. G.S. 1A-1, Rule 6(a); G.S. 1-594.

2. **Taxation § 41.2— tax foreclosure sale—notice to owner**

The statute requiring that notice of a foreclosure sale be mailed to the property owner twenty days prior to the sale, G.S. 45-21.17(4), does not apply to a tax foreclosure sale.

3. **Rules of Civil Procedure § 60.2— relief from judgment—failure to show excusable neglect, equitable grounds**

The trial court properly concluded that defendant failed to show excusable neglect or sufficient equitable grounds to set aside under G.S. 1A-1, Rule 60(b)(1) and (6) a judgment affirming a tax foreclosure sale of her property where the court made findings supported by the evidence that defendant received notice of the action against her, understood the nature of the action, and did not respond until after her property had been sold.

4. **Taxation § 44.1— tax foreclosure sale—inadequacy of price—insufficient showing to set aside sale**

Defendant was not entitled to have a tax foreclosure sale set aside where she showed only inadequacy of price but failed to show any element of fraud, suppression of bidding or other unfairness in the sale.

APPEAL by defendant Marjorie S. Keen from *McKinnon, Judge.* Order entered 26 January 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals on 6 March 1979.

This is a civil action instituted on 5 March 1976 by the City of Durham to collect delinquent taxes for the years 1971 to 1975 owing on the defendant Keen's property. Plaintiff requested that the court appoint a Commissioner to sell the property. The County of Durham was named as a defendant due to its lien on the property for County ad valorem taxes. On 18 March 1976, the County of Durham filed an Answer admitting all of the allegations of the Complaint and further alleging that $1,763.10 taxes were due it for the years 1966 to 1975. The defendant Keen did not file

an Answer. On 17 August 1977 an entry of default and a default judgment was entered by the Assisant Clerk of Superior Court. The default judgment appointed William H. Holloway as Commissioner to sell the property at public auction. On 19 October 1977 a report of the sale was filed which stated that at 12:00 noon at the courthouse door in Durham County, the property was offered for sale and Robert C. Knott and Patricia P. Knott submitted the highest bid in the amount of $3,798.38. On 1 November 1977, a judgment confirming the sale was entered by the Assistant Clerk of Superior Court stating that more than ten days had elapsed since the report of the sale was filed and that no increased bids or exceptions had been filed with respect to the sale. This judgment further ordered that the Commissioner deliver to the purchasers a deed to the property. On 4 November 1977, the Commissioner filed a Final Account showing disbursements of $1,224.58 to the City of Durham for 1971-1977 city taxes. $2,417.48 to the County of Durham for 1966-1977 county taxes, $50.00 attorney's fees, and $127.97 for court costs and other expenses incurred in connection with the sale.

On 7 November 1977 the purchasers made application for an Order granting possession of the subject property, in which the purchasers stated that a Notice was sent to the defendant Keen. On 17 November 1977, an Order was entered by the Clerk of Superior Court ordering the defendant Keen and all other occupants of the subject property to surrender possession to the purchasers and further ordering the Sheriff to deliver possession of the premises to the purchasers.

On 28 November 1977, the defendant Keen, pursuant to G.S. § 1A-1, Rule 60, filed a motion to set aside the judgment confirming the sale and Order entered by the Clerk of Court. As grounds for her motion, defendant alleged that she had made arrangements with the office of the tax collector to pay the arrearages, and that she had made partial payments totalling $400.00; that the default judgment was taken without her knowledge; that upon receipt of the Notice of Sale under the default judgment, defendant contacted the tax collector's office and was informed that she could make partial payments and thus avoid the sale, and relying on this statement did not obtain legal representation until after the Order granting possession to the purchasers was entered; that the sale was improperly confirmed because the court failed to find that it was in the best interest of the property owner; and that the sale was fraudulent and im-

proper. On 29 November 1977, the purchasers filed an Answer to this motion alleging that the allegations in the motion did not set forth any legal grounds to set aside a final judgment as required by Rule 60, and that the motion was "not made in the interest of justice but for the purpose of delay."

On 19 December 1977, after a hearing, the Clerk of Superior Court entered an Order denying defendant Keen's Rule 60 motion. Defendant appealed to the Superior Court on 21 December 1977 for review of the Order. A hearing was held before Superior Court Judge Henry A. McKinnon, Jr., and on 26 January 1978, defendant's motion was denied in an Order containing the following findings and conclusions relevant to this appeal:

> 1. That this action was instituted by the City of Durham to foreclose for delinquent taxes against the property described in the Complaint owned by the defendant, Marjorie S. Keen, on March 5, 1976.
>
> 2. That a Summons was served, together with a copy of the Complaint, on the defendant, Marjorie S. Keen, on March 6, 1976.
>
> 3. That within the time provided by law the defendant, Marjorie S. Keen, failed to answer or otherwise plea and that no extension of time was granted.
>
> . . .
>
> 6. That entry of default against the defendant, Keen, was filed August 17, 1977, and a Judgment of Sale was entered directing, among other things, that the Commissioner appointed conduct a Judicial Sale of the property described in the Complaint according to law. That the defendants were not notified that the Judgment of Sale would be entered.
>
> 7. That the City of Durham mailed by registered mail, return receipt requested, a Notice of Sale to the defendant on October 13, 1977; that this was received on October 14, 1977.
>
> 8. That the Notice of Sale was first posted on the Courthouse door on September 19, 1977.
>
> 9. That the Sale was conducted on October 19, 1977 and a report was filed that the Purchasers named in the record were the last and highest bidders for the amount set forth in the record.

10. That no exceptions were filed to the report by the defendants, Keen, or anyone else and no increase bid was filed within the time provided by law.

11. That after ten days had expired from the date the sale was reported the plaintiff applied to the court that a Judgment confirming the sale be entered and same was entered on November 1, 1977.

12. That the Commissioner appointed by the court delivered a Commissioner's Deed to the Purchasers upon a receipt of the purchase price and a Final Report was filed and audited.

13. That the Purchasers applied for a Writ of Possession under the Provisions of G.S. 1-339.29(c) and that a copy of the application, Notice of Hearing, and proposed Order was served on the defendant, Marjorie S. Keen, by certified mail on November 5, 1977.

14. That a Hearing was held pursuant to the Application for Possession, on November 17, 1977 and that the defendant, Marjorie S. Keen, failed to appear nor did she file objections.

15. That the defendant attempted to engage counsel to represent her interest but was informed prior to the hearing on the Application for Writ of Possession that nothing could be done; that this information came from counsel employed by the Legal Aid Society of Durham who investigated the matter for the defendant and advised her not to appear as nothing could be done in her case; that subsequent to the hearing on the Application, the defendant engaged her current counsel of record to pursue her rights in this matter.

16. That by Order entered November 17, 1977 the defendant, Marjorie S. Keen, and all other persons occupying the premises known as 2311 Englewood Avenue were directed to surrender possession forthwith to the Purchasers and that the sheriff of Durham County was ordered to deliver possession of the premises to the Purchasers in compliance with that Order.

17. That the defendant, Keen, through her attorneys, filed the Motion to set aside the Judgment and Order on

November 28, 1977, and filed an Amendment to said Motion on December 6, 1977.

18. That evidence was presented tending to show that the house and lot were worth approximately Twenty Thousand Dollars at the time of the sale; that the plaintiff, City of Durham, had attempted in 1975 to effect a garnishment of the defendant's wages for taxes; that agents of the defendant's corporate employer had regularly received from the pay of the defendant sums of money totaling Four Hundred Dollars and attempting to transmit the said monies to the Office of the Collector of Taxes for the City of Durham; that the defendant was aware of the suit and had attempted to pay, however, no evidence was presented that tended to show that the plaintiff, City of Durham received any payments or had any record of the garnishment. Evidence was presented which tended to show that the defendant, Marjorie S. Keen was delinquent in her payment of taxes to the City of Durham and had not responded to any demands, notices or legal process prior to the application for a Writ of Possession.

19. That the defendant, Keen, testified that she was delinquent in her taxes and that she had received service of a Summons and Complaint to foreclose taxes and testified that she understood the City was attempting to foreclose her property for failure to pay taxes.

. . .

21. That evidence offered by the defendant further showed that the attorney for the Purchaser was the only bidder present at the sale of the property; that the Commissioner for the City announced the amount of taxes and expenses in advance; that one bid in the exact amount of the alleged liens and expenses was made and received.

BASED UPON THE FOREGOING FINDING OF FACT THE COURT CONCLUDED TO A MATTER OF LAW AS FOLLOWS:

. . .

2. That the defendant, Marjorie S. Keen, was personally served with Summons and a copy of the Complaint and that

she failed to answer or otherwise plea within the time provided by law therefore the court had jurisdiction of the subject matter of this action and of the person of the defendant, Marjorie S. Keen.

3. That Default was entered and a Judgment ordering sale of the property and the appointment of a Commissioner was properly entered.

4. The sale was conducted in a proper manner and reported as provided by law and that within the time provided by law the defendant, Keen, failed to file an exception to the Report of Sale and may not now, as a matter of law, object to the sale on the ground that the price was inadequate.

5. That the defendant, Keen, does not now have a legal right to redeem the property after the Judgment of Sale, Judgment of Confirmation, the purchase price paid and Deed delivered to the Purchasers; that the Purchasers were bona-fide purchasers for value who purchased without notice of any alleged irregularities in the manner in which the sale was conducted and the defendant, Keen, was not diligent in protecting her interest in her property nor has she been prejudiced by any alleged irregularities in the manner in which the sale was conducted, if any.

6. That the general allegations of fraud or suppression of bidding made by the defendant, Keen, nor the evidence offered by the said defendant supported the defendant's contentions of fraud and the court concludes as a matter of law that the sale was conducted fairly and in a proper manner, free from fraud, knowledge of fraud or suppression of bidding.

7. That the defendant, Keen's evidence fails to show that her failure to answer was through mistake, inadvertence, surprise, or excusable neglect; the Judgment has not been satisfied, released, or discharged and the said defendant is not entitled to relief on any other grounds.

8. That the Notice of Sale was posted on the 19th day of September, 1977 at the Courthouse door; that G.S. 1A-1, Rule 6(a) provides that day cannot be included in computing the amount of time required; that sale was had on October

19, 1977 which was the 30th day after posting of the Notice; that this complies with the requirements of G.S. 1-339.17(a)(1) when read with Rule 6 of the Rules of Civil Procedure and G.S. 1-594.

9. That G.S. 45-21.17(4) requiring Notice of Sale be mailed to owner twenty days prior to sale does not apply to tax foreclosure sales.

10. That the court concludes upon the facts presented that the actions of the defendant, Keen, with respect to her nonpayment of taxes and her lack of diligence in protecting her interest do not entitle her to any equitable relief from a Judgment and Order of this Court.

Defendant appeals.

Rufus C. Boutwell, Jr., for plaintiff appellee City of Durham.

Blackwell M. Brogden, Jr., and E. C. Harris, Jr., for defendant appellant Marjorie S. Keen.

C. Horton Poe, Jr., for defendant appellees Robert C. Knott and Patricia P. Knott.

No counsel for defendant appellee County of Durham.

HEDRICK, Judge.

[1, 2] Defendant first contends that the sale of the subject property is void and thus should have been set aside under Rule 60(b)(4) and (6) because the Commissioner failed to comply with the applicable statutes concerning notice of the sale. Defendant first argues that the provisions of G.S. § 1-339.17(a)(1), requiring that notice be posted at the courthouse door for thirty days immediately preceeding the sale, were not met. The record, however, discloses that notice was posted on 19 September 1977 and that the sale was held at 12:00 noon on 19 October 1977. Rule 6(a) provides in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the . . . publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included . . .

Additionally, G.S. § 1-594 provides: "The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication." *See also* G.S. § 1-593. Applying the foregoing rules to the facts in the present case, it is clear that the notice was posted for thirty days as required. Defendant next argues that the Commissioner should have given her notice in accord with the provisions of G.S. § 45-21.17(4), which requires that notice of a foreclosure sale be mailed twenty days prior to the sale. Pursuant to G.S. § 45-21.1, however, this statute applies only to "a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust." We hold that the provisions of G.S. § 45-21.17(4) do not apply to a tax foreclosure sale.

[3] Defendant next contends that the court erred in holding that the defendant failed to show excusable neglect or sufficient equitable grounds to support her motion to set aside the judgment under Rule 60(b)(1) and (6). Defendant argues that she introduced evidence tending to show that she paid her employer $400.00 for transmittal to the tax supervisor of the City of Durham, that she thought that the payments were going to discharge her tax liability, and that after being served she took no action because she was unaware that her account was not being credited with the payments. The court found as facts that the defendant "had received service of a Summons and Complaint to foreclose taxes and testified that she understood the City was attempting to foreclosure her property for failure to pay taxes" and that she "had not responded to any demands, notices or legal process prior to the application for a Writ of Possession." The Court concluded that the defendant "was not diligent in protecting her interest in her property," that her "evidence fails to show that her failure to answer was through mistake, inadvertence, surprise, or excusable neglect," and that her actions "with respect to her lack of diligence in protecting her interest do not entitle her to any equitable relief."

The trial judge's findings of fact on a Rule 60(b) motion are conclusive on appeal when supported by competent evidence; however, the conclusions of law based thereon are reviewable on appeal. *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978); *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611,

219 S.E. 2d 787 (1975). The trial court found that the defendant received notice of the action against her, understood the nature of the action, and did not respond until after her property had been sold. These facts are supported by competent, uncontroverted evidence. The court concluded that the defendant had failed to show excusable neglect or that she was entitled to equitable relief. We think the facts found support the court's conclusions. The exceptional relief provided by Rule 60(b) "will not be granted where there is inexcusable neglect on the part of the litigant. '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." [citations]' *Pepper v. Clegg*, 132 N.C. 312, 43 S.E. 906 (1903)." *Holcombe v. Bowman*, 8 N.C. App. 673, 676, 175 S.E. 2d 362, 364 (1970).

[4] Finally defendant contends that the gross inadequacy of the sale price coupled with "the numerous defects appearing in the record" requires that the sale be set aside. It has long been held that inadequacy of price alone is not grounds for setting aside a tax sale, but that some element of fraud, suppression of bidding or other unfairness must appear before a court of equity can afford relief. *Duplin County v. Ezzell*, 223 N.C. 531, 27 S.E. 2d 448 (1943). The defendant in the present case has failed to show any fraud, suppression of bidding or other unfairness in the conduct of the sale.

We hold there is plenary evidence in the record to support the decision of the trial court and the defendant's motion to set aside the judgment was properly denied.

Affirmed.

Judges VAUGHN and CARLTON concur.

JAMES EDWIN KING III v. REBECCA FAYE KING DEMO

No. 7826DC551

(Filed 17 April 1979)

1. **Divorce and Alimony § 26.3— foreign custody order—child in N. C.—jurisdiction to modify order**

A minor child's physical presence in N. C. was sufficient to confer jurisdiction upon the trial court to modify a foreign custody decree. G.S. 50-13.5(c)(2).

2. **Divorce and Alimony § 26.2— foreign child custody order—changed circumstances**

Plaintiff met his burden of proving a sufficient change of circumstances to warrant a modification of a Colorado custody order entered four years earlier where plaintiff offered evidence that defendant mother's husband beat the child with a belt a few days prior to the hearing, that other incidents of abuse had occurred within the last three years, that the child feared defendant's husband, that the child desired to reside with plaintiff, and that plaintiff had remarried since the custody order was entered.

3. **Divorce and Alimony § 23.9— child custody proceeding—character of mother's second husband—evidence admissible—objection waived**

In an action to modify a Colorado decree giving custody of the parties' child to defendant, the trial court did not err in admitting evidence as to the prior arrest record and abusive behavior of defendant's husband, since such evidence had a direct bearing on the child's environment and welfare, and since the evidence was admissible to impeach the testimony of defendant's husband that the child had received bruises from playing and not from any blows he dealt; moreover, defendant waived any objection she might have had to the evidence where similar evidence was admitted without objection.

4. **Divorce and Alimony § 25.12— visitation privileges—denial during residency in Japan—insufficiency of findings**

The trial court erred in failing to make findings to support its denial of any visitation privileges to defendant during a three year period when she planned to live in Japan.

APPEAL by defendant from *Brown, Judge.* Order entered 31 January 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 8 March 1979.

This is an appeal from an order modifying a Colorado custody decree.

The plaintiff and the defendant were married in 1967. One minor child, James Edwin King IV, was born to the marriage. The parties were divorced in Colorado on 29 April 1970. The divorce

decree awarded custody of the minor child to the defendant and granted the plaintiff specific visitation privileges. On 19 July 1973 an order confirming custody in the defendant was entered in the Colorado court with the consent of the plaintiff.

The defendant remarried Mr. Demo; however, the evidence is in conflict as to when the remarriage took place. The defendant testified that she married Mr. Demo in September 1973, while Mr. Demo testified that he married the defendant on 21 September 1972.

Plaintiff remarried in 1975 and moved to North Carolina where he has since resided.

Evidence for the plaintiff tended to show the following: That in May of 1977, the defendant left Mr. Demo because of his excessive drinking and his physical abuse of her and that the minor child stayed with his grandparents in Burlington and his father in Charlotte from 4 May 1977 until August 1977 when defendant and Mr. Demo reconciled; that on or about 13 December 1977, the minor child was struck with a belt and belt buckle by Mr. Demo causing severe bruises on the minor child's back; that on 16 December 1977 the minor child arrived in North Carolina for a Christmas visitation period with the plaintiff; that while visiting his paternal grandparents in Burlington on 16 December 1977, the grandmother discovered the bruises on the minor child's back while he was dressing and the minor child told the plaintiff and his grandmother that Mr. Demo had beat him with the belt and belt buckle; that the minor child did not want to tell the plaintiff or his grandmother how he received the bruises for fear that Mr. Demo would beat him upon his return to Colorado.

On 22 December 1977, temporary custody of the minor child was granted to the plaintiff on the ground that the child was an apparent victim of physical abuse in an *ex parte* proceeding in Mecklenburg County District Court, pending a full hearing on the merits.

On 26 January 1978, this action was tried in the District Court of Mecklenburg County, North Carolina. Dr. Michael J. Grode, a pediatrician in Charlotte, testified at this hearing that the bruises on the minor child's back could not have been caused accidentally and were caused by the minor child being struck

with an object such as a belt and belt buckle. The minor child did not testify at the hearing but the parties stipulated that the court could interview the child privately and include in its findings and use as a partial basis for any order the court might enter some or all of the information that the court gathered from interviewing the minor child. The parties further stipulated that any findings based on such interview could not be raised on appeal, as the evidence would not be in the record. The parties also stipulated that the Colorado order was entitled to full faith and credit in North Carolina.

On 31 January 1978 a final order was entered granting custody of the minor child to the plaintiff on the ground that a substantial change of circumstances had occurred since the entry of the 1973 Colorado order and that it would be in the best interest of the child to be in the custody of plaintiff. The court found that the defendant and her husband planned to move to Japan for three years in conjunction with Mr. Demo's employment and concluded that the denial of visitation privileges during this period was appropriate. However, defendant was allowed a 7-day visitation period with the child prior to her departure for Japan.

From the entry of this order, defendant appealed.

Hicks & Harris, by Richard F. Harris III, for plaintiff appellee.

Walter C. Benson, for defendant appellant.

CARLTON, Judge.

[1] The defendant first contends that the trial court improperly exercised jurisdiction. We do not agree.

This action was commenced on 22 December 1977 by the plaintiff. On that date, the minor child was physically present in North Carolina.

The applicable statute is G.S. 50-13.5(c)(2). That statute provides in part as follows:

> (2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

> a. The minor child resides, has his domicile, *or is physically present in this State* . . . . (Emphasis added.)

Cases decided under G.S. 50-13.5(c)(2) have established that the minor child's physical presence in this State is sufficient to confer jurisdiction upon the courts to modify foreign custody decrees. *See Pruneau v. Sanders*, 25 N.C. App. 510, 214 S.E. 2d 288 (1975), *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975); *Spence v. Durham*, 16 N.C. App. 372, 191 S.E. 2d 908, *revd. on other grounds*, 283 N.C. 671, 198 S.E. 2d 537 (1973); *cert. denied*, 415 U.S. 918, 39 L.Ed. 2d 473, 94 S.Ct. 1417 (1974); 5 Strong, N. C. Index 3d, Divorce and Alimony, § 26.3, p. 372.

In the case at bar, the trial court properly exercised jurisdiction and the denial of the defendant's motion to dismiss on jurisdictional grounds was proper.

[2] The defendant next contends that the plaintiff failed to meet the burden of proving a sufficient change of circumstances to warrant a modification of the Colorado custody order pursuant to G.S. 50-13.7(b). That statute provides as follows:

> (b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support.

The party moving for modification of a custody order has the burden of showing that there has been a substantial change of circumstances affecting the welfare of the child. *King v. Allen*, 25 N.C. App. 90, 212 S.E. 2d 396 (1975), *cert. denied*, 287 N.C. 259, 214 S.E. 2d 431 (1975). The defendant contends that the plaintiff relied on various incidents of corporal punishment against the minor child by Mr. Demo as constituting "changed circumstances." She argues that the incidents complained of all occurred prior to the 1973 Colorado custody order and were therefore considered by the Colorado court in entering its order awarding custody to the defendant and were not properly before the North Carolina court.

The trial judge however, in his findings of fact, based his decision to modify the custody order on the specific belt beating

incident of December 1977, other incidents of abuse occurring within the last three years, the child's fear of Mr. Demo, the child's desire to reside with the plaintiff and the plaintiff's remarriage. There is ample evidence from the record to support the judge's findings in this case. The plaintiff has met the burden of proving changed circumstances and this assignment of error is therefore overruled.

[3] The defendant's next assignment of error is that the trial judge improperly admitted evidence as to the prior arrest record and abusive behavior of Mr. Demo. We do not agree.

On cross-examination of the defendant, the following exchange took place:

> Q. You know he has been tried a couple of times for assault, don't you, and disorderly conduct?
>
> A. No, I don't know about that.
>
> Q. You don't know anything about that?
>
> A. No, I don't.
>
> Objection. Objection overruled.

After this exchange, the defendant testified without objection that, "I have taken out an assault warrant against him once or twice in January or February of 1977."

During cross-examination of a neighbor of the defendant, this exchange took place:

> Q. You are aware that Mr. Demo has struck his wife before, are you not?
>
> A. Yes, I am.

Prior to this dialogue, other evidence was admitted without objection or exception concerning Mr. Demo striking his wife.

In *Shelton v. R.R.*, 193 N.C. 670, 139 S.E. 232 (1927) Justice Brogden, speaking for the Court, stated the well established rule that when evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

Even had the benefit of the objection not been lost, the evidence of Mr. Demo's arrest and physical abuse would be relevant and admissible in this child custody proceeding. "One of the commonest methods of impeachment is by showing that the witness's character is bad, . . . or by eliciting on cross-examination specific incidents of the witness's life tending to reflect upon his integrity or general moral character." 1 Stansbury, N.C. Evidence 2d (Brandis Rev. 1973), § 43, p. 122. Bad moral character, including specific instances of misconduct, may be established through cross-examination as a ground for impeachment. 1 Stansbury, N.C. Evidence 2d (Brandis Rev. 1973), § 42, p. 121. The character of Mr. Demo was more than a collateral issue in this child custody proceeding. His presence and conduct in defendant's home had a direct bearing on the child's environment and welfare. Having testified at the hearing that the child received bruises from playing and not from any blows he dealt, his testimony was subject to impeachment as any other witness's testimony would be.

[4] We agree with defendant, however, that there are insufficient findings to support the trial court's denial to her of any visitation privileges with the child during the three-year period of her residency in Japan. The findings are sufficient to support the other restrictions on visitation ordered by the trial court, *i.e.*, limiting the visits to Mecklenburg or Alamance counties, providing that the child not be in the presence of Mr. Demo, requiring the child to sleep in his father's or paternal grandparents' home, preventing defendant from removing the child from either county or the state for any reason, and providing that plaintiff or someone designated by him be with the child and defendant during visits except for reasonable daylight hours. Such restrictions are consistent with the trial court's findings and are obviously designed to assure compliance with the two major thrusts of the order, *to wit*, that plaintiff have sole custody of the child and that the child not be subjected to further physical abuse by Mr. Demo.

However, the denial of visitation between mother and child under the restrictions stated for a three-year period is wholly inconsistent with the trial court's findings and with established law.

Unless the child's welfare would be jeopardized, courts should be generally reluctant to deny all visitation rights to the

divorced parent of a child of tender age. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967); *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971).

Moreover, G.S. 50-13.5(i) provides as follows:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, *shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.* (Emphasis added.)

In the case at bar, the trial court clearly failed to meet the requirements of the italicized portion of the statute. To the contrary, the trial court made, in part, the following findings:

> 18. The defendant loves her son and no evidence is before this Court of any physical abuse of the minor child by the defendant.
>
> 26. The defendant is a fit and proper person to have custody of the minor child.
>
> 36. The defendant is a caring and loving mother.
>
> 38. It would not be in the best interests of the minor child for there to be visitation rights with the minor by the defendant *in Japan*. (Emphasis added.)

The court then made, in part, the following conclusions of law:

> 5. The defendant is a fit and proper person to have custody of said minor child and to have visitation privileges with said minor child.

In the dispositive portion of the order, the court ordered, in part, as follows:

> 5. The defendant shall have no visitation privileges from June 1, 1978, until the defendant returns to the United States from Japan, but the defendant shall have the right to contact said minor child by telephone or letter and said contact shall not be limited or infringed upon by the plaintiff.

Since there are no findings of fact or conclusions of law to support the dispositive provision of number 5 above, the order must be remanded for further proceedings to comply with G.S. 50-13.5(i) *with respect to that portion of the order above.*

The defendant next contends, in a broadside assignment of error, that the trial court's remaining findings of fact are not supported by the evidence. The findings of the trial judge, who has the opportunity to see and hear the witnesses, are binding on appellate courts if supported by competent evidence. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1924). Upon a review of the record, we hold that the findings of the trial judge are supported by competent evidence.

The decision of the trial judge in child custody proceedings ought not to be upset on appeal absent a clear showing of abuse of discretion. *See In re Mason*, 13 N.C. App. 334, 185 S.E. 2d 433 (1971), *cert. denied*, 280 N.C. 495, 186 S.E. 2d 513 (1972). Except as stated with respect to visitation rights, we find no error in the trial judge's exercise of discretion.

Defendant's remaining assignment of error is not argued in her brief, therefore that assignment of error is deemed abandoned under Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure.

The order appealed from is

Affirmed in part, vacated in part and remanded.

Judges VAUGHN and HEDRICK concur.

JAMES GRAHAM SASSER, BY HIS GUARDIAN AD LITEM, H. BRUCE HULSE v. SAM BECK AND WIFE, MRS. SAM BECK, T/A THE PRINCESS MOTEL

No. 788SC589

(Filed 17 April 1979)

Indians § 1— tort on Cherokee lands—action against Cherokee Indian—jurisdiction of courts of this State

The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an oc-

currence on land within the Qualla Boundary, since the State of North Carolina acquired civil jurisdiction over the Eastern Band of Cherokee Indians when the Cherokee Nation emigrated to lands west of the Mississippi River following the Treaty of New Echota in 1835, and such jurisdiction was not removed by the fact that the Eastern Band of Cherokee Indians has since been recognized as an Indian tribe and brought under federal supervision.

APPEAL by defendant from *Davis, Judge*. Order filed 10 April 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 26 March 1979.

The minor plaintiff by his guardian brings this action to recover for personal injuries he sustained in a swimming pool at defendants' motel. Defendant Sam Beck moved to dismiss for lack of subject matter and personal jurisdiction, on the grounds that he is a member of the Eastern Band of Cherokee Indians, that his motel is located on Cherokee lands, and that the Eastern Band of Cherokee Indians has never agreed to accept North Carolina State jurisdiction.

Defendant's motion was denied, and his petition for a writ of certiorari was allowed by this Court.

Duke & Brown, by John E. Duke, and Hulse & Hulse, by Herbert B. Hulse, for plaintiff appellee.

Smith, Anderson, Blount & Mitchell, by Samuel G. Thompson, and Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Herbert L. Hyde, for defendant appellant.

ARNOLD, Judge.

The question of first impression presented by this appeal is whether the courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary.

The history of the Cherokee Indians is set out at length in *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 6 S.Ct. 718, 29 L.Ed. 880 (1886), and *United States v. Wright*, 53 F. 2d 300, *cert. den.* 285 U.S. 539 (4th Cir. 1931). The Cherokee originally occupied the territory that is now North and South Carolina, Georgia, Alabama and Tennessee. When this country

was settled by Europeans, England claimed sovereignty over this territory, subject to the possessory right of the Indians over the lands they occupied. By treaties enacted in the period between 1785 and 1835, the possessory right of the Cherokee over North Carolina lands was gradually extinguished. By treaty of 1785, the United States was given the exclusive right to manage all Indian affairs, and the Cherokee Nation was brought under federal jurisdiction. In 1817, the Cherokee by treaty ceded to the federal government certain lands east of the Mississippi and received in exchange land on the Arkansas and White Rivers. Approximately one-third of the Cherokees emigrated to these western lands.

Under the Treaty of New Echota, made in 1835, the remaining Cherokees ceded to the United States all their land east of the Mississippi and agreed to move to the western lands. Many of the eastern Cherokee were reluctant to emigrate, however, and eventually eleven or twelve hundred remained behind. The Supreme Court said in *Eastern Band of Cherokee Indians v. United States, supra*, that those who remained "ceased to be part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the state in which they resided." *Id.* at 303, 6 S.Ct. at 724, 29 L.Ed. at 884.

The United States first recognized the rights of the Indians who had remained in North Carolina by an Act of 1848, establishing a fund for their benefit. The Qualla Boundary lands were purchased partly with money from this fund. In 1866 the North Carolina legislature passed a statute granting the Cherokee permission to remain in the State, and in 1868 Congress provided that the Secretary of the Interior should "take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians." *U.S. v. Wright, supra* at 303. In 1889 the Eastern Cherokees were incorporated under the laws of North Carolina, and in 1897 their charter was amended to give the Cherokee limited power of government, with special reference to control of tribal property. The title to the Qualla Boundary lands, which had been held by the Commissioner of Indian Affairs, was conveyed to the corporation but remained subject to the supervision of the Commissioner. This title was conveyed to the United States in trust in 1925.

It is against this historical background that we consider the limited case law dealing with civil jurisdiction over the Eastern

Band of Cherokee. Prior to the 1885 Supreme Court decision in *Eastern Band of Cherokee Indians v. United States, supra,* dicta in two North Carolina cases had indicated that the cherokee were subject to our civil jurisdiction. In *State v. Ta-Cha-Na-Tah,* 64 N.C. 614, 615 (1870), a criminal prosecution, the court noted that "[o]n examination of the Treaty of New Echotah, . . . we find, that, Article XII, it was provided, that individuals and families who were averse to moving West of the Mississippi River, might remain, and become citizens of the States where they resided. Our civil laws have been extended over these Indians, at least, ever since 1838: Rev. Code, ch. 50, sec. 16." (This Code section dealt with fraudulent conveyances, creating a statute of frauds requirement for any contract made with an Indian.) In *Rollins v. The Eastern Band of Cherokee Indians,* 87 N.C. 229 (1882), the court held that a federal statute controlled the effect of contracts made with Indians, but noted that the Act of Congress of 1868 which gave the Commissioner of Indian Affairs "the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians" gave him authority to establish schools, appoint agents, and organize local government and public administration, "but of course in subordination to the state government." *Id.* at 242. This view was reaffirmed by the court in 1907 in *State v. Wolf,* 145 N.C. 441, 444, 59 S.E. 40, 42: "Indians are subject to the general laws of the State, unless specially excepted."

Subsequent to these early North Carolina decisions, *United States v. Wright, supra,* was decided by the Fourth Circuit Court of Appeals. That court, holding that Congress could exempt Indian lands from taxation, noted in often-quoted dicta Congress' limited authority, and the existence of state jurisdiction over the Eastern Band of Cherokee:

> [W]e think there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band. It is clear, however, that not every act of Congress with relation to the band would come within the power. . . . [T]he members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interfered with the exercise of the police power of the state. . . . [A] law to be sustained must have

> relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states; *i.e.*, it must have reasonable relation to their economic welfare.

Id. at 307. This language was relied upon by our Supreme Court in finding state jurisdiction in a criminal case. *State v. McAlhaney*, 220 N.C. 387, 17 S.E. 2d 352 (1941).

In 1953, Congress enacted Public Law 280, 28 U.S.C. 1360, giving to five states, not including North Carolina, "jurisdiction over civil causes of action . . . to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action . . . ." Sec. 7 of this law, now repealed, gave the consent of the United States "to any other State not having jurisdiction with respect to . . . civil causes of action . . . to assume jurisdiction . . . ." North Carolina did not assume jurisdiction under this law, but in 1957 the Fourth Circuit found state tort jurisdiction in a case closely analogous to the one before us. The non-Indian plaintiff in *Haile v. Saunooke*, 246 F. 2d 293, *cert. den.* 355 U.S. 893 (4th Cir. 1957) sought to recover for personal injuries suffered in the collapse of a swinging bridge located on Indian land. The court, without referring to Public Law 280, upheld the dismissal of the action against the Eastern Band of Cherokee and the United States as trustee and guardian of the tribe and the individual defendants, but allowed the suit against the individual Indian defendants to proceed.

The most recent federal legislation concerning State civil jurisdiction over Indians was enacted in 1968. By the terms of 25 U.S.C. 1322(a), the United States gave consent "to any State *not having jurisdiction* over civil causes of action . . . to which Indians are parties which arise in . . . Indian country [emphasis added]" to assume such jurisdiction with the consent of the tribe affected. Since it is uncontradicted that the Eastern Band of Cherokee has never given its consent to state jurisdiction, North Carolina has assumed no jurisdiction under this section.

The question, then, clearly is not whether North Carolina has assumed civil jurisdiction over the Eastern Band of Cherokee by complying with a federal statute, but whether by virtue of jurisdiction existing at the time the statutes were enacted North

Carolina is exempt from such compliance. Both applicable statutes contain language which implies that such exemption is possible, since each gives federal consent to jurisdiction in "any State not having jurisdiction." The later statute, 25 U.S.C. 1322(a), might be interpreted to mean "any State not having jurisdiction *by virtue of the earlier statute*," but such an interpretation would be nonsensical if applied to Sec. 7 of Public Law 280, since it was the first statute enacted on the subject. Accordingly, it must have been possible, prior to enactment of the statutes, for state courts to obtain civil jurisdiction over Indians in other ways.

The limited case law on the subject, from both the North Carolina and federal circuit courts, supports our conclusion that North Carolina has had civil jurisdiction over the Eastern Band of Cherokee at least since the emigration west following the Treaty of New Echota, when the Indians remaining in North Carolina became "subject to the laws of the state." The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina.

Our view that state jurisdiction over Indian affairs continued is in accord with the analysis of this question found in the leading treatise on the subject, Felix S. Cohen's Handbook of Federal Indian Law (1942):

> While the general rule . . . is that plenary authority over Indian affairs rests in the Federal Government to the exclusion of state governments, we have . . . noted two major exceptions to this general rule: First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involves non-Indian questions sufficient to ground state jurisdiction.

Id. at 119. Having examined the effect of the factors of situs, person and subject matter on exclusive federal jurisdiction, Cohen concludes:

> The foregoing sections may be summarized in two propositions:

(1) In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.

(2) In all other cases, the state has jurisdiction unless there is involved a subject matter of special federal concern.

Id. at 121. We also find persuasive the reasoning of the federal court in *United States v. Wright, supra,* that the purpose of the federal guardianship was to protect the Indians' *economic* welfare, and not to interfere with the police power of the state over its citizens.

Nor do we find that the enactment of Public Law 280 terminated existing jurisdiction. The exemption language in the statute itself belies this, as does the legislative history of the statute, set out by the United States Supreme Court in the recent case of *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* --- U.S. --- (No. 77-388, 47 L.W. 4111, 16 Jan. 1979):

> Pub. L. 280 was the first jurisdictional bill of general applicability ever to be enacted by Congress. It reflected congressional concern over . . . the financial burdens of continued federal jurisdictional responsibilities on Indian lands. . . . It was also, however, without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's. [This policy, set out in n. 32 of the opinion, was 'as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws . . . as are applicable to other citizens of the United States, [and] to end their status as wards of the United States. . . .']
>
> Indeed, the circumstances surrounding the passage of Pub. L. 280 in themselves fully bear out the State's general thesis that Pub. L. 280 was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States.

Id., 47 L.W. at 4118.

We find that North Carolina's civil jurisdiction over the Eastern Band of Cherokee continues to this day, and that our

courts have jurisdiction over this tort action. Defendants' motions to dismiss for lack of personal and subject matter jurisdiction were properly denied. The order of the trial court is

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

CHEMICAL REALTY CORPORATION v. HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD

No. 7828SC420

(Filed 17 April 1979)

1. **Courts § 4— $6,000,000 in controversy—superior court appropriate forum**

An action by plaintiff to recover $6,000,000 for defendant's failure to provide permanent financing for a hotel pursuant to the parties' letter agreement was properly brought in superior court. G.S. 7A-243.

2. **Process § 14— foreign corporation—contract completed in N. C.—minimum contacts**

Where plaintiff alleged that it made a construction loan to a hotel in reliance upon the nonresident defendant's commitment to provide permanent financing, and defendant allegedly refused to perform under the parties' letter agreement, the N. C. courts had personal jurisdiction over defendant, since the borrower accepted the permanent loan commitment in N. C.; the hotel which was the subject of the loan was constructed in N. C.; the loan in this action was arranged by an N. C. mortgage broker; and defendant availed itself of the benefits and protection of N. C. laws not only by the instant contract, but also by a permanent loan commitment for a $2,500,000 loan for an apartment project in Jacksonville, N. C.

3. **Rules of Civil Procedure §§ 4, 15— amendment of summons—no prejudice—amendment of complaint—no responsive pleading filed**

Pursuant to G.S. 1A-1, Rule 4(i), plaintiff could amend its summons so that defendant's name appeared differently, since defendant showed no prejudice resulting therefrom, and pursuant to G.S. 1A-1, Rule 15(a), plaintiff could, as a matter of right, amend its complaint so that defendant's name appeared differently, since no responsive pleading had been filed.

APPEAL by defendant from *Martin (H. C.), Judge.* Orders entered 1 October 1977 and 27 October 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 February 1979.

Plaintiff Chemical Realty Corporation (Chemical) is a New York corporation with its principal office in New York City. Defendant Home Federal Savings & Loan Association of Hollywood (Home Federal) maintains its principal office in Hollywood, Florida. Chemical alleges that Home Federal made a permanent loan commitment to advance $6,000,000 upon the completion of the Landmark Hotel in Asheville, North Carolina, and that in reliance on this permanent loan commitment Chemical made a $6,000,000 construction loan commitment to Landmark. Chemical further alleges that the parties entered into a "Letter Agreement" by which Home Federal agreed that upon construction of the hotel in substantial compliance with the plans and specifications it would purchase from Chemical a note for the indebtedness of Landmark to Chemical for the funds advanced under the construction loan and would accept an assignment from Chemical of a deed of trust on the hotel. For the alleged refusal of Home Federal to perform under this letter agreement, Chemical seeks damages of at least $3,000,000. Chemical seeks a second $3,000,000 for the alleged refusal of Home Federal to extend the time during which the permanent loan commitment and letter agreement would be in effect, pursuant to the terms of the agreements.

Home Federal moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper service of process. In the alternative, Home Federal sought a "change of venue" to Broward County, Florida on the ground that Buncombe County is an inconvenient forum. Chemical then moved for leave to amend its complaint and summons by changing the defendant's name from "Home Federal Savings & Loan Association" to "Home Federal Savings and Loan Association of Hollywood."

The trial court granted Chemical leave to amend and denied Home Federal's motions to dismiss and for change of venue, making findings of fact and conclusions of law in support of its order. Home Federal's motion to amend the findings and conclusions was denied. Home Federal appeals.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Sydnor Thompson and Fred T. Lowrance, and Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Herbert L. Hyde, for plaintiff appellee.

John E. Raper, Jr. and Reginald M. Barton, Jr., for defendant appellant.

ARNOLD, Judge.

I.

[1] Home Federal's argument that this action should have been dismissed for lack of subject matter jurisdiction is without merit. Original civil jurisdiction "is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice." G.S. 7A-240. And where the amount in controversy exceeds $5,000, the superior court is the proper division for the trial. G.S. 7A-243. This action was brought appropriately in superior court.

II.

[2] Home Federal argues that none of the circumstances which would give the North Carolina courts personal jurisdiction over it exists in this case. In determining this question we consider North Carolina's long-arm statutes, since it is stipulated that Home Federal is a federal savings and loan association with its principal office in Hollywood, Florida, and that it has not applied for authority to transact business in North Carolina or appointed a local agent for service of process.

G.S. 55-145(a) provides that "[e]very foreign corporation shall be subject to suit in this State . . . on any cause of action arising . . . (1) Out of any contract made in this State or to be performed in this State. . . ." Home Federal contends that the permanent loan commitment was made not in North Carolina, but in Florida; that the "Letter Agreement" referred to in Chemical's complaint was in fact not an agreement, but an "estoppel certificate"; and that performance of any commitment was to take place in Florida.

For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E. 2d

15, *aff'd* 277 N.C. 223, 176 S.E. 2d 784 (1970). In *Goldman*, a letter was sent to the North Carolina plaintiff from Atlanta, Georgia, instructing him: "If the above is agreeable, please sign and return the original copy of this letter." Plaintiff signed the letter in Greensboro, North Carolina, and deposited it in the mail there addressed to a Texas corporation. This Court found that the final act necessary in that case to create a binding obligation was the depositing of the letter containing the plaintiff's signature in the mail.

In the present case, three communications between the parties make up the permanent loan commitment. On 14 April 1972, Home Federal sent the permanent loan commitment letter to a North Carolina mortgage broker for forwarding to the borrower. This letter stated: "I am enclosing a copy of this letter for your acceptance. Receipt of same, executed by the borrower, together with the commitment fee of $60,000.00 must be acknowledged by May 15, 1972 or this commitment letter will be automatically cancelled." On 15 May 1972 the borrower executed a copy of the commitment letter and delivered it with a cover letter and the commitment fee to the mortgage broker, who mailed the letters and fee to Home Federal. The borrower's cover letter stated: "Attached please find copy of Commitment accepted by me on behalf of Asheville Development Associates as well as check for $60,000. We respectfully request that the following items and points of clarification be added to and made a part of captioned Commitment . . . ." On 24 May 1972 Home Federal wrote back to the mortgage broker: "Please be advised that this Association is in receipt of $60,000.00 tendered by Asheville Development Associates. This letter is to confirm that our mortgage commitment dated April 14, 1972, is in full force and effect subject to three items. . . ."

Home Federal would have us find that the borrower's cover letter of 15 May was not an acceptance, but a counter-offer, and that Home Federal's letter of 24 May was the acceptance of this counter-offer and the final act necessary to create a binding contract. We see no support for this position in the communications involved. The borrower's letter of 15 May by its terms accepts the permanent loan commitment and requests three added "points of clarification" which do not change the essential nature of the commitment. The acceptance is not made conditional upon addi-

tion of the requested points. See 17 C.J.S. Contracts § 43. Nor does Home Federal by its letter of 24 May treat the borrower's letter as a counter-offer; it merely acknowledges receipt of the commitment fee and confirms the mortgage commitment. We find that the contract was completed by the borrower's acceptance in North Carolina of the permanent loan commitment. As a result, G.S. 55-145(a)(1) applies to give the North Carolina courts personal jurisdiction over Home Federal.

Home Federal next contends that even if the statutory standards for jurisdiction are met, the constitutional requirements of due process are not. This contention is untenable. In *Equity Associates v. Society for Savings*, 31 N.C. App. 182, 228 S.E. 2d 761, *cert. den.* 291 N.C. 711 (1976), we found, based upon a fact situation practically identical to the one before us, that the contract itself was sufficient to satisfy the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Also, here, as in *Equity Associates*, other factors set out in *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965), for satisfying the test of "minimum contacts" and "fair play" are present. It is stipulated that Home Federal received actual notice of the action. Since the hotel which was the subject of the loan was constructed here, it seems clear that "crucial witnesses and material evidence," *id.* at 57, 143 S.E. 2d at 231, also will be found here. Home Federal has availed itself of the benefits and protections of our laws not only by the instant contract, but also by a permanent loan commitment for a $2,500,000 loan for an apartment project in Jacksonville, North Carolina. That loan is secured by a deed of trust filed in North Carolina, and is being serviced by the North Carolina mortgage broker who arranged the loan in this action. Due process is satisfied.

III.

[3] Chemical's complaint and summons named as defendant "Home Federal Savings and Loan Association." Home Federal assigns as error the granting of Chemical's motion to amend these documents so that the defendant's name appears as "Home Federal Savings and Loan Association of Hollywood." As Chemical points out, it was entitled to amend its complaint as a matter of right, since no responsive pleading had been filed. G.S.

1A-1, Rule 15(a). Amendment of the summons may be allowed by the court in its discretion "unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." G.S. 1A-1, Rule 4(i). Home Federal has not shown any prejudice that resulted from this misnomer. It is stipulated that Home Federal received the complaint and summons and knew that they were meant for it. We find no error in the court's ruling. *Accord Bailey v. McPherson*, 233 N.C. 231, 63 S.E. 2d 559 (1951); *Propst v. Hughes Trucking Co.*, 223 N.C. 490, 27 S.E. 2d 152 (1943).

IV.

Home Federal contends that its motion to amend certain findings of fact and conclusions of law in the trial court's order should have been granted because the findings are not supported by the evidence. Where the trial judge finds the facts, they are conclusive on appeal if there is evidence to support them, even if there is also evidence to the contrary. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Cox v. Cox*, 33 N.C. App. 73, 234 S.E. 2d 189 (1977). We have examined the contested findings and have found that each is based upon competent evidence.

Home Federal finally argues that certain findings and conclusions should be stricken because they are irrelevant to the issues before the court at the hearing on the motion. We find that all the challenged determinations resulted from issues raised by Home Federal in its motion. This assignment of error is unfounded.

We have considered Home Federal's other assignments of error and find that they are without legal merit.

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

BARBARA MEDDERS (DAVIS) v. RONALD R. MEDDERS

No. 7810SC491

(Filed 17 April 1979)

1. **Husband and Wife § 10.1— support provisions of separation agreement—uncertain duration—enforceability**

A provision of a separation agreement requiring the husband to pay the wife $700.00 per month commencing on the date of the agreement, when considered with a further provision that "this amount is established on a temporary basis," was not unenforceable because of uncertainty as to duration, since a reasonable time will be implied, and since it is clear from the circumstances and the terms of the agreement that the agreement was to remain enforceable and the amount of payment was to remain constant until the execution of a subsequent agreement.

2. **Husband and Wife § 10.1— separation agreement—revocation "as necessity may dictate"—definiteness**

A provision of a separation agreement that the monthly amount to be paid by the husband to the wife could be revoked "as necessity may dictate" did not make the agreement too indefinite to be enforceable.

3. **Husband and Wife § 10.1— separation agreement—revocation "as necessity may dictate"—notice of termination**

A separation agreement was not terminable at will because it provided that it could be revoked "as necessity may dictate"; therefore, the husband could not terminate the agreement until he had notified the wife of the occurrence of the specified contingency.

4. **Husband and Wife § 12— separation agreement—monthly payments as support—termination upon remarriage**

The trial court could properly find from the evidence that the $700.00 monthly payments which a separation agreement required the husband to pay to the wife were for support and that the payments were to terminate upon the wife's remarriage.

5. **Husband and Wife § 12— separation agreement—payments as support for wife and daughter—reduction when daughter no longer resided with wife**

The evidence supported the trial court's determination that a $700.00 monthly payment which a separation agreement required the husband to make to the wife was intended as support for the wife and a daughter, that the parties intended that the payment would be reduced when the daughter no longer resided with the wife, and that a reasonable amount of such reduction within the intent of the parties was $250.00.

APPEAL by plaintiff and defendant from *Brewer, Judge.* Judgment entered 31 January 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 26 February 1979.

Plaintiff filed complaint in District Court seeking money damages for breach of a separation agreement executed by plaintiff and defendant in Mullins, South Carolina.

The agreement provided in pertinent part:

"WHEREAS, the parties hereto are Husband and Wife, and there have been two (2) children of said marriage, to wit: Ronda Lee Medders, age 19 years; and Ronald R. Medders, Jr., age 16 years;

WHEREAS, in consequence of Husband having demanded that wife vacate the home which they live in in Mullins, South Carolina, and the wife having done so, it being acknowledged by husband that such leaving on the part of wife does not constitute desertion by wife, and that said leaving was at the request and consent of husband, the parties have separated, and the parties agree to the following:

* * *

3. Husband freely agrees to accept the responsibility for all debts incurred by himself and his wife as of the date of this Agreement, February 20, 1975, and agrees to pay all such debts in full. Husband further agrees to pay in full any bank notes or existing charge accounts in both names for all debts incurred through the date of this Agreement. Husband agrees to convey to wife one of the automobiles which they own, and that he will complete all payments on said automobile. Husband further agrees to maintain at his expense adequate liability and collision insurance on said automobile for his wife and for any of their children which may drive said automobile.

* * *

9. Husband agrees to pay unto wife the sum of Seven Hundred and no/100 ($700.00) Dollars per month commencing on the date of this Agreement. It is agreed that wife shall receive such funds tax free, and that all income taxes, if any, on said sum shall be paid for by husband. It is also agreed that this amount is established on a temporary basis and may be revoked by husband or wife as necessity may dictate. It is also agreed that it is probable that such sum will have to

be increased when their son begins living with wife at the end of the current school year. The parties hereto leave open the matter of any alimony or child support should a divorce action ever be instituted by one against the other."

Defendant filed answer moving for dismissal for failure to state a claim. As a further defense, he alleged compliance with the agreement's terms. Subsequently, defendant filed motion for a transfer of the action to Superior Court. The motion for dismissal was denied. The motion for transfer was allowed.

At trial, plaintiff's evidence tended to show that the separation was initiated by defendant; defendant had failed to comply with the terms of the agreement; consequently, the house had been taken through foreclosure proceedings, and her car had been repossessed. Plaintiff testified that the $700.00 payments were in the nature of a settlement; but she admitted that she agreed to accept less than $700.00 until after their daughter's wedding. She stated:

"[M]y daughter had a bedroom while she was there. Utilities were $75 to $100 a month and were not included in the rent. Water was about $30.

Approximately $50 to $75 a week was our food bill. Maybe one-third of that was attributable to my daughter. I couldn't tell a great deal of difference in the expenses after my daughter got married. After she was married, I expected my husband to resume paying $700 a month."

Defendant presented evidence tending to show that he subsequently mailed plaintiff payments on various dates and that he stopped making all payments at the end of November 1975 when he became unemployed.

Defendant also testified:

"[A]t the time of signing the Separation Agreement, I had in mind two things—first, to hold on to the job and didn't want a big court battle; second, I didn't want to burn any bridges behind me in case we could reconcile. So I signed the Agreement looking at it as an interim-type or temporary-type agreement.

* * *

I understood the $700 would go for the support of the household which at that time included a daughter and possibly a son later on. There was no determined number of what would be for my wife, how much would be for the daughter or son. I didn't have a clear understanding on that. It was my understanding that it was not all for my wife. I understood it to cover all my daughter's expenses while she was living with her mother."

The trial court found: the agreement to be valid and enforceable; that the $700.00 was intended as support for plaintiff and the parties' daughter; that it was the intent of the parties that a portion of the $700.00 monthly payments be reduced when the parties' daughter no longer resided with plaintiff; that a reasonable amount of abatement within the intent of the parties was $250.00; that defendant owed plaintiff $8,700.00 under the terms of the agreement; and it was in the contemplation of the parties that the payments to plaintiff would terminate upon her remarriage.

Plaintiff and defendant appealed.

Cheshire, Bruckel & Swann, by William J. Bruckel, Jr. and Michael A. Swann, for plaintiff appellant.

Barringer & Howard, by Robert E. Howard, for defendant appellant.

ERWIN, Judge.

Defendant's Appeal

The validity, effect, and construction of the agreement before us is governed by the law of South Carolina. 24 Am. Jur. 2d, Divorce and Separation, § 884, p. 1004.

Under the law of South Carolina, it is the court's duty to effect the intention of the parties in construing a contract to the end that justice may be done. *Rainwater v. Hobeika*, 208 S.C. 433, 38 S.E. 2d 495 (1946).

Defendant contends the trial court erred in finding Section 9 of the agreement valid and enforceable. We find no error.

[1] The provision in question provided for the payment of $700.00 monthly, commencing on the date of the agreement. It is certain as to the amount and as to the time of payment. Its only uncertainty is to the duration of performance, but this uncertainty is not fatal. Where parties to a contract express no period for its duration and no definite time can be implied from the circumstances surrounding them, the contract extends for a reasonable time. *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911). Conversely, it follows that if a definite time can be implied from the circumstances surrounding the execution of the contract, then such time period governs the duration of performance. *See Childs v. Columbia, supra.* The circumstances surrounding the agreement and the terms of the agreement itself indicate that the contract was to remain enforceable for an indefinite period:

> "[N]o Decree obtained by either party shall in any way affect this Agreement or any of the terms, covenants, or conditions hereunder, this Agreement being unconditional and both parties intending to be legally bound thereby, except to such extent as may be herein limited with particular respect to any amount of alimony or child support."

The parties' use of the term on a *temporary basis* does not make the agreement too uncertain for enforcement. It is clear from the circumstances that the amount of payment was to remain constant until the execution of a subsequent agreement. The mere fact that the amount of future support payments is to be agreed upon in the future does not make the agreement invalid for indefiniteness and uncertainty as to the present certain terms. *See generally* 1 Corbin on Contracts § 97 (1963 & Supp. 1971). The cases relied on by defendant do not establish a contrary proposition. What they indicate is that the enforceability of the unagreed upon terms may be too uncertain to be enforced where specific performance is sought. *See Craven v. Williams*, 302 F. Supp. 885 (D.S.C. 1969).

[2] Defendant's contention, that the parties' provision that the agreement would be revocable "as necessity may dictate" makes the agreement too indefinite, is without merit. Parties to a contract may expressly reserve a power to cancel or terminate the agreement upon a specified contingency or designated event.

Helsby v. St. Paul Hospital and Casualty Company, 195 F. Supp. 385, (D. Minn. 1961), *aff'd*, 304 F. 2d 758 (8th Cir. 1962); 17 C.J.S., Contracts, § 100(6), p. 809.

In Helsby, *supra*, the District Court held an employment contract terminable only "with cause" sufficiently certain to be enforceable. A power to revoke "as necessity may dictate" is also sufficiently certain to constitute a valid and enforceable term.

[3] Defendant contends that the contract was one terminable at will and that no notice was required. This contention is also without merit.

The agreement by its express terms provided that it was to be revocable only "as necessity may dictate." It was not one terminable at will. Defendant's power to terminate the agreement was contingent upon the occurrence of a specified contingency. Until the contingency occurred, defendant had no power to terminate it. *A fortiori*, he could not terminate the agreement until he had shown the occurrence of the specified contingency. 6 Corbin on Contracts § 1266 (1962 & Supp. 1964). Where an agreement extends for an indefinite duration and is only revocable upon the occurrence of a specified contingency, it is incumbent upon the party asserting the occurrence of the condition to notify the other party to the agreement of the occurrence. *See generally* 6 Corbin on Contracts § 1266 (1962 & Supp. 1964). This defendant did not do. His attempted revocation of the agreement was ineffective, and the trial court correctly found him liable for failing to pay in accordance with the contract's terms.

We find no error in the trial court's rulings as to defendant.

Plaintiff's Appeal

[4] Plaintiff contends that the trial court erred in finding that the $700.00 monthly payments were for support and thus terminated upon her subsequent remarriage.

Section 9 of the agreement provides for the payment of $700.00 monthly. It does not specify whether the payments are for support or property settlement. It provides that the payment of money shall be "tax free"; but also provides that the parties "leave open the matter of any alimony or child support should a divorce action ever be instituted by one against the other." Parol

evidence was admissible to ascertain the true meanings and intentions of the parties. *Herndon v. Wardlaw*, 100 S.C. 1, 84 S.E. 112 (1915). We find no error in the court's admittance of the parol evidence or in the court's determination that the payments were to cease upon remarriage.

Unless a contrary intention is expressed, a wife's remarriage terminates the husband's obligation to support her under a separation agreement which is silent on the question of the wife's remarriage. Annot., 48 A.L.R. 2d 318 (1956). Here the agreement is noticeably silent on the question of the effect that the wife's remarriage would have. The trial court could properly find from the evidence presented that the payments were to terminate upon the subsequent remarriage of the spouse.

[5] Plaintiff's final assignment of error is that the court erred in abating the $700.00 monthly payments by $250.00. We disagree.

Section 9 of the agreement expressly states that the plaintiff is to receive such funds tax free, and that all income taxes, if any, are to be paid by the husband. The agreement further provides that it is to be binding on the parties except as limited therein to alimony or child support. Language creating such an ambiguity may be clarified by looking at the subject matter and surrounding circumstances at the time the agreement was executed. *Herndon v. Wardlaw*, 100 S.C. 1, 84 S.E. 112 (1915); 3 Corbin on Contracts § 543 (1960 & Supp. 1971).

From the evidence presented at trial, the trial court could properly conclude that the parties intended that the monthly payments abate by $250.00 when the daughter no longer resided with plaintiff. We find no error.

The judgment entered below is affirmed as to both the plaintiff and defendant.

Judges PARKER and HEDRICK concur.

In re Yow

IN THE MATTER OF: ZANN XAVIER YOW, D.O.B. 9/14/72, 2765 HOPE CHURCH ROAD, WINSTON-SALEM, N. C. 27107

No. 7821DC1155

(Filed 17 April 1979)

1. **Infants § 6; Constitutional Law § 23— dependent child proceeding—custody given to persons other than parents—notice—due process rights protected**

Appellant was not denied her due process rights when her child was declared to be a dependent child and was placed in the custody of suitable persons, though appellant was not given notice of the first hearing, since, at the time of the hearing, appellant's address was unknown; all the evidence showed that at the time the order was entered, the child in question was a helpless infant with no one to care for him; and pursuant to G.S. 7A-286, appellant could apply for a review of the matter at any time and there would be a review at six month periods for the first year and annually thereafter.

2. **Infants § 6.3— dependent child—custody given to persons other than parents—best interests of child controlling**

In a proceeding to declare appellant's son a dependent child, appellant's contention that the trial court's finding of fact that she was a fit and proper person to have custody of the child compelled the conclusion that custody be awarded her was without merit, since the test under G.S. 7A-286 as to where custody is placed is what best meets the needs of the child, and the trial court found that the best interests of the child required that custody remain in persons other than his parents.

APPEAL by movant Elsa I.J.P. Yow from an order of *Freeman, Judge*. Order entered 28 November 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 2 April 1979.

This proceeding was commenced with the filing of a petition by George H. King of the Department of Social Services of Forsyth County. It was alleged in the petition that Zann Xavier Yow was a dependent child as defined by G.S. 7A-278(3). Service of process was had on the father of Zann Xavier Yow, but no service was had on the child's mother, Elsa I.J.P. Yow. On 1 March 1978, Judge Gary B. Tash signed an order in which it was found that the whereabouts of the child's mother was unknown and that he was a dependent child. Custody of the child was placed in Arvil Stanley Crater and Lucinda Crater. On 3 October 1978, Elsa I.J.P.

Yow filed a motion to review the order of 1 March 1978. In this motion she alleged that Zann Xavier Yow was born 14 September 1972 and she had custody of the child until he was forcibly taken from her by her former husband, Robert Yow, III in June 1977. She alleged she was a fit and proper person to have custody of the child and asked that custody be given to her. A hearing was held on 18 October 1978 by Judge William H. Freeman. He signed an order in which it was recited that no attempt to serve process on Elsa I.J.P. Yow was made prior to the 1 March 1978 hearing. He concluded from this that her due process rights under the United States Constitution had been violated, but that any previous defect in the service of process was cured by her making an appearance on the motion for review. The court ordered the matter set for a hearing at a later date. In an order dated 28 November 1978, Judge Freeman found that Elsa I.J.P. Yow was a fit and proper person to have custody and visitation with Zann Xavier Yow. He also found that the best interests of Zann Xavier Yow required that he remain in the custody of Arvil Crater and wife Lucinda Crater with visitation rights in Elsa I.J.P. Yow. Elsa I.J.P. Yow has appealed.

Legal Aid Society of Northwest North Carolina, Inc., by Paul B. Eaglin, for movant appellant.

Wright and Parrish, by Carl F. Parrish, for Arvil Crater and Lucinda Crater, respondent appellees.

WEBB, Judge.

This proceeding was brought pursuant to Article 23 of Chapter 7A of the General Statutes of North Carolina. This appeal is by a parent who has contested an award of custody under this Article of the General Statutes. The parties in their briefs have cited no cases and we have found none dealing with such a contest. We believe it is a case of first impression. We quote at length some pertinent parts of Article 23.

G.S. 7A-278 says:

* * *

(3) "Dependent child" is a child who is in need of placement, special care or treatment because such child has no parent, guardian or custodian to be responsi-

ble for his supervision or care, or whose parent, guardian or custodian is unable to provide for his supervision or care.

G.S. 7A-283 says:

The summons and a copy of the petition shall be served upon the parents or either of them or the guardian or custodian, and the child, not less than five days prior to the date scheduled for the hearing . . . .

G.S. 7A-286 says:

The judge shall select the disposition which provides for the protection . . . of the child after considering the factual evidence, the needs of the child, and the available resources, as may be appropriate in each case. . . .

In any case where the court adjudicates the child to be . . . dependent . . . , the jurisdiction of the court to modify any order of disposition made in the case shall continue during the minority of the child or until terminated by order of the court . . . .

* * *

. . . Upon motion in the cause or petition, and after notice as provided in this Article, the court may conduct a review hearing to determine whether the order of the court is in the best interest of the child, and the court may modify or vacate the order in light of changes in circumstances or the needs of the child.

The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction . . .

* * *

(2) In the case of any child . . . who needs placement, the court may:

* * *

(b) Place the child in the custody of a parent, relative, private agency offering placement services, or some other suitable person;

* * *

> In any case where custody is removed from a parent, the court shall after 10 days' notice to the parent order and conduct periodic reviews, not less frequently than semiannually during the first year after such removal and annually thereafter, to determine if the needs of the child are being met and if the placement is in the child's best interests.

From reading the statute, it can be seen that the General Assembly has provided for a method of having a person found to be a dependent child. A dependent child is one who needs placement because he does not have a parent, guardian, or custodian to be responsible for his supervision or care, or his parent, guardian or custodian is unable to provide for his supervision or care. In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them or the guardian or custodian. Upon a finding that the child is dependent, the court may place the child in the custody of a suitable person. The statute provides for review of the status of the placement semiannually for the first year after the initial placement and annually thereafter. It also provides that after a child has been adjudicated to be dependent, the jurisdiction of the court shall continue during the minority of the child or until terminated by order of the court.

[1] The appellant contends we should reverse the district court and award her custody of Zann Xavier Yow. She says this should be done because she was deprived of due process by not being served with any notice before the first hearing and the district court so held. She argues further that since the initial finding that the child was dependent is not binding on her and the court found in its order of 28 November 1978 that she is a fit and proper person to have custody of Zann Xavier Yow, there was no basis for finding as to her that the child is dependent. She concludes that her fundamental right as the natural mother of Zann Xavier Yow requires that she be given custody. We are faced at the outset of this case with the question of whether G.S. 7A-283 is unconstitutional as applied to the appellant. The facts of the case are that in early 1978, Zann Xavier Yow was five years of age; a hearing was held in district court as to his dependency; his father was served with notice; his mother was not served with notice,

but it was found as a fact that her address was unknown and no evidence to dispute this finding is in the record. We hold that on these facts the United States Constitution does not proscribe a finding which is binding on all parties that the child is dependent so that his custody may be placed with a suitable person. The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law." To deprive a person of custody of a child is not to deprive her of "life, liberty, or property." Nevertheless, it has been held that the giving of notice in cases involving child custody is subject to due process requirements. It has been said it is one of the "basic civil rights of man" and a right "far more precious than a property right." *See Newton v. Burgin*, 363 F. Supp. 782, 785 (W.D.N.C. 1973), *aff'd*, 414 U.S. 1139, 94 S.Ct. 889, 39 L.Ed. 2d 96 (1974). In this case we are faced with a balancing of interests. The State has an interest in the welfare of children, in this case Zann Xavier Yow. Children have a right to be protected by the State while they are helpless infants. The appellant has some right to custody of the child. She cannot be arbitrarily deprived of this custody. All the evidence shows that at the time the order of 1 March 1978 was entered, Zann Xavier Yow was a helpless infant with no one to care for him. The statute provides that the appellant may apply for a review of the matter at any time and there will be a review at six months periods for the first year after the entry of the order of 1 March 1978 and annually thereafter. Balancing the interest of the State that a helpless infant should not suffer with that of the appellant that she not be arbitrarily deprived of her right to custody of her child, and considering the right of protection that belongs to the child, we hold that the appellant's due process rights were adequately protected. *See Newton v. Burgin, supra.* The order of 1 March 1978 is binding on the appellant.

[2] The appellant argues that the finding of fact in the order of 28 November 1978 that she is a fit and proper person to have custody of the child compels the conclusion that custody be awarded to her. She has cited cases to support this proposition. *See Thomas v. Pickard*, 18 N.C. App. 1, 195 S.E. 2d 339 (1973); *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759 (1955), and *In re Hughes*, 254 N.C. 434, 119 S.E. 2d 189 (1961). Whatever the rule of child custody may be as held in those cases, they do not apply in

this case. None of them dealt with the statute which is controlling here. G.S. 7A-286 says the jurisdiction of the court shall continue after the child has been found to be dependent and the order shall be modified in light of a change in circumstances or the needs of the child. This section provides that upon review the court will determine if the child's needs are being met and if the placement is in the child's best interest. Although the court found the appellant was a fit and proper person to have custody of the child, the test under the statute as to where custody is placed is what best meets the needs of the child and what is in the child's best interests. The court found the best interest of the child required that the custody remain in the Craters. We cannot disturb this ruling.

Affirmed.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. GARY DEWAYNE STEWART

No. 7911SC3

(Filed 17 April 1979)

1. **Hunting § 1— police power—protection of wildlife**

Since the State's wildlife population is a natural resource of the State held by it in trust for its citizens, the enactment of laws reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the General Assembly.

2. **Constitutional Law § 11— review of exercise of police power**

In reviewing an exercise of the police power by the General Assembly, the only duty of the courts is to ascertain whether the act violates any constitutional limitation, the question of public policy being solely one for the legislature.

3. **Hunting § 1— act prohibiting shining of light beyond surface of road—unconstitutionality**

Chapter 269 of the 1975 North Carolina Session Laws, which prohibits the deliberate shining of an artificial light from a motor-driven conveyance beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals during certain evening hours in specified counties violates due process because it is so overbroad as to con-

stitute arbitrary and unreasonable interference with innocent conduct and it lacks any rational, real or substantial relation to the public health, morals, order, safety or general welfare.

APPEAL by the State from *Canaday, Judge*. Order entered 20 November 1978 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 7 March 1979.

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

Philip C. Shaw for the defendant appellee.

MITCHELL, Judge.

The State has brought this appeal from an order finding Chapter 269 of the 1975 North Carolina Session Laws unconstitutional. The defendant, Gary Dewayne Stewart, was charged by citation with deliberately displaying an artificial light from a motor-driven conveyance into a field frequented by wild deer and beyond the surface of a roadway between the hours of 11:00 p.m. and one-half hour before sunrise in violation of Chapter 269 of the 1975 North Carolina Session Laws. The case came before the District Court Division where the defendant's motion to dismiss pursuant to G.S. 15A-954 was allowed upon a finding that the chapter was unconstitutional. The State appealed to the Superior Court Division pursuant to G.S. 15A-1432. The defendant there made a motion to dismiss asserting the unconstitutionality of the chapter. This motion was allowed, and the State appealed pursuant to G.S. 15A-1445.

[1] The State assigns as error the order of the trial court finding Chapter 269 of the 1975 North Carolina Session Laws unconstitutional and allowing the defendant's motion to dismiss charges brought against him pursuant to that chapter. Chapter 269 of the 1975 North Carolina Session Laws provides that:

> Section 1. Any person who, between the hour of eleven o'clock p.m. on any day and one-half hour before sunrise on the following day, deliberately flashes or displays an artificial light from or attached to a motor-driven conveyance or from any means of conveyance attached to said motor-driven conveyance so as to cast the beam thereof beyond the surface of

a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals shall be guilty of a misdemeanor. Every person occupying such vehicle or conveyance at the time of such violation shall be deemed prima facie guilty of such violation as a principal.

Sec. 2. Each person violating the provisions of this act, shall, on the first conviction thereof, be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00). Upon a second or subsequent conviction, such person shall be fined not less than one hundred dollars ($100.00) nor more than two hundred dollars ($200.00) or imprisoned not more than 60 days, or both, in the discretion of the court.

Sec. 3. The provisions of this act shall not apply to a person while on land owned by him in fee simple or in which has had a life estate or a person who leases land for agricultural purposes, but the fact of such ownership shall be a matter of defense in any prosecution for violation of this act.

Sec. 4. All lawful peace officers of the county and State, including wildlife protectors, shall have authority to arrest for violations of this act.

Sec. 5. This act shall apply only to the counties of Johnston and Hertford, Gates, Northampton and Wayne.

Sec. 6. This act shall become effective upon ratification.

Other counties were later brought under the coverage of the chapter. 1977 N.C. Sess. Laws Chs. 106 and 167. The purpose of the General Assembly in enacting the chapter clearly was to facilitate the protection of wildlife from indiscriminate slaughter. As the State's wildlife population is a natural resource of the State held by it in trust for its citizens, the enactment of laws reasonably related to the protection of such wildlife constitutes a valid exercise of the police power vested in the General Assembly. *Baldwin v. Montana Fish and Game Comm'n.*, 436 U.S. 371, 56 L.Ed. 2d 354, 98 S.Ct. 1852 (1978); *State v. Lassiter*, 13 N.C. App. 292, 185 S.E. 2d 478 (1971); *cert. denied*, 280 N.C. 495, 186 S.E. 2d 514; *appeal dismissed*, 280 N.C. 724, 186 S.E. 2d 926 (1972).

[2] In reviewing an exercise of the police power by the General Assembly, the only duty of the courts is to ascertain whether the

act violates any constitutional limitation, the question of public policy being solely one for the legislature. *City of Raleigh v. R. R. Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969). The General Assembly is under no compulsion to exercise the police power of the State in a manner which the courts may deem wise or best suited to the public welfare. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663 (1969). If a statute is to be sustained as a legitimate exercise of the police power, however, it must be substantially related to the valid object sought to be obtained. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed*, 422 U.S. 1002, 45 L.Ed. 2d 666, 95 S.Ct. 2618 (1975). When the issue of whether an act of the General Assembly constitutes an unreasonable, arbitrary or unequal exercise of the police power is fairly debatable, the courts will not interfere. In such instances, courts will not substitute their judgment for that of the legislative body charged with the primary duty of determining whether its action is in the interest of the public health, safety, morals, or general welfare. *In Re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706 (1938).

[3] In the present case, the defendant contends that the challenged chapter denies due process and is both unconstitutionally vague and overbroad. We do not find the chapter in any way vague. Its vice lies in its overbreadth.

By its terms, the challenged chapter prohibits the shining of any artificial light beyond the surface of a roadway during specified evening hours in the counties affected. In order to establish a violation of the chapter, the State is not required to show that the defendant was in possession of a firearm or other device capable of harming wildlife or that the defendant had any intent to harm wildlife. *Cf. State v. Lassiter*, 13 N.C. App. 292, 185 S.E. 2d 478 (1971); *cert. denied*, 280 N.C. 495, 186 S.E. 2d 514; *appeal dismissed*, 280 N.C. 724, 186 S.E. 2d 926 (1972) (holding constitutional a statute requiring the State to make such showing). Instead, the chapter creates in clear and concise terms a new offense of shining an artificial light from a motor-driven conveyance beyond the surface of a roadway during certain evening hours. Other provisions of our law require drivers of such motor vehicles to have their headlights on during the same hours. G.S. 20-129. The challenged chapter, therefore, would apply to all motorists operating motor vehicles in an otherwise lawful manner during

the evening hours in question. Such motorists would be left with only the options of remaining off the public roadways during the hours in question or being in violation of law.

The challenged chapter does not lend itself to a limiting interpretation such as would be required in order to bring it into compliance with the requirements of due process. We do not find the fact that the challenged chapter applies only to motorists who "deliberately" flash or display artificial lights from or attached to motor-driven conveyances makes the chapter amenable to an interpretation which would limit its application to those situations in which it may be shown by other competent evidence that the defendant intended to do harm to wildlife. Any such interpretation would render the chapter totally meaningless and entirely defeat the clearly expressed legislative intent found therein. In fact, we find no limiting construction, reasonably consistent with the apparent intent of the General Assembly, which can be given the challenged chapter in order that it may be saved. Instead, it must stand or fall as a whole.

Having so construed the chapter under consideration, we find it so overbroad as to comprise an arbitrary interference with otherwise innocent conduct and lacking any rational, real, or substantial relation to the public health, morals, order, safety or general welfare. Chapter 269 of the 1975 North Carolina Session Laws does not meet the due process "standard of reasonableness" which acts as a limitation upon the exercise of the State's police power, and it, therefore, violates the Fourteenth Amendment to the Constitution of the United States and Section 19 of Article I of the Constitution of North Carolina. *State v. Smith*, 265 N.C. 173, 143 S.E. 2d 293 (1965). The order of the trial court granting the defendant's motion to dismiss the charges brought against him pursuant to that chapter was correct. The State's assignment of error is overruled.

We are cognizant of the fact that the Supreme Court of the United States has rendered opinions recently tending to somewhat modify and breathe new life into the doctrine of substantive due process. *E.g., Moore v. East Cleveland*, 431 U.S. 494, 52 L.Ed. 2d 531, 97 S.Ct. 1932 (1977). *See* Preston & Mehlman, *The Due Process Clause as a Limitation on the Reach of State Legislation: An Historical and Analytical Examination of Substantive Due*

Process, 8 Univ. of Baltimore L. Rev. 1 (1978); Saltzman, *Strict Criminal Liability and The United States Constitution: Substantive Criminal Law Due Process*, 24 Wayne L. Rev. 1571 (1978); *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 128-37 (1977); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 42-43 (1972). In light of these developments, it has been pointed out that even legislation which is not an arbitrary or capricious interference with the rights of citizens may constitute a violation of substantive due process, if through overbreadth the legislative enactment in question imposes limitations upon rights so important that they cannot be abridged under almost any circumstances. Preston & Mehlman, *supra*, at 40 n. 240 (1978). Our determination that the chapter under challenge in the present case is so overbroad as to constitute arbitrary and unreasonable interference with innocent conduct and to deny due process makes it unnecessary for us to consider whether the right of citizens to engage in intrastate travel during the hours involved in the present case constitutes any such fundamental and important right. *Cf., e.g., Shapiro v. Thompson*, 394 U.S. 618, 630, 22 L.Ed. 2d 600, 612, 89 S.Ct. 1322, 1329 (1969) (quoting with approval Chief Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L.Ed. 702, 790 (1849), implying a right to "pass and repass" within "our own States"); *Kent v. Dulles*, 357 U.S. 116, 125-26, 2 L.Ed. 2d 1204, 1210, 78 S.Ct. 1113, 1118 (1958) ("Freedom of Movement is basic in our scheme of values.")

For the reasons previously set forth, we hold that the trial court correctly determined that Chapter 269 of the 1975 North Carolina Session Laws is constitutionally invalid. The order of the trial court dismissing the charges brought against the defendant pursuant to that chapter was, therefore, correct and is hereby

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

WILLIAM T. McADAMS, D/B/A McADAMS BROTHERS v. ALTON D. MOSER AND WIFE, CARLEEN F. MOSER

No. 7815SC466

(Filed 17 April 1979)

1. **Evidence § 31— contracting job—notebooks containing facts and figures—best evidence rule inapplicable**

In an action to recover for the cost of laying water and sewer pipes on defendants' land, plaintiff was not required, pursuant to the best evidence rule, to produce notebooks in which he had kept track of the number of men on the job, the footage of pipe used, the number of hours spent grading, and other facts rather than testifying to the facts himself, since the best evidence rule requires the production of a document only where the contents or terms of the document are in question, but here facts about plaintiff's work which were within plaintiff's own knowledge were in issue, not the contents of the notebook.

2. **Customs and Usages § 1— contracting business—"cut sheets"—contract silent—evidence of custom admissible**

In an action to recover for the cost of laying water and sewer pipes on defendants' land, the trial court did not err in permitting plaintiff to testify that it was the custom in the contracting business for "cut sheets" to be furnished and paid for by the owner of the land, not the contractor, since this action involved an oral contract, and the challenged testimony was admissible to prove a matter upon which the contract was silent.

3. **Contracts § 27.3— amount owing on contract—sufficiency of evidence**

In an action to recover for the cost of laying water and sewer pipes on defendants' land, evidence was sufficient to be submitted to the jury, though plaintiff testified from his memory, where plaintiff's evidence showed that he submitted to defendants a detailed bill for parts and labor.

4. **Trial § 42.1— amount of recovery—no compromise verdict**

In an action to recover for the cost of laying water and sewer pipes on defendants' land, the fact that the jury awarded plaintiff a sum greater than that which defendants claimed was due and less than that which plaintiff claimed was due did not require that the verdict be set aside as a compromise verdict, since it was the function of the jury to determine from the evidence which services and materials defendants requested after the making of the parties' oral agreement, and the prices plaintiff charged for them.

APPEAL by defendants from *McKinnon, Judge*. Judgment entered 20 October 1977 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 28 February 1979.

Plaintiff and defendants entered into an agreement whereby plaintiff was to lay water and sewer pipes on defendants' land.

According to plaintiff's allegations, the terms of the agreement provided that he was to be fully compensated for the materials and services he provided. Defendants aver that the parties agreed that the total cost of the materials and work would not exceed $44,000.

Plaintiff testified that under the agreement he was to be paid $44,000-$46,000, plus the cost of rock work. Subsequent to the making of the agreement, defendants requested that he perform additional services, including grading two lots of almost solid rock; installing a force main on the other side of the highway and close beside another main, making the work more difficult; pumping out septic tanks; extending the lines underneath trailers, where the digging had to be done by hand; installing home connections and P traps; laying 146 feet of storm drainpipe; and installing a ten-foot manhole and a catch basin and grate. The job also took more pipe than had been anticipated and included in the agreement. Plaintiff testified that the value of the services he provided was "[s]omething over sixty-six thousand dollars." (He had submitted a bill for $66,885.)

> I did not notify Mr. Moser that I was getting way above and away from that forty-four to forty-six thousand ($44,000 to $46,000.00) until he wanted me to put those home connections in and I said, 'That's going to run more and I just ain't going to do it', and he said, 'Well, it's got to be done', and I said, 'All right', and then I agreed to go on and do it but he never asked me what it was going to cost extra. . . . [E]very time he come out and wanted me to do something extra I went on and done it and never turned a word about nothing. . . .
>
> As I went along I knew it was running up here and I never told him although he and I discussed the fact that he couldn't pay forty-four to forty-six thousand dollars ($44,000 to $46,000) and I never told him anything about it.

Defendants have paid a total of $33,601.81.

Defendant testified that the original agreement was that the complete job would cost $40,000; his "understanding of the agreement with Mr. McAdams was that the forty thousand dollars ($40,000.00) was to include everything it took to do the job with

and his labor. In other words, it was a complete job according to the plans." The only changes he was aware of were some extra pipe plaintiff ordered for him for the future, and for which he paid extra, some drainage pipe put in a ditch, and a catch basin and grates. The grading occurred because plaintiff "told me that he was going to need some dirt to fill in over the pipe and I told him that right there on that bank he could get all the dirt he wanted, that I wanted to grade it down anyway." When it looked like the job was going to run over $40,000, he asked plaintiff, "Will it run over forty-four thousand?" and plaintiff said, " 'Oh, no definitely not over forty-four thousand.' "

Defendants' motion for directed verdict was denied. The jury found that the parties agreed that the cost of the work was not to exceed $44,000; that defendants thereafter asked plaintiff to provide materials and work which were in addition to those included in the agreement; and that defendants owe plaintiff a balance of $20,661. Defendants' motions for judgment notwithstanding the verdict and new trial were denied. Defendants appeal.

Coleman, Bernholz & Dickerson, by Douglas Hargrave, for plaintiff appellee.

Sanders, Holt, Spencer & Longest, by Emerson T. Sanders and James C. Spencer, Jr., for defendant appellants.

ARNOLD, Judge.

[1] Relying on the "best evidence rule," defendants argue that part of the plaintiff's testimony was improperly admitted. This reliance is misplaced. Plaintiff was allowed to testify, over objection, to the number of men he probably used on the job, the actual footage of pipe used, and the number of hours spent grading. These facts, and others, had been recorded by plaintiff in small notebooks as the job progressed, and after the bill was prepared the notebooks were thrown away. Defendants contend that plaintiff should have been required to produce the notebooks where plaintiff kept track of these figures, rather than testifying to the facts himself. The "best evidence rule," however, requires the production of a document "only where the *contents* or *terms* of [the] document are in question." 2 Stansbury's N.C. Evidence § 191 at 103 (Brandis Rev. 1973). Here not the contents of the notebooks, but facts about plaintiff's work which were within

plaintiff's own knowledge are in issue. "[I]f a fact has an existence independent of the terms of any writing [as is the case here], the best evidence rule does not prevent proof of such fact by the oral testimony of a witness having knowledge of it. . . ." *Id.*, n. 24. *See also Whitehurst v. Padgett*, 157 N.C. 425, 73 S.E. 240 (1911).

[2] Defendants also assign error to the admission of plaintiff's testimony that it is the custom in the contracting business for "cut sheets" to be furnished and paid for by the owner of the land, not the contractor. Defendants argue that such evidence would not be admissible to add a new element to a contract. Defendants rely on *Lewis v. Salem Academy & College*, 23 N.C. App. 122, 208 S.E. 2d 404, *cert. denied* 286 N.C. 336, 210 S.E. 2d 58 (1974), for this proposition, but that case is not on point. The court in *Lewis* had before it an express written contract, the terms of which plaintiff attempted to contradict by evidence of the "usual and customary practice" of Salem College. Here we are concerned with an oral contract, and there is no evidence that "cut sheets" were considered by the parties at the time the contract was made. (Defendant testified that after he "thought everything was settled," plaintiff "came up one day and said we were going to have to have some cut sheets before he could start work. I didn't know what he was talking about.") This Court in *Lewis* quoted 55 Am. Jur., Usages & Customs § 31 at 292, for the proposition that "[a] custom or usage may be proved . . . to annex incidents to the contract in matters upon which it is silent." *Lewis v. Salem Academy & College, supra* at 128, 208 S.E. 2d at 408. We believe that the challenged testimony here was admissible to prove a matter upon which the contract is silent.

[3] Error is also assigned by defendants to the denial of their motions for directed verdict or judgment notwithstanding the verdict. On such motions the evidence is to be taken as true and considered in the light most favorable to the plaintiff, *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977), and the motion should not be allowed unless it appears as a matter of law that plaintiff cannot recover upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). Defendants argue that the plaintiff's evidence was too speculative to go to the jury, since he relied upon his memory rather than written records in testifying to the value of his services. The plaintiff's

evidence showed, however, that he submitted a final bill for $66,885 and that he installed 4700 feet of force main at $4.00 per foot, 3060 feet of 4-inch sewer pipe at $4.50 per foot, a lift station for $8700, 27 P-traps at $125 each, 146 feet of storm drainpipe at $8.00 per foot, a manhole for $650, and a catch basin and grate for $100. There was equally specific evidence of other charges. This assignment of error is untenable.

[4] We likewise find no error in the denial of defendants' motion for a new trial, though defendants argue that the damage award was a compromise verdict which should have been set aside. The trial court charged the jury that if they accepted plaintiff's view of the contract they should award him the reasonable value of his materials and services, while if they accepted defendants' view they should not award plaintiff more than the balance unpaid on $44,000. The jury determined that defendants requested plaintiff to provide materials and services in addition to those included in the agreement, and awarded plaintiff $20,661. This amount comports neither with defendants' contention of $9,165.60 due to the plaintiff nor plaintiff's contention of $33,283.13 due him, but it need not be set aside as a compromise verdict simply on that basis. There was much testimony as to which materials and services allegedly were requested after the making of the agreement, and the prices plaintiff charged for them. It was the function of the jury to determine which of those materials and services actually were outside the agreement, and how much was due plaintiff for them. The jury has performed this function, and there is no basis for setting the verdict aside.

We find no error in the trial court's charge to the jury, or in the other assignments of error defendants bring forward. While the evidence here may not compel the verdict reached, the jury has made its decision, and we can find

No error.

Chief Judge MORRIS and Judge CLARK concur.

HUGH A. WELLS AND WIFE ANNE WELLS, LAWRENCE W. HARRIS AND WIFE LUCILLE HARRIS, EUNICE B. EILERS, WILLIAM F. BEAL, JR. AND WIFE DORA BEAL, AND MRS. GEORGE B. COOPER, PETITIONERS v. C. L. BENSON, F. L. ROBUCK, JR., AND CEDAR HILLS DEVELOPMENT CORPORATION, D/B/A B & R ASSOCIATES; CAROLINA BUILDERS CORPORATION; AND THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENTS

No. 7810SC447

(Filed 17 April 1979)

1. **Waters and Watercourses § 4— private dam—authority of Environmental Management Commission to order repair**

The Dam Safety Law of 1967, G.S. 143-215.23 *et seq.*, did not authorize the Environmental Management Commission to require the owners of a private washed-out dam to repair rather than remove the dam when the condition of the dam was not such as to present a threat of physical damage to surrounding property owners.

2. **Waters and Watercourses § 4— notice of orders involving private dam**

Petitioners who were not landowners whose property would be endangered by a failure of a private dam were not entitled to notice of actions and orders of the Environmental Management Commission with respect to the dam. G.S. 143-215.33(b).

APPEAL by respondents from *Smith (David I.), Judge*. Order entered 7 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 9 February 1979.

On 31 January 1977, a dam owned by C. L. Benson, F. L. Robuck, Jr., Cedar Hills Development Corporation, d/b/a B & R Associates, and Carolina Builders Corporation suffered a washout. After preliminary discussion between representatives of the Department of Natural Resources and Community Development (hereinafter referred to as the Department) and the owners of the dam, the Director of the Division of Earth Resources (hereinafter referred to as the Director) of the Department issued Dam Safety Order No. 77-4 to the owners of the dam:

> "Therefore, by the authority of NCGS 143-215.32(b) and 15 NCAC 2K. 0002, it is hereby ordered that:
>
> 1. B & R Associates and Carolina Builders Corp. make within 91 days of the issuance of this order, to wit May 30, 1977 the necessary maintenance, repair,

alteration, or reconstruction to this dam pursuant to engineering plans and specifications submitted to and approved by the Director, Division of Earth Resources,

or

2. B & R Associates and Carolina Builders Corp within 91 days of the issuance of this order, to wit May 30, 1977 breach this dam pursuant to engineering plans and specifications submitted to and approved by the Director, Division of Earth Resources, in such a manner that it can no longer impound water and in such a manner that will preclude the washing of sediment downstream.

Date: February 28, 1977.

s / STEPHEN G. CONRA. .
Stephen G. Conrad, Dire. . . . .
Division of Earth Resou. . . ."

The above order was issued without notice to the petitioners, who are owners of property surrounding and submerged by the water of Cedar Hills Lake and downstream from the dam impounding the lake. The owners of the dam failed to submit the required plans by 30 May 1977, and as a result thereof, the Director notified the owners of the assessment of civil penalties on 12 September 1977. The owners of the dam, through counsel, requested remission of the civil penalties on 23 September 1977, and subsequently, a hearing was scheduled on the matter.

On 2 November 1977, the petitioners filed a motion to intervene and a petition for relief with the Environmental Management Commission (hereinafter referred to as the Commission) seeking to review the Director's order set out above. Petitioners sought to have the dam repaired and rebuilt, but not removed. At the scheduled hearing of the Commission on the owners' request for remission, the petitioners were denied an opportunity to argue their case to the Commission, and their motion to intervene was denied.

Petitioners then appealed to the Superior Court pursuant to the Administrative Procedure Act. G.S., Chap. 150A, Art. 4. The Commission filed a motion to dismiss the appeal on the ground that it had no authority to grant the petitioners the relief re-

quested by them. On 3 April 1978, petitioners filed a motion for partial summary judgment requesting the court to require the Commission to grant them a hearing so that a determination by the Commission could be made on the matter involved and to provide a basis for an appeal on the merits. On 7 April 1978, the Superior Court entered an order granting the petitioners partial summary judgment and ordering the Commission to grant a hearing to the petitioners according due process to all parties. The trial court held that the Commission had the right to require the owners of the dam to repair or reconstruct the defective dam without giving the owners the option to remove it. The Commission appealed.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for respondent appellant Environmental Management Commission.

Kimzey, Smith & McMillan, by James M. Kimzey, for petitioner appellees.

ERWIN, Judge.

We hold that the trial court committed error by denying the Commission's motion to dismiss the petition on the grounds that the Commission is without authority to grant the relief requested by the petitioners. The judgment entered below is reversed.

The case *sub judice* will require us to review the Dam Safety Law of 1967 as amended in keeping with the prayer of relief as requested by the petitioners, to wit:

"Wherefore, Petitioners pray the Court that:

1. It issue its order requiring the Environmental Management Commission to permit the petitioners to intervene in this matter.

2. It require the Environmental Management Commission to hold a hearing where petitioners are accorded due process including the right to be heard, to examine and cross examine witnesses and to present evidence in their own behalf.

3. It issue a stay order, staying the Environmental Management Commission from carrying out the dictates of its

Dam Safety Order # 77-4 specifically in so far [sic] as said order permits the owners of the dam to breach the dam; and it issue an injunction requiring B & R Associates and Carolina Builders Corporation the owners of the dam to cease and desist from any breach of said removal of said dam or any other alteration of said dam to the detriment of petitioners until the final determination of this matter."

G.S. 143-215.24 declares the purpose of the Dam Safety Law as follows:

"It is the purpose of this Part to provide for the certification and inspection of dams in the interest of public health, safety, and welfare, in order to reduce the risk of failure of dams; to prevent injuries to persons, damage to property and loss of reservoir storage; and to ensure maintenance of minimum stream flows below such dams of adequate quantity and quality."

G.S. 143-215.32 grants the following authority to the Commission:

"(b) If the Department upon inspection finds that any dam is not sufficiently strong, or is not maintained in good repair or operating condition, or is dangerous to life or property, or does not satisfy minimum stream-flow requirements, the Department shall cause such evidence to be presented to the Commission and the Commission may issue an order directing the owner or owners of the dam to make at his or her expense maintenance, alterations, repairs, reconstruction, change in construction or location, or removal as may be deemed necessary by the Commission within a time limited by the order, not less than 90 days from the date of issuance of each order, except in the case of extreme danger to the safety of life or property, as provided by subsection (c) of this section.

(c) If at any time the condition of any dam becomes so dangerous to the safety of life or property, in the opinion of the Environmental Management Commission, as not to permit sufficient time for issuance of an order in the manner provided by subsection (b) of this section, the Environmental Management Commission may immediately take such meas-

ures as may be essential to provide emergency protection to life and property, including the lowering of the level of a reservoir by releasing water impounded or the destruction in whole or in part of the dam or reservoir. The Environmental Management Commission may recover the costs of such measures from the owner or owners by appropriate legal action."

Petitioner appellees contend that they are entitled to "a full and complete hearing pursuant to a holding by this Court that the Environmental Management Commission does have the authority AND THE RESPONSIBILITY to require the rebuilding of the dam if its removal would damage property and result in the loss of reservoir storage as Petitioners allege."

The intent of the Legislature controls the interpretation of the statute. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). If the language of the statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 164 S.E. 2d 2 (1968); *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335 (1963).

[1] The statutes before us are clear. The intent of the Legislature in enacting these statutes was to protect the citizens of this State from failures of dams; to prevent injuries to persons, damage to property, and loss of reservoir storage; and to ensure maintenance of minimum stream flow below such dams of adequate quantity and quality.

G.S. 143-215.33(b) provides:

"(b) If an applicant under this Part, or owner of a dam which is the subject of an application, or any landowner *whose property would be endangered by failure of a dam*, are dissatisfied with any final order or decision of the Environmental Management Commission issued under this Part, he (or they, as the case may be) shall have a right of appeal to the superior court pursuant to the provisions of Article 4 of Chapter 150A of the General Statutes." (Emphasis added.)

When viewed in context, it is clear that the evils which the act seeks to prevent are evils which ensue from dam failure. It is only in the event that the condition of the dam is such as to pre-

sent a threat of *physical damage* to surrounding property owners that the Commission is empowered to require owners to repair the dam. *See* G.S. 143-215.32(b). Since this required condition is not present, we agree with the Commission that the act does not authorize the relief requested by plaintiffs.

We hold that: (1) G.S. 143-215.27, which deals with repair, alteration, or removal of a dam, contains a criterion for original construction only that the design is safe and adequate; (2) G.S. 143-215.27(b) provides for work to begin on repair, alteration, or removal when necessary to safeguard life and property; (3) G.S. 143-215.28(a) sets forth standards by which the Commission will approve or disapprove applications for construction, repair, alteration, or removal; and (4) G.S., Chap. 143, Art. 21, entitled Water and Air Resources, Part 3, Dam Safety Law, does not authorize the Commission to deny a removal of a private washed-out dam by the owners, unless the above criteria are met.

[2] G.S. 143-215.33(b) designates the person or persons who shall have a right to appeal from the Commission to the Superior Court. To us, the statute designates the person who shall have notice of the Commission's actions and orders. Petitioners are not included within G.S. 143-215.33(b), in that they are not landowners whose property would be endangered by a failure of the dam. The dam in question here was washed out, and the owners of the dam have submitted to the Commission plans to breach the dam and drain the lake by their engineers. Even if the petitioners were entitled to notice, we hold that the relief sought by them is not authorized by the statutes in question.

The judgment appealed from is reversed and remanded. The trial court shall enter judgment dismissing appellees' petition.

Reversed and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

GEORGE E. GODWIN v. CLARK, GODWIN, HARRIS & LI, P.A.; CLARK, TRIBBLE, HARRIS & LI, P.A.; FRANKLIN J. CLARK III; JOSEPH M. HARRIS; GERALD LI; AND MICHAEL TRIBBLE

No. 7826SC482

(Filed 17 April 1979)

Reference § 7; Rules of Civil Procedure § 53— value of stock—compulsory reference—procedures

The report of a certified public accountant appointed as a referee to determine the value of plaintiff's stock in a corporation in accordance with a stock redemption agreement was not defective because the referee did not conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation, since such procedures were not required by G.S. 1A-1, Rule 53(f) or by the court's order of compulsory reference. Furthermore, the value placed on the stock by the referee was supported by an exhibit submitted as a part of the report.

APPEAL by plaintiff from *Smith (David I.), Judge.* Judgment entered 19 January 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 March 1979.

In December 1975, plaintiff brought this action against his former architectural firm, Clark, Godwin, Harris & Li, P.A. (hereinafter "Corporation"), the successor firm, Clark, Tribble, Harris & Li, P.A., and his former partners, Franklin J. Clark III, Joseph M. Harris, Gerald Li, and Michael Tribble, to enforce his rights under a stock redemption agreement. The stock redemption agreement was entered into with the Corporation on 13 May 1974 by the four original shareholders and Tribble, a new shareholder, providing for the redemption of their stock by the Corporation upon the death or termination of a shareholder. The agreement contains the following: "The certified public accountant in charge of the books of the Corporation at the time of the occurrence of any event requiring a sale shall determine the book value of the capital and surplus of the Corporation by first valuing the entire assets of the Corporation as of the last day of the calendar month next preceding the month in which any event requiring sale . . . occurs." A formula for determining value was spelled out in the agreement. The Corporation terminated plaintiff's employment around 2 July 1974. This occurrence required the Corporation to purchase plaintiff's one hundred shares of

stock pursuant to the stock redemption agreement. Upon Corporation's failure to perform, plaintiff brought this action.

Defendants moved for a compulsory reference under Rule 53 of the North Carolina Rules of Civil Procedure for the purpose of determining the value of plaintiff's stock pursuant to the agreement. Defendants' motion was granted in an order entered by Judge Ralph Walker on 15 April 1977, appointing Mr. John L. Eikenberry, a certified public accountant employed with the firm of Coopers and Lybrand, as referee to make the valuation of the stock in accordance with the terms of the stock redemption agreement. Mr. Eikenberry filed the referee's report on 8 November 1977, concluding the value of the stock to be $53.95 per share and the value of plaintiff's shares (100) to be $5,395. On 8 December 1977, plaintiff objected to the report of referee. On 19 January 1978, an order was entered by Judge David I. Smith adopting the report of referee. From the entry of this judgment, plaintiff gave notice of appeal.

Cansler, Lockhart, Parker & Young, by Joe C. Young and George K. Evans, Jr., for plaintiff appellant.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant appellees.

MARTIN (Harry C.), Judge.

The sole assignment of error on this appeal was the trial court's acceptance and entry of judgment on the referee's report. Plaintiff filed exceptions to the referee's report and defendants moved to adopt the report, all pursuant to Rule 53(g)(2). Plaintiff contends the report was fatally defective and was not in compliance with Rule 53. Specifically, plaintiff alleges the referee's report is defective because it contained no records and exhibits considered by the referee in rendering his decision, no hearings were held, nor was there an audit. Plaintiff contends these defects manifest a denial of constitutional and statutory due process requirements in that plaintiff was not given an adversary hearing with the opportunity to present evidence and testimony, and to challenge the evidence and testimony presented by other parties. Defendants contend plaintiff failed to enter a timely objection to the order of reference.

The procedures to be applied in a compulsory reference are set out in the statute. The statute provides:

Rule 53. Referees.

(a) Kinds of reference.—

. . . .

(2) Compulsory.—Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

. . . .

. . . .

(e) Powers.—The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts. . .. Subject to the specifications and limitations stated in the order, every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. . . .

(f) Proceedings.—

(1) Meetings.—When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. . . .

> (2) Statement of Accounts.—When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted . . .. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

N.C. Gen. Stat. 1A-1, Rule 53.

In the case *sub judice*, defendants entered a motion for reference pursuant to Rule 53 for the reason that one of the issues in the lawsuit involved the examination of a long and complicated account. The trial judge found the issue did involve a long and complicated account and properly granted the motion. Rule 53(a)(2)a; *Shute v. Fisher*, 270 N.C. 247, 154 S.E. 2d 75 (1967). In entering a compulsory reference, the statute spells out the powers that a judge may give the referee. The duty and powers of the referee are not inherent but are determined by the order of the judge. *Jones v. Beaman*, 117 N.C. 259, 23 S.E. 248 (1895). Mr. Eikenberry, a certified public accountant, was appointed referee "for the purpose of valuing Plaintiff's stock" and was instructed to make the valuation "in accordance with the terms of the stock redemption agreement" as of 30 June 1974. The trial judge further instructed Mr. Eikenberry that he was to "function as the 'certified public accountant' " as utilized in the stock redemption agreement. The order authorized, but did not require, the referee to conduct a hearing and take evidence. The meeting under Rule 53(f) is not required if the "order of reference otherwise provides." The trial judge found that a meeting as contemplated under Rule 53(f) was not necessary, but left this in the discretion of the referee.

Plaintiff challenges the instructions given the referee in the order of the trial court and the procedures followed by referee in conducting the valuation. Plaintiff maintains that the trial court and referee did not comply with the terms of Rule 53 in that referee did not conduct hearings, examine witnesses under oath,

admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation. None of these procedures are required under the statute. The trial court order did not require any of these procedures. The stock redemption agreement did not require an audit of the corporate books to determine the value of the stock. The judge instructed the referee to make the valuation according to the terms of the agreement. Therefore, the referee acted properly in not conducting an audit. At the time the order for a compulsory reference was entered, plaintiff did not object to the contents of the order. Plaintiff cannot now complain. We find no error in these exceptions.

Plaintiff complains on appeal that the referee's activities were conducted *ex parte*. To the contrary, the record shows plaintiff, his attorney and accountant appeared before the referee and participated in the proceedings. The record indicates that none of the defendants nor their representatives contacted the referee during the proceedings, except to agree by letter to extensions of time for the filing of the referee's report. During the proceedings before the referee, plaintiff did not object at any time to the procedures used. We find no error in this exception.

Plaintiff further contends the referee's report is fatally defective because it is ambiguous and equivocal in its language and not supported by any evidence. The referee's report established a value of the stock according to the formula prescribed in the stock redemption agreement. The report contained a balance sheet for Clark, Godwin, Harris & Li, P.A.; explanations of the items appearing in the balance sheet; and how the valuation procedures in the agreement were applied to the figures. The order of reference did not require the referee to make findings of fact and conclusions of law and there were none labeled as such in the report. The referee's report was very clear in its language, and the value placed on the stock by the referee was supported by the exhibit submitted as a part of the report.

Plaintiff made no exception to the referee's finding as to the value of his stock. Under the terms of the order of reference, the finding of fact by the referee that plaintiff's stock had a value of $5,395 is supported by the evidence in the record, and the trial

court's approval of this finding is conclusive on appeal and is affirmed. *Williamson v. Spivey*, 224 N.C. 311, 30 S.E. 2d 46 (1944).

Affirmed.

Judges VAUGHN and ERWIN concur.

DONALD R. DALE AND WIFE, MARY C. DALE v. IOWA MUTUAL INSURANCE COMPANY

No. 7825SC608

(Filed 17 April 1979)

Insurance § 121 — fire insurance — wilful misrepresentation of loss of personalty — policy not divisible — policy void as to real property

Where a fire insurance policy contained a forfeiture clause for wilful misrepresentation of a material fact and contained one basic premium in payment for the coverage of both plaintiffs' house and their personal property therein, and the risk to the real and personal property was identical, both being subject to the same fire, the policy was not divisible; therefore, where plaintiffs wilfully misrepresented material facts in swearing to their proof of loss with respect to their personal property, the policy was void with respect to their real property as well.

APPEAL by plaintiffs from *Gaines, Judge*. Judgment entered 15 February 1978 in Superior Court, BURKE County. Heard in the Court of Appeals 27 March 1979.

Plaintiffs appeal from a judgment denying recovery on a claim for real and personal property loss under a policy of fire insurance. We find no prejudicial error in the trial.

The evidence showed that on 4 April 1976 defendant issued to plaintiffs a standard fire insurance policy insuring plaintiffs' dwelling house and personal property in the house. The property was in Burke County, North Carolina, and the contract of insurance issued in North Carolina. The premium was paid and while the policy was in effect a fire occurred on 6 May 1976 destroying and damaging the house and personal property belonging to plaintiffs. Evidence of plaintiffs tended to show a loss in excess of $35,000 for damages to the dwelling house and in excess of

$17,500 to the personal property. Defendant's evidence conceded the policy was issued, but tended to show plaintiffs wilfully misrepresented material facts in swearing to their proof of loss with respect to this alleged personal property loss. For this reason, defendant refused to pay under the policy, except the payment of $13,656.66 to Morganton Savings & Loan Association according to the provisions of the mortgage assignee clause of the policy.

The evidence further showed a fire was first detected about 1:15 p.m. in an upstairs bedroom. This fire was extinguished by the Salem Fire Department. However, fire was again detected about 8:50 p.m. when the house was totally destroyed. Certain personal property had been removed from the premises after the first fire and before the 8:50 p.m. fire.

The jury found that the plaintiffs had wilfully concealed or misrepresented material facts concerning the insurance, and the court entered judgment denying plaintiffs' claims.

John H. McMurray for plaintiff appellants.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr. and Steven Kropelnicki, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiffs' principal contention is that the policy of insurance is divisible and if plaintiffs violate the policy with respect to their claim for personal property loss, it does not void the policy as to the claim for damages to the dwelling house.

The policy is a standard fire insurance policy and the statutory provisions are incorporated in it. The terms of N.C.G.S. 58-176(c) require that the standard fire insurance policy for North Carolina contain this provision:

> This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

This provision is inserted in the insurance contract by the statute as a part of the public policy of the state. *Greene v. Insurance Co.*, 196 N.C. 335, 145 S.E. 616 (1928). This provision is valid, and the rights and liabilities of the parties under the policy must be ascertained and determined in accordance with its terms. *Gardner v. Insurance Co.*, 230 N.C. 750, 55 S.E. 2d 694 (1949). The parties are presumed to know all the terms, provisions and conditions included in the contract of insurance. *Midkiff v. Insurance Company*, 197 N.C. 139, 147 S.E. 812 (1929).

Plaintiffs argue that under the divisibility theory, the words "entire policy" in the statutory provision refer only to the "entire policy" which the fraudulent statement affected and does not include those separate provisions of the policy insuring other risks unaffected by the fraudulent statement. We do not agree.

It is generally held that if a building and its contents are insured, and the risk insured against is generically identical as to each, a breach of condition respecting either the realty or the personalty insured affects the hazard as to all the property insured and will thus avoid the contract of insurance as an entirety. 43 Am. Jur. 2d Insurance § 302 (1969). Plaintiffs rely primarily upon *Claxton v. Fidelity & Guaranty Fire Corp.*, 179 Miss. 556, 175 So. 210 (1937). The policy in *Claxton* had a forfeiture clause similar to the provision in plaintiffs' policy. The court found plaintiff had made a false statement with respect to the personal property and held the policy void as to the claim for personal property but valid as to the claim for damages to the real property. The policy in *Claxton* was a scheduled policy, insuring various items and fixing the amount of insurance to be paid on each; with the premium based upon the various items insured, fixed as an entirety.

The policy *sub judice* contains one basic premium in payment for the coverage of both the real and personal property. The risk to the real and personal property is identical, both being subject to the same fire. We hold the case is controlled by *Coggins v. Insurance Co.*, 144 N.C. 7, 56 S.E. 506 (1907), where the Court held:

> Plaintiff then takes the position that while this ruling would prevent a recovery for the loss of the goods, he should still be allowed to recover for the loss of the storehouse, inasmuch as the policy placed a definite and distinct portion of the insurance on the building. But we cannot so interpret the

contract. True, the amount of the insurance is apportioned, a definite sum being specified for the building and another for the goods. It is also true that the stipulations of the iron-safe clause are more especially addressed to the insurance of the goods; but the premium on the policy is entire; the concluding stipulation is to the effect that if the insured fails to produce the set of books and inventories as required by the contract, the policy shall become null and void, and the "failure shall constitute a perpetual bar to any recovery thereon"; and, furthermore, the goods are insured "while they are contained in the storehouse, and not elsewhere"; thus making the risk on the goods and on the building substantially identical.

. . . the destruction of the one would almost of a certainty involve the destruction of the other; and the physical hazard of the risk and the moral hazard, as affected by these stipulations in question, were one and the same. In such case we are clearly of the opinion that the contract is not divisible, and that a breach of the stipulation will go to the entire measure of the obligation.

. . . .

. . . we are of opinion that the great weight of authority, as well as the better reason, establishes the position that when to the fact that the premium is entire there is added the fact of identity of risk, the obligation is single, and on breach of the stipulation all recovery is barred.

Id. at 13-14, 56 S.E. at 508-09.

In *Biggs v. Insurance Co.*, 88 N.C. 141 (1883), Justice Ruffin, the younger, stated:

[I]n a case like ours, in which the property insured consists of a single storehouse and the goods kept therein, a breach as to part will work a forfeiture as to the whole. In such case it is impossible to introduce any new element of carelessness by lessening the interest of the owner in one species of the property, so as to increase the risk thereof, without at the same time adding to the hazard of the other. Every risk that can attend the one must attend the other, and consequently the same rule must apply to both.

> The contract in this case was an entire one—the premium paid, a single amount—the application for the insurance on both the house and the goods, one act—and any misrepresentation as to one would have avoided the policy as to both. So that the court feels no hesitation in saying under which rule the case falls.

Id. at 144-45.

Where the rate of premium of each class of property is determined by the different risks to the different classes of property, it can be reasoned that the insurance contract is divisible; but where the risk is identical, and the premium entire, as here, the contract is indivisible. *Mortt v. Insurance Co.*, 192 N.C. 8, 133 S.E. 337 (1926). Plaintiffs' assignments of error are overruled.

Plaintiffs assign as error the testimony of the witness Clark concerning statements made to him by the plaintiff Donald Dale as to Dale's belief that his wife may have had something to do with the fire. The statements by Dale were those of a party to the action and not hearsay as to him. *Tredwell v. Graham*, 88 N.C. 208 (1883). In *McRainy v. Clark*, 4 N.C. 698, 699 (1818), Ruffin, J., later the great Chief Justice, stated: "The rule is universal that whatever a party says or does shall be evidence against him, to be left to the jury. It is competent evidence. The jury can and will give it its due weight, ... I know of no solitary exception to this rule, and cannot imagine one."

No specific objection was made on behalf of plaintiff Mary C. Dale to the challenged testimony. Only a general objection was entered. The issue as to the alleged misrepresentation was addressed to both plaintiffs, not Donald Dale alone. Both plaintiffs signed the proof of loss. The jury reconciled the issue against both plaintiffs. The assignment of error is overruled.

We have considered plaintiffs' other assignments of error and find them without merit. Plaintiffs received a fair trial free of prejudicial error.

No error.

Judges PARKER and ERWIN concur.

MARGIE U. PLYLER, PLAINTIFF AND FIREMAN'S FUND AMERICAN INSURANCE COMPANY, ADDITIONAL PLAINTIFF v. MOSS & MOORE, INC., DEFENDANT

No. 7819SC347

(Filed 17 April 1979)

1. **Professions and Occupations § 1— furnace repairman—representations as to skill—standard of care**

A defendant who engaged in the business of installing and repairing furnaces represented that it possessed the knowledge, skill and ability that others engaged in the same business ordinarily possess, and when defendant undertook to install a furnace in plaintiff's mobile home, it assumed the duty to exercise reasonable care in the use of its skill and in the application of its knowledge and to exercise its best judgment in the performance of this work, within the limits of the profession.

2. **Professions and Occupations § 1— furnace—installation and servicing—no negligence**

In an action to recover for fire damages to plaintiff's mobile home which allegedly resulted from defendant's negligent installation and servicing of a furnace, plaintiff failed to show that defendant breached any duty (1) by installing the furnace in such a manner that the exhaust outlet of the furnace was not directly below the smokestack so that the exhaust outlet and smokestack were connected with a flue pipe containing two elbows, since there was no evidence that this method of installation was negligent, or (2) by installing new nozzles in the furnace but failing to inspect the flue pipes during its service call, since there was no evidence that a reasonably prudent serviceman confronted with the same or similar circumstances would have done anything other than change the nozzles in the furnace.

APPEAL by defendant from *Collier, Judge*. Judgment entered 2 December 1977 in Superior Court, CABARRUS County. Heard in the Court of Appeals 18 January 1979.

The defendant herein, Moss & Moore, Inc., installed a replacement furnace unit in a mobile home owned by the plaintiff, Margie U. Plyler, during August of 1969. The defendant returned to the plaintiff's mobile home on 31 December 1970 and again on 25 October 1972 to service the furnace. Thereafter the plaintiff Plyler informed the defendant that the furnace was emitting smoke and fumes. On 31 December 1973, the defendant again went to the plaintiff's mobile home to service the unit. During this service call, the nozzles on the furnace were changed but nothing else was done. The plaintiff was then told that it would

be all right to use the furnace. The furnace was turned on and she left it on when she went to work the following day. After arriving at work, the plaintiff received a telephone call informing her that her mobile home was on fire. She returned to her home and found that the flames had been extinguished. Later that day, another fire erupted in the mobile home causing additional damage before it could be extinguished.

The plaintiff Plyler filed a complaint against the defendant on 4 March 1975 setting forth claims for relief based upon negligence, breach of express warranty and breach of implied warranty. The defendant answered the complaint and denied that it had either been negligent or breached any warranty. Additionally, the defendant in its answer moved to join Fireman's Fund American Insurance Company as an additional party plaintiff on the ground that the insurance company had made a payment to the plaintiff Plyler as a result of the fire. Prior to trial, the trial court determined that the insurance company was a proper party plaintiff and granted the motion.

When the case was called for trial, the plaintiffs presented evidence tending to show that the most extensive damage caused by the fire was in the area of the furnace. They also tendered, and the court accepted, Paul Efird Price as an expert on "the cause of fire in mobile homes, the extent of the damage to them and the repair of them." Mr. Price testified that he had examined the mobile home after the fire in question. During his examination, he found that the exhaust outlet from the furnace was not directly below the smokestack. In order to connect the exhaust outlet to the smokestack, two elbows had been installed in the flue pipe. The elbows had been wrapped in asbestos but there was a hole in the elbow closest to the furnace's exhaust outlet. In Mr. Price's opinion, the fire in the mobile home was caused by a high flame in the furnace hitting the elbow in the flue pipe over a number of years and thereby causing a hole to appear in the elbow.

At the close of the plaintiffs' evidence, the defendant moved for a directed verdict as to the claims based upon breach of express and implied warranty and negligence. The trial court granted the defendant's motion with regard to the claims based on breach of warranties but denied its motion with regard to the

claim based upon negligence. The defendant chose not to present evidence. The jury found that the plaintiffs had been damaged in the amount of $6,000 by the defendant's negligence and the trial court entered judgment accordingly. From the entry of that judgment, the defendant appealed.

Hartsell, Hartsell & Mills, P.A., by Fletcher L. Hartsell, Jr., for plaintiffs appellees.

Williams, Willeford, Boger & Grady, by Samuel F. Davis, Jr. and John Hugh Williams, for defendant appellant.

MITCHELL, Judge.

The defendant assigns as error the trial court's denial of its motion for a directed verdict in its favor as to the plaintiffs' claim for relief based upon allegations of negligence. A motion for a directed verdict raises the issue of whether the evidence supporting the nonmoving party's claim for relief is sufficient to require that the claim be submitted to the jury. *Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978). In determining whether the evidence is sufficient in such situations, the court must consider it in the light most favorable to the nonmoving party giving that party the benefit of every reasonable inference which may be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978).

The plaintiffs contend that they presented sufficient evidence at trial to support a jury finding that the defendant negligently installed the furnace in the mobile home of the plaintiff Plyler. The plaintiffs' evidence tended to show that the defendant installed the furnace in a manner which did not cause the exhaust outlet of the furnace to be located directly below the smokestack. Instead of installing a new smokestack in the roof of the mobile home directly over the exhaust outlet, the defendant connected the smokestack to the exhaust outlet with a flue pipe containing two elbows. These elbows were made of a galvanized material and covered with asbestos. Mr. Price, who was accepted by the court as an expert in determining the origin of mobile home fires, gave the following testimony concerning the elbows in the flue pipe: "In the area between the furnace and the smokestack I observed an elbow right on top of the furnace. I am not sure what type metal this elbow was. Originally they put stainless steel. This was

not original." In offering his opinion as to the origin of the fire, Mr. Price testified that:

> On this type of furnace, if the air is cut down too low, it appeared that is what happened and the flame, the high flame hit that over a period of years and it took it awhile to do this, maybe a year. Eventually, it worked its way through and made the hole and that is my opinion. As to what it hit, it hit the elbow. Ordinarily they go straight up with the stainless steel, but this was offset.

Mr. Price also testified that it was not typical to use such elbows. When questioned by the defendant, Mr. Price testified that: "The furnace was setting in that area of three feet. That was not the only way, if there was an offset by an elbow. You could have put another hole in the roof, and cover the other one up. Then you could go directly straight up."

The plaintiffs also introduced into evidence a copy of the installation instructions which came with the furnace. Those instructions contained the following directions:

> This unit shall be installed with the labeled Strawsine Model 75M roof jack, 8-2-2042C flue pipe connector and 8-2-2064C flue pipe connector shield. (The flue pipe connector is installed inside the roof jack.) . . . . The flue pipe extension is inserted into the roof jack. Simply pull the pipe extension down and connect to flue on unit.

[1] A claim for relief based on negligence must be supported by sufficient evidence to show that the defendant was under a duty to conform to a certain standard of conduct, that he breached that duty, that the plaintiff was injured, and that the plaintiff's injury was the proximate result of the defendant's breach. *See* W. Prosser, Law of Torts § 30 (4th ed. 1971). As the defendant represented itself as being in the business of installing and repairing furnaces, it represented that it possessed the knowledge, skill and ability that others engaged in the same business ordinarily possess. When the defendant undertook to install a furnace in the plaintiff's mobile home, it assumed the duty to exercise reasonable care in the use of its skill and in the application of its knowledge and to exercise its best judgment in the performance of this work, within the limits of the profession. *See*

Insurance Co. v. Sprinkler Co., 266 N.C. 134, 146 S.E. 2d 53 (1966). If the evidence was insufficient to show that the defendant breached one of those duties, then it was insufficient to show that the defendant was negligent.

[2] Evidence that the defendant installed the furnace in the plaintiff Plyler's home in a manner different from the manner in which the original furnace was installed, or that the furnace was not installed in an ordinary manner, or that the furnace was not installed in a typical manner would not constitute evidence that the defendant breached its duty to exercise reasonable care or to exercise its best judgment. Such evidence standing alone does not tend to show that a person engaged in the business of installing and repairing furnaces and exercising his best judgment and reasonable care would have installed the furnace in an original, ordinary or typical fashion, or that a failure to install the furnace in such fashion was careless or constituted poor judgment.

Additionally, the installation instructions which came with the furnace and were introduced into evidence failed to provide any evidence that the defendant was negligent. The instructions indicate that certain components must be installed with the furnace but do not specify whether the flue pipe must be made in a particular shape or from a particular metal. Additionally, nothing in the evidence tends to show that the particular components specified in the instructions were not in fact used. As the plaintiffs failed to present evidence that the defendant breached its duty to exercise reasonable care and to use its best judgment in installing the furnace, they failed to carry their burden of proof with regard to the claim for relief based upon negligent installation of the furnace.

In order to determine whether the trial court erred in denying the defendant's motion for a directed verdict, we must also consider whether there was sufficient evidence from which a jury could conclude that the defendant negligently serviced the plaintiff Plyler's furnace. Evidence concerning the defendant's service call consisted of testimony by the plaintiff Plyler that:

> As to what difficulty or problem that caused me to call them, it was smoking, my mattress was black and I smelled fumes. The serviceman from Moss & Moore arrived on October 31, 1973. I was present the whole time he was there. I

observed him change the nozzles in the furnace. That is all I recall him doing.

When the defendant serviced the plaintiff Plyler's furnace, it was again under a duty to exercise reasonable care in the use of its skill and in the application of its knowledge and to exercise its best judgment in the performance of its work, within the limits of the profession. *See Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966); Annot., 72 A.L.R. 2d 865 (1960). The plaintiffs contend that the exercise of reasonable care and good judgment in the present case required that an inspection be made of the flue pipes. The plaintiffs have not, however, presented any evidence to support this contention. There was no testimony or other evidence introduced tending to indicate that a reasonably prudent serviceman confronted with the same or similar circumstances would have done anything other than change the nozzles in the furnace. *Cf. Frazier v. Gas Company*, 247 N.C. 256, 100 S.E. 2d 501 (1957), *petition for rehearing dismissed*, 248 N.C. 559, 103 S.E. 2d 721 (1958) (similar evidence properly presented). Therefore, the plaintiffs failed to show that the defendant breached any duty when it installed new nozzles in the furnace but did not inspect the flue pipes during its service call.

As the evidence when considered in the light most favorable to the plaintiffs fails to show that the defendant breached any duty it owed them, the plaintiffs' claims for relief based upon negligence should not have been submitted to the jury. Therefore, the trial court erred in denying the defendant's motion for a directed verdict. Although the defendant made the necessary motions for a directed verdict and judgment notwithstanding the verdict, we have determined in the exercise of our authority under G.S. 1A-1, Rule 50(d), that the plaintiffs should be, and they are hereby, granted a

New trial.

Judges MARTIN (Robert M.) and ERWIN concur.

MARINE ECOLOGY SYSTEMS, INC. v. SPOONERS CREEK YACHT HARBOR, INC.

No. 783DC529

(Filed 17 April 1979)

1. **Claim and Delivery § 2— valuation in affidavit not binding**

A plaintiffs' valuation of property in an affidavit and undertaking in a claim and delivery action is not conclusive and binding on the plaintiff but is only some evidence of actual value, and plaintiff may show at the trial that the actual value is lower.

2. **Landlord and Tenant § 5— lease of equipment—damages for breach**

In an action to recover for breach of an agreement to lease equipment, the trial court did not err in using as its measure of damages the rent for the entire remaining term of the lease less the fair market value of the equipment at the time it was repossessed where the evidence showed that plaintiff attempted to mitigate its damages by unsuccessfully attempting to sell the equipment, which was an outdated model by the time it was repossessed.

3. **Attorneys at Law § 7.4— breach of lease agreement—no recovery of attorney fees**

A lease agreement for personal property was not an "evidence of indebtedness" within the meaning of G.S. 6-211, and plaintiff was not entitled to recover attorney fees in an action brought upon the lease although the lease provided for the recovery of such fees.

APPEAL by defendant from *Phillips, Judge*. Judgment entered 12 January 1978 in District Court, CARTERET County. Heard in the Court of Appeals 7 March 1979.

Plaintiff brought this civil action for the recovery of rental arrearage owed it for certain items of marine waste removal and storage equipment leased to defendant. The lease was for ten years, commencing 26 March 1973, with an annual rental of $300. The rent was paid by defendant for the first and second years but the third year's rent, due on 26 March 1975, was not paid.

Plaintiff instituted suit and repossessed the equipment in question, alleging by affidavit that its value was $2,400. Defendant in his answer denied the allegations of the complaint and alleged that plaintiff had breached the lease agreement by failing to maintain and service the equipment as required.

The court, sitting without a jury, made findings of fact and concluded that defendant had breached the terms of the lease

agreement and that plaintiff had not committed any material breach of the agreement. judgment was entered for the plaintiff in amounts according to the terms of the lease, less $800.00 credit for the repossessed property, and plus attorney's fees in the amount set forth in the agreement. Defendant appealed.

Bennett, McConkey & Thompson, by Thomas S. Bennett, for the plaintiff.

Everette L. Wooten, Jr., for the defendant.

MARTIN (Robert M.), Judge.

[1] Defendant contends the court erred in finding that the value of the equipment on the date it was repossessed was $800. He argues that plaintiff, having filed an affidavit in the claim and delivery action stating that the property was worth $2,400, was estopped to change his position with respect to a material matter during the course of litigation. In support of this proposition, defendant cites *Roberts v. Grogan*, 222 N.C. 30, 21 S.E. 2d 829 (1942); *Ingram v. Power Company*, 181 N.C. 359, 107 S.E. 209 (1921). We find these cases distinguishable from the instant case. A plaintiff seeking to gain possession of property which he contends is rightfully his must, as a part of the claim and delivery proceeding, provide an undertaking for twice the value of the goods or property to be repossessed, this value being established by affidavit made upon information and belief. N.C. Gen. Stats. § 1-475. The required undertaking is for the protection of defendants, so that a fund might be established from which recovery could be had were it shown that the plaintiff was not lawfully entitled to the property or that the property was damaged or diminished in value through plaintiff's fault while plaintiff held possession of it. *See* 66 Am. Jur. 2d *Replevin*, § 64 (1973). Custom and prudence have established that plaintiffs will ordinarily assign to the property to be repossessed a value which represents the maximum amount in controversy over such property, where that figure is likely to be higher than the actual value of the property. This provides the maximum protection for the party from whom the property has been taken by the claim and delivery proceeding and is consistent with our notions of due process. However, the affidavit and undertaking in a claim and delivery action, intended as they are for the defendant's protection, are

not made as conclusive declarations of value and, accordingly, defendant is not entitled to take those valuations from the proceeding before the clerk (which was ancillary to the action on the lease in the instant case) and seek, by collateral estoppel, to prevent plaintiff from proving at trial the actual (and here, lower) value of the property, using market value or other applicable standards of valuation. The North Carolina claim and delivery proceeding is essentially a statutory form of the common law action of replevin. We turn, therefore, to authorities dealing with replevin for support of our conclusions. There is a split of authority with respect to whether the valuation of property made in an affidavit and undertaking will be binding upon the party making it. The better rule, and the one we have adopted above, is that the valuation made in an affidavit or undertaking may be *some* evidence of value but is not conclusive. This principle was well stated by the court in *Maguire v. Pan-American Amusement Co.*, 205 Mass. 64, 91 N.E. 135 (1910):

> If a plaintiff in replevin chooses to make a statement of the value of the property in his writ or in his bond, undoubtedly it should be regarded as an admission by him, and should afford evidence of that value against him and those who, like his sureties, are in privity with him. But it is against all the analogies of the law to treat the mere admission of a party, not essential, as we have seen that this is not essential, to the institution or the prosecution of his proceedings, and not acted upon or intended to be in any way acted upon by the opposite party, as an estoppel. *Athol Savings Bank v. Bennett*, 203 Mass. 480, 485. The averment may have been made without seeing the property or knowing anything of the condition into which it has been put by the defendant in replevin. It is customary in our practice to prepare the bond in advance of the service of the writ and before an appraisal of the property has been made under R. L. c. 190, §§ 3 and 9. If this is done, the plaintiff will naturally make the penalty of the bond large enough to cover whatever appraisal may in the future be made. Under such circumstances the fact that the bond is required to be in double the value of the property scarcely justifies the inference that the plaintiff and his sureties are estopped to deny that the value of the property is at least half of the penalty of the bond, especially since we

have decided that no harm is done to any party by making that penalty needlessly large. *Clap v. Guild*, 8 Mass. 153.

Id. at 71-72, 91 N.E. 137-138. *Accord, Peters v. Brown*, 245 Ill. App. 570 (1927). *But see, contra, Capitol Lumber Corp. v. Learned*, 36 Or. 544, 59 P. 454 (1899). *Also see generally* 66 Am. Jur. 2d *Replevin* § 150 (1973). We find that the evidence before the court was sufficient to support the judge's findings that the equipment when returned was worth only $800.00. Facts found by the court during a hearing without a jury will not be disturbed if supported by competent evidence. Accordingly, defendant's assignments of error are overruled.

[2] Defendant contends that the trial court erred in using as its measure of damages the rent for the entire remaining term of the lease, less the fair market value of the property as of the time it was repossessed since the facts showed that the plaintiff did not attempt to resell or re-lease the property and thus did not attempt to mitigate his damages as he was obligated to do.

In *Tillinghast v. Cotton Mills*, 143 N.C. 268, 55 S.E. 621 (1906), the Court said: "It is an established principle that when there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business 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." This principle has been reaffirmed by numerous decisions of the Court. The president of plaintiff corporation testified that he attempted to sell the equipment to an outfit in Ohio, but was unsuccessful. He also stated that the equipment was an outdated model by the time it was repossessed and that he based his opinion of value on the fact that they tried to get $800 for the equipment but were unable to do so. It is only necessary that the injured party acts with such care and diligence as a man of ordinary prudence would under the circumstances, and his efforts to minimize damages are determined by the rules of common sense, good faith, and fair dealing. 22 Am. Jur 2d, § 32. We find that plaintiff took the necessary steps to minimize the loss. Defendant's assignments of error are overruled.

[3] Finally, defendant contends the court erred in allowing recovery of attorney fees. He argues that the lease contract was not an evidence of indebtedness and that attorney fees could not

be allowed under N.C. Gen. Stats. § 6-211, and that only agreements intended as security are covered under this statute. Defendant cites *Construction Co. v. Development Corp.*, 29 N.C. App. 731, 225 S.E. 2d 623 (1976). We agree with defendant. Plaintiff is not, under the statute, entitled to attorney's fees and that part of the judgment allowing attorney's fees is reversed.

Affirmed in part, reversed in part.

Judges MITCHELL and WEBB concur.

STATE OF NORTH CAROLINA v. JOHNNY CLIFTON EVANS

No. 7814SC1040

(Filed 17 April 1979)

1. **Constitutional Law § 34— assault by pointing gun—communicating threats—one incident—two offenses—no double jeopardy**

Defendant was not subjected to double jeopardy where he was charged with communicating threats, a violation of G.S. 14-277.1, and assault by pointing a gun, a violation of G.S. 14-34, though the two charges arose out of the same incident, since the elements of the two offenses differed.

2. **Assault and Battery § 15— communicating a threat—instructions proper**

In a prosecution for communicating a threat, the trial court did not err in instructing the jury only that it must find that the threat was communicated orally, and failing to instruct that the threat could be communicated "by any other means," as provided in G.S. 14-277.1(a)(2).

ON *certiorari* to review an order of *Hobgood, Judge*. Judgment entered 28 November 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 February 1979.

Defendant was charged with a violation of G.S. 14-277.1, communicating a threat, and a violation of G.S. 14-34, assault by pointing a gun. Defendant moved to require the State to elect between the two charges. He claimed that both charges arose out of the same act and that the charge of communicating threats was a lesser included offense of the charge of assault by pointing a gun. This motion was denied and the case proceeded to trial.

The State's evidence tends to show that on 3 June 1977, Thomas Dolby, a medical technician, was sitting in his ambulance in a parking lot next to the Haufbrau, a beer place, on Broad Street in Durham. Defendant came out of the Haufbrau, recognized Dolby and walked up to his window. Defendant, who had been drinking, called Dolby names. He walked two to three car lengths away from the ambulance, pulled a gun out of his belt, pointed it at Dolby, and told Dolby, "I'm going to kill you." Dolby ducked down into the ambulance and called for help on his radio. During this time the defendant was waving his gun and cursing. Defendant and his partner got into a Volkswagen and drove off. Dolby and several other ambulances followed them. At one point, the Volkswagen stopped in the middle of the street, defendant got out, pointed his gun at Dolby's ambulance, and said, "If you don't get off . . . I'm going to kill you." The defendant got back into the car and drove off. Dolby saw the defendant throw something out of the window. The police finally stopped the defendant and arrested him.

At this point, a *voir dire* hearing was conducted to determine the identity of the gun. Dolby testified that the gun, marked as State's Exhibit One, looked like the gun that the defendant pointed at him. Officer Knight, a public safety supervisor, testified on *voir dire* that, upon responding to a call, he saw an old model Volkswagen being followed by four or five ambulances. He drove in behind the Volkswagen on Sedgefield Street and saw a small, dark object being thrown out of the passenger side of the Volkswagen. The object landed on a grassy median at the intersection of Forest Road and Sedgefield Street. Knight followed the Volkswagen approximately 300 yards until it stopped. The two occupants of the Volkswagen had not changed seats and the defendant was sitting in the passenger seat. Knight asked one of the ambulance drivers to go to the location where he saw the object land and stand by. Knight went to that median approximately ten to fifteen minutes later and found a gun lying on the ground close to where he saw the object thrown. Knight identified State's Exhibit One as the same gun he found on the ground by the serial number. The court ruled that the gun was admissible as evidence.

Dolby testified, in the jury's presence, that he remembered the gun had a brown handle when he saw the defendant holding

it. He believed that State's Exhibit One was the gun pointed at him; it looked like that gun. Officer Knight testified as he had on *voir dire*. He stated that the gun had been in the property room of the Durham Police Department since the time it was recovered. The gun was offered into evidence over defendant's objection.

Defendant was convicted of assault by pointing a gun and communicating threats. From a judgment imposing two six months' jail sentences to run concurrently, defendant gave notice of appeal. He failed to perfect the appeal and the same was dismissed. We allowed defendant's present court-appointed counsel's petition for review by *certiorari*.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Loflin, Loflin, Galloway, Leary and Acker, by James R. Acker, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first contends that the trial court erred in imposing judgment on both charges because the result is that he has been twice convicted and sentenced for the same criminal act. In case number 77CRS12277, defendant was charged with having

> "unlawfully and willfully threaten to (physically injure the person) . . . of Thomas Dolby. The threat was communicated to the person by Johnny Evans, orally stating that he would kill Thomas Dolby, during the time that he had a pistol drawn and pointed at Thomas Dolby, and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out, in violation of GS 14-277.1."

In case number 77CRS12278, it was charged that defendant "did unlawfully, willfully, . . . assault Thomas Dolby by intentionally pointing a gun . . . at such person without legal justification in violation of the following law: GS 14-34."

These warrants charge two separate offenses. G.S. 14-34 provides that "[i]f any person shall point any gun or pistol at any per-

son, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault." The gun must be pointed intentionally and not accidentally. *State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768 (1956). The elements of the crime of communicating a threat are set out in G.S. 14-277.1, as follows.

> "(1) [A person] wilfully threatens to physically injure the person or damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out."

In the present case, the offense of pointing a gun was complete as soon as the defendant pointed the gun at Dolby. He could have done it in fun or without any belief on the part of Dolby that the threatened act would have been executed. Communicating a threat, however, requires more than just the pointing of the gun. There must be, among other things, the additional elements of a wilful threat to physically injure another and an actual and reasonable belief on the part of the victim that the threat would be carried out. In *State v. Roberson*, 37 N.C. App. 714, 247 S.E. 2d 8 (1978), the surrounding circumstances making it likely that the threat would be carried out included prior altercations between the defendant and the victim as well as the fact that the defendant held a rock in her hand with which she threatened to hit the victim. In the present case, evidence was presented which showed that there had been "bad blood" between the defendant and Dolby. This fact, in addition to the presence of the gun, would have been sufficient surrounding circumstances to make it likely that the threat would be carried out. It would not have been necessary for the defendant to have pointed the gun at Dolby.

Defendant relies on *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). In *Summrell*, defendant was charged with resisting arrest and assaulting an officer. Both charges arose out of one event, the defendant assaulted an officer who was trying to arrest

him. "The assaults were 'the means by which the officer was resisted.' " *State v. Summrell, supra,* at 173. As the Court stated, "[t]he warrants themselves indicate duplicate charges. Each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody." *State v. Summrell, supra,* at 173. *Summrell* is distinguishable from the case at bar. Defendant was charged with communicating threats while pointing a gun and assault by pointing a gun. Although the two charges arose out of the same incident, as we have pointed out the elements of the charge of assault by pointing a gun differ from the elements of the charge of communicating a threat.

[2] Defendant next contends that the court erred in instructing the jury that

> "for you to find the defendant guilty of communicating threats towards Dolby on said occasion, the state must prove four things beyond a reasonable doubt; that, he, the defendant, wilfully threatened physical injury to the person of Dolby; second, that the threat is communicated to Dolby by telling him orally on said occasion; third, that the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and fourth, that the person threatened believed that the threat will be carried out."

Defendant claims error because the trial court instructed that the threat must be proven to have been communicated orally. G.S. 14-277.1(a)(2), requires that the threat be communicated "orally, in writing, or by any other means." In failing to instruct the jury that the threat could be communicated "by any other means," defendant contends that the judge foreclosed the jury's right to find that the threat was communicated by the pointing of the gun and, therefore, defendant could be found guilty of only one charge. The argument is without merit.

Defendant's final assignment of error is directed to the admission of the gun into evidence. Defendant contends that the gun was not properly identified as the one used in the crimes charged. This assignment of error is without merit. The gun was relevant

to the offenses charged and sufficient evidence was presented to support the conclusion that the gun was the one used by the defendant. *State v. Battle*, 4 N.C. App. 588, 167 S.E. 2d 476 (1969).

Defendant's appeal fails to disclose prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JUDY FAYE CODY

No. 7826SC1172

(Filed 17 April 1979)

1. **Criminal Law § 99.4— ruling on evidence—no expression of opinion**

In an armed robbery prosecution in which the victim testified the robbery had lasted from 6 to 10 minutes, the trial court did not express an opinion when defense counsel asked the victim to "tell me when six minutes is up" and the court sustained the State's objection and stated that "the clock is there and the time can be counted. It's just a matter of waiting until six minutes have passed."

2. **Criminal Law § 114.2— failure to summarize some testimony—no expression of opinion**

The trial court did not express an opinion on the evidence by its failure to summarize the testimony of two defense witnesses where the court did summarize the principal features of the evidence relied on by the prosecution and by the defense.

3. **Criminal Law § 114.3— reference to defendant as "offender"—no expression of opinion**

Defendant was not prejudiced by the court's reference to her at one point in the charge as "the offender the defendant," although use of the word "offender" in referring to a criminal defendant is disapproved.

4. **Criminal Law § 39— testimony ruled inadmissible for defense—subsequent rebuttal testimony for State by same witness**

The trial court did not err in permitting a witness to testify for the State on rebuttal after his testimony had been ruled inadmissible when offered by the defense.

APPEAL by defendant from *Johnson, Judge*. Judgment entered 4 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1979.

Defendant was indicted for armed robbery, convicted by a jury of common law robbery, and sentenced to 3 to 6 years.

Evidence for the state tended to show the following: Kimberly Walker was walking down a street in Charlotte on 27 October 1977 when the defendant came up behind her, choked her and demanded money. Defendant grabbed her pocketbook, took her billfold containing $25 or $30 and left. Defendant had a bulge in her pocket resembling a gun, told Walker she would "blow my head off" and stuck her hand in the pocket. Defendant had on blue jeans, a brown suede jacket and was wearing turquoise rings. The episode lasted from 6 to 10 minutes. Walker described defendant to police and picked defendant from a group of photographs shortly after the robbery. Defendant was arrested at approximately 9:00 p.m. in the vicinity of the street where the incident occurred. Some two or three weeks later, Walker identified defendant in a lineup.

Evidence for the defendant tended to show the following: Defendant denied the robbery. She testified that she had a conversation with Debbie Adsitt and others in jail, that she stated to them the description of the robber as given the police by Walker, that Debbie Adsitt said, "that sounds like me," and that Debbie was wearing turquoise rings. Debbie Adsitt testified that she was serving time for an armed robbery which occurred on 26 October 1977, the day before this incident. She did not commit this crime. She did wear turquoise rings and told the defendant it sounded like her, but it wasn't.

Defendant also presented Debbie Adsitt's brother for the purpose of testifying that Debbie had told him that she had committed the robbery. However, he testified that he saw Debbie on 26 October 1977, at which time she told him that she had committed an armed robbery and that she would commit another. He saw her around noon on 27 October 1977 and she told him she had robbed someone else and was going to Atlanta. Following this testimony, the state moved to suppress his testimony. Defendant joined in the motion and it was allowed. The trial court found that the testimony did not benefit the defendant, was not critical to her defense, was not trustworthy and constituted hearsay evidence.

In rebuttal, the state called Robert Adsitt to testify that he saw Debbie on 27 October 1977 around noon and told her to get out of town because the police were looking for her. She then headed south on I-85 and he did not hear from her again until she called him long distance on the telephone.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

Ann C. Villier, Assistant Public Defender, for the defendant.

CARLTON, Judge.

Defendant first assigns as error improper judicial comment on the evidence. She argues that the trial judge, in three instances, expressed an opinion on the evidence.

[1] After allowing defense counsel to reenact the incident on cross-examination of the prosecuting witness, defense counsel then asked the witness to "tell me when six minutes is up." The court sustained the state's objection and stated, "Mr. Michael, the clock is there and the time can be counted. It's just a matter of waiting until six minutes have passed." Defendant argues that this comment amounted to an expression by the trial judge of an opinion about the evidence.

The trial court had allowed defendant wide latitude on cross-examination to show that Mrs. Walker was mistaken in her estimation of the time which elapsed during the robbery. In sustaining the objection to defense counsel's question in this instance, the trial judge was exercising his duty to see that the trial proceeded in an expeditious manner without unnecessary delay. The court's comment certainly did not constitute an expression of opinion on the evidence. A remark by the trial court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. *State v. Hooks*, 228 N.C. 689, 47 S.E. 2d 234 (1948); 4 Strong, N.C. Index 3d, Criminal Law, § 99.3, p. 492.

[2] Defendant also argues that the failure of the trial court to summarize the testimony of two defense witnesses constituted judicial comment on the defendant's evidence.

Our review of the judge's charge indicates that he succinctly and fairly summarized the evidence for the state and the defendant. He also reminded the jury to recall all the testimony and to understand that he was undertaking only to summarize the testimony. The law does not require recapitulation of all of the evidence in the charge of the court to the jury. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). The statutory requirement that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102, 96 S.Ct. 886 (1976). Moreover, defendant did not object to the court's review of the evidence. A party desiring further elaboration must bring an alleged omission to the court's attention prior to the jury's retirement. *State v. Looney, supra.*

[3] At one point in its charge, the trial court referred to the defendant as "the offender the defendant." Defendant argues that this remark is of the type contemplated by G.S. 15A-1222 and G.S. 15A-1232 and amounted to an expression by the court that the defendant was guilty.

Standing alone, we do not approve of the word "offender" in referring to defendants in criminal cases. Contextually, however, we do not find any prejudice to defendant in this instance. "[T]he test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury." *State v. Staley*, 292 N.C. 160, 165, 232 S.E. 2d 680, 684 (1977).

In none of the cited instances do we find that the trial judge violated G.S. 15A-1222 or G.S. 15A-1232. This assignment of error is overruled.

[4] Defendant's next assignment of error is that the court erred in allowing Robert Adsitt to testify for the state on rebuttal because earlier in the trial his testimony had been ruled inadmissible when offered by the defense.

The defendant had offered testimony attempting to show that Debra Adsitt may have committed the crime. The state's rebuttal witness, Robert Adsitt, testified as to the whereabouts

of Debra Adsitt on the day of the crime. The testimony obviously was necessary and relevant for the state to rebut the negative inferences raised by the defendant. A witness is not permanently disqualified to testify for one party simply because his testimony has been previously ruled inadmissible when presented by the other party. Moreover, where defendant brings out evidence tending to show that someone else committed the crime charged, the state is entitled to introduce evidence in explanation or rebuttal. *See State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977). This assignment of error is overruled.

The defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

F. RAY SMITH III AND WIFE, ANNE S. SMITH v. DONALD PATRICK CURRIE

No. 7821SC555

(Filed 17 April 1979)

Vendor and Purchaser § 1— agreement to purchase land—subject to financing clause—reasonable effort—jury question

In N.C. a subject to financing clause in an offer to purchase real estate includes the implied promise that the purchaser will act in good faith and make a reasonable effort to secure the financing, and whether a purchaser has made such a reasonable effort is generally a question for the jury and summary judgment is inappropriate.

APPEAL by plaintiffs from *McConnell, Judge*. Judgment entered 29 March 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 8 March 1979.

This is a civil action instituted on 14 October 1977 wherein plaintiffs seek specific performance of a contract to purchase real estate or, in the alternative, damages for breach of said contract. On 3 November 1977, defendant answered, denying the material allegations of the complaint and alleging as further defenses that the contract is unenforceable because it does not comply with the

Statute of Frauds and that he was excused from performance by a provision in the contract that made his performance conditional upon obtaining a loan. On 20 January 1978, defendant, pursuant to G.S. § 1A-1, Rule 56, moved for summary judgment and offered two affidavits in support of his motion. The affidavits offered in support of defendant's motion contained the following:

The defendant is a practicing physician in the field of urology in Winston-Salem, North Carolina. On 4 June 1977 he executed a printed form real estate "Offer to Purchase Agreement" relating to the plaintiffs' condominium. This agreement contained the following provision: "Subject to: Buyer securing a 90% conventional loan in the amount of $44,550.00." It was the defendant's intention to purchase the condominium if he could obtain such a loan. The plaintiffs' real estate agent recommended that defendant apply at First Federal Savings and Loan in Winston-Salem. On 7 June 1977, defendant did apply and made a "good faith attempt to furnish all information required." An employee of the savings and loan reviewed defendant's application and advised defendant that it appeared that defendant would not qualify for the loan because of federal guidelines concerning permissible debt to income ratios. Defendant then conferred with his accountant who reminded him of various additional fixed obligations which he had, including his obligation to purchase the interest of Dr. Oliver J. Hart, Sr., in Maplewood Urological Associates, an obligation for federal income taxes, a balance on a loan at Duke University Medical School, his obligation to make premium payments on life insurance for his wife, amounts owed for a stock purchase in Medical Park Hospital, and his "obligation to pay tuition at an expensive private school for his children." Defendant subsequently filed another application at the savings and loan listing his debts "more completely than in the earlier application." This application was denied because his monthly payments on fixed obligations exceeded the 33 percent maximum allowable percentage.

On 23 January 1978, plaintiff filed extensive interrogatories seeking to discover various factual information pertaining to defendant's financial condition. Plaintiffs offered the defendant's answers to these interrogatories and one affidavit in opposition to the motion. This evidence offered in opposition to the motion tended to show the following:

Defendant executed an "Offer to Purchase Agreement" agreeing to buy the plaintiffs' condominium for $49,500.00. The defendant did not disclose any potential problems at the time he executed the agreement and plaintiffs' broker indicated "that the defendant's credit report had checked out and that the loan looked fine." On the basis of these facts, the plaintiffs entered into a contract to purchase another house on 15 June 1977. Because of the defendant's failure to obtain a loan, the plaintiffs became obligated to pay two mortgages. In an attempt to mitigate their losses, the plaintiffs continued to seek a buyer and finally sold their condominium on 31 October 1977 for $46,000.00. The defendant's first application for a loan listed gross income of $6,250 a month; total assets of $155,300, which included $93,000 in real estate, a 1977 Mercedes 450 SL automobile valued at $22,000, a 1973 Porsche automobile valued at $10,000, a motorboat valued at $4,500; mortgages of $49,500; resulting in a net worth of $101,800.00. Defendant listed as a monthly obligation his alimony payments of $2,100.00. Defendant's second application showed assets totaling $141,600 and total liabilities of $136,276, resulting in a net worth of $5,324.00. Defendant listed monthly installment obligations, including alimony payments totalling $2,946.00.

On 29 March 1978, the trial court entered an Order granting defendant's motion for summary judgment. Plaintiffs appeal.

Alexander and Hinshaw, by Robert D. Hinshaw, for plaintiff appellants.

Hall and Liner, by Roy G. Hall, Jr., for defendant appellee.

HEDRICK, Judge.

The plaintiffs assign as error the court's entry of summary judgment in favor of the defendant. Under Rule 56(c), summary judgment shall be entered "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); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *North*

Carolina National Bank v. Gillespie, 291 N.C. 303, 230 S.E. 2d 375 (1976). When the party moving for summary judgment supports his motion as provided in this rule, the party opposing the motion

> may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

G.S. § 1A-1, Rule 56(e); *Kidd v. Early, supra*; *Cameron-Brown Capital Corp. v. Spencer*, 31 N.C. App. 499, 229 S.E. 2d 711 (1976).

In North Carolina a subject to financing clause, such as the one contained in the "Offer to Purchase Agreement" in the present case, includes the implied promise that the purchaser will act in good faith and make a reasonable effort to secure the financing. *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974). Thus, the issue for resolution on the motion for summary judgment is whether the defendant, as movant, has met his burden of showing that he acted in good faith and made reasonable efforts in his unsuccessful attempt to obtain financing and consequently that there is no genuine issue as to any material fact and he is entitled to judgment as a matter of law.

We are of the opinion that the defendant has failed to meet his burden. The nature of the issue involved in the present case, whether the defendant acted in good faith and made reasonable efforts to obtain a loan, is such that summary judgment is ordinarily not a proper vehicle for its resolution. Generally, summary judgment is inappropriate "when issues such as motive, intent, and other subjective feelings and reactions are material," 6 Moore's Federal Practice ¶ 56.17 [41.-1], at 930 (1978), or when the evidence presented "is subject to conflicting interpretations, or reasonble men might differ as to its significance." 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2725, at 515 (1973). Whether a purchaser made reasonable efforts to obtain financing has been held to be a question that should be submitted to the trier of fact where "fair-minded men might differ as to the conclusion to be drawn" from the evidence submitted on a summary judgment motion. *Betnar v. Rose*, 259 Ark. 820, 829, 536

S.W. 2d 719, 724 (1976). Whether the defendant in the present case made reasonable efforts in a good faith attempt to obtain financing is precisely the type of question that depends for its resolution on a consideration of the subjective intentions and motivation of the actor. Such an inquiry necessarily involves conflicting interpretations of the perceived events, and even where all the surrounding facts and circumstances are known, reasonable minds may still differ over their application to the legal principle involved. It is only in the most exceptional case that the movant would be entitled to summary judgment when the issue, as here, concerns the reasonableness of his actions. Thus, because of the nature of the issue in this case, summary judgment for the defendant was inappropriate.

Reversed and remanded.

Judges VAUGHN and CARLTON concur.

WEYERHAEUSER COMPANY v. GODWIN BUILDING SUPPLY CO., INC.

No. 7811SC627

(Filed 17 April 1979)

1. Contracts § 27.2— agreement to assist in obtaining financing—breach—sufficiency of evidence

In an action to recover for the cost of various building materials where defendant counterclaimed that plaintiff breached its promise to assist in providing financing for houses constructed by defendant, evidence was sufficient to permit the jury to find that, though plaintiff made some efforts to assist defendant in obtaining financing, plaintiff breached its contract with defendant by failing to make reasonable efforts to assist defendant in obtaining financing.

2. Contracts § 27.3— breach of contract—damages—sufficiency of evidence

Evidence was sufficient for the jury to find that defendant suffered damage in the amount of $100,000 as a result of plaintiff's failure to assist defendant in obtaining financing for houses built by defendant where such evidence tended to show that after entering into the contract with plaintiff defendant expended $102,640.74 in constructing a manufacturing plant which defendant was forced to close after being unable to obtain financing.

APPEAL by plaintiff from *Baley, Judge*. Judgment entered 15 December 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals on 29 March 1979.

This is a civil action instituted on 29 September 1970 wherein plaintiff sought recovery for the purchase price of various building materials valued at $7,541.10 furnished to defendant pursuant to a "Weyerhaeuser Registered Home Marketing Agreement." Defendant answered and asserted as a counterclaim that it was induced to enter into the contract by plaintiff's promises and assurances "that it would provide unlimited ninety per cent (90%) conventional financing at locally competitive rates up to Forty Thousand Dollars ($40,000) per house;" that in reliance on plaintiff's promises, it expended $115,000 for the construction of a manufacturing plant; and that thereafter "the plaintiff wrongfully and willfully breached its contract with the defendant by failing and refusing to provide the 90% conventional financing which it promised and contracted to provide . . ." After a trial, a jury awarded plaintiff $7,541.10 on its claim and the defendant $100,000 on its counterclaim. On appeal, the North Carolina Supreme Court, in *Weyerhaeuser Co. v. Godwin Building Supply Co., Inc.*, 292 N.C. 557, 234 S.E. 2d 605 (1977), awarded the plaintiff a new trial on defendant's counterclaim. Upon retrial, the following issues were submitted to and answered by the jury as indicated below:

1. Did Weyerhaeuser Company breach its contract with Godwin Building Supply Co., Inc., dated May 9, 1968 as alleged in the complaint [counterclaim]?

Answer: Yes.

2. Did Godwin Building Supply Co., Inc., commit any material breach of the said contract which would excuse Weyerhaeuser Company from complying with its obligations under said contract?

Answer: No.

3. What amount of damages, if any, is Godwin Building Supply Co., Inc., entitled to recover from Weyerhaeuser Company?

Answer $100,000.00

From a judgment entered on the verdict, plaintiff appealed.

Edgar R. Bain and Hutchins, Romanet, Thompson & Hilliard, by Robert W. Hutchins for plaintiff appellant.

Johnson & Johnson, by W. A. Johnson, for defendant appellee.

HEDRICK, Judge.

[1] The only question presented on this appeal is whether the trial court erred in denying plaintiff's motions for a directed verdict and for a judgment notwithstanding the verdict with respect to defendant's counterclaim. The oft restated rule applicable in this situation is that when a motion for a directed verdict under Rule 50(a) is made at the conclusion of the evidence, the trial court must determine whether the evidence, taken in the light most favorable to the claimant and giving it the benefit of every reasonable inference that may legitimately be drawn therefrom, and with all contradictions, conflicts, and inconsistencies resolved in its favor, is sufficient to justify a verdict in its favor. *E.g., Kinston Building Supply Co. v. Murphy,* 13 N.C. App. 351, 185 S.E. 2d 440 (1971); *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971). The standards for granting a motion for judgment notwithstanding the verdict are the same as those for granting a directed verdict. *Brokers, Inc. v. High Point City Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56 (1977). The first argument advanced by the plaintiff in support of its assignments of error is that there is no evidence in the record from which the jury could find that Weyerhaeuser breached its contract with the defendant by failing "to assist in arranging interim financing." The pertinent provision of the contract with regard to the financing is as follows:

> Weyerhaeuser shall provide dealer with or arrange the following marketing services:
>
> . . .
>
> (i) Through a Weyerhaeuser approved correspondence system, assist dealer in arranging interim and permanent mortgage financing for Weyerhaeuser Registered Homes.

The thrust of plaintiff's argument is that it had no duty to *provide* financing but only to *assist* in arranging financing and that all the evidence is to the effect that agents of the plaintiff attempted to assist the defendant in securing financing by contacting Stockton and White in Raleigh, Frederick Behrend in Durham and First Federal Savings and Loan in Dunn.

It is a basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement. "Good faith and fair dealing are required of all parties to a contract; and each party to a contract has the duty to do everything that the contract presupposes that he will do to accomplish its purpose." 17A C.J.S. Contracts § 451, at 564 (1963). In North Carolina it has been held that a clause in a contract to purchase real estate making the buyer's obligation conditional upon obtaining financing, includes the implied promise that the purchaser will act in good faith and make reasonable efforts to secure the financing. *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974).

The provision at issue in the present case clearly required the plaintiff to make reasonable efforts to assist the defendant in obtaining financing. In this regard the defendant offered evidence tending to show that O. W. Godwin, Jr., had conversations with Mr. Ed Turco, finance officer for Weyerhaeuser, and all of the Task Force of Weyerhaeuser about the financing referred to in the contract. Godwin was informed that there was backing to provide 90% conventional financing, that Weyerhaeuser was the world's largest manufacturer of lumber and had unlimited finances, and that $600,000,000 was available and at his disposal to finance every home that the plant could turn out. Mr. Godwin testified:

> After I got the plant ready I talked with these gentlemen connected with Weyerhaeuser almost daily, either in person or by phone . . . I talked with Mr. Turco with respect to the contract which said that Weyerhaeuser would assist Godwin in arranging interim and permanent mortgage financing for Weyerhaeuser Registered Homes . . . Weyerhaeuser didn't do anything to assist me directly in arranging

> permanent or interim financing for these homes. . . . Mr. [Ray] Henderson came to me on or about December 1, 1968 and told me the financing had temporarily bogged down but not to worry about it. He said the financing was coming . . . After that Mr. Henderson did not do anything to assist in arranging any interim and permanent financing.

While the plaintiff offered evidence that it made some efforts to assist defendant in obtaining financing, we think that when the evidence is considered in the light most favorable to the defendant, it is sufficient to permit the jury to find that the plaintiff breached its contract with the defendant by failing to make reasonable efforts to assist Godwin in obtaining financing.

[2] Next the plaintiff argues that the defendant has "failed to show any damages which proximately flowed from the alleged breach of contract." The evidence adduced at trial tends to show that after entering into the contract, Godwin expended $102,640.74 in constructing the facility at Carpenter during the fiscal year beginning 30 April 1968. After defendant was unable to obtain financing, it was forced to close the manufacturing facility at Carpenter. From this evidence the jury could find that the defendant suffered damage as a result of the plaintiff's breach of the contract.

Plaintiff's final argument is that Godwin "breached the contract and such breach excused any breach by Weyerhaeuser." Clearly this issue is not raised by the two assignments of error. Furthermore, the jury found as a fact that Godwin had not materially breached the contract. *See Weyerhaeuser Co. v. Godwin Building Supply Co.*, 292 N.C. at 566, 234 S.E. 2d at 610.

Plaintiff's two assignments of error have no merit.

Affirmed.

Judges PARKER and CARLTON concur.

STATE OF NORTH CAROLINA v. BOBBY NESMITH

No. 7810SC1094

(Filed 17 April 1979)

1. **Searches and Seizures § 7— search incident to arrest**

A search incident to a lawful arrest made without a search warrant is valid as an exception to the warrant requirement of the Fourth Amendment.

2. **Searches and Seizures § 36— search incident to arrest—delay after arrest**

In this prosecution for breaking and entering and larceny, a pawn ticket for a stolen television set was properly admitted in evidence as having been seized as an incident of a lawful arrest where defendant was lawfully arrested for an unrelated incident and his wallet was taken from him upon his arrival at the police station; defendant was questioned about the break-in and told an officer that a key to the victim's apartment was in his wallet; the officer obtained the wallet from another room, searched the entire wallet, and found the pawn ticket; and the arrest, questioning and search occurred in less than a one-hour period, since the delay did not vitiate the search as incident to a lawful arrest, and the pawn ticket was admissible even though defendant was being prosecuted for offenses different from that for which he was arrested at the time of the seizure. Furthermore, the pawn ticket was also admissible as the result of an inspection of the wallet for the purpose of inventory of property found on defendant's person.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 27 July 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 1 March 1979.

Defendant was arrested on 12 May 1978 between 9:00 p.m. and 10:00 p.m. for involvement in an incident unrelated to the subject of this appeal. Defendant had been charged in a warrant drawn on 11 April 1978 with the felonious breaking and entering of the residence of Michael Moses at 1030 Walnut Street in Raleigh on 11 April 1978. This warrant had not been served at the time of defendant's arrest on 12 May 1978. On 16 May 1978, a warrant was drawn and defendant was charged with the felonious breaking and entering and larceny of a black and white television from the residence of Michael Moses at 1030 Walnut Street in Raleigh on 10 April 1978. From convictions of felonious breaking and entering on 11 April 1978 and of felonious breaking and entering and larceny of a black and white television on 10 April 1978, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Fred M. Morelock for defendant appellant.

MARTIN (Harry C.), Judge.

The sole question on appeal is whether the trial court committed reversible error in denying defendant's motion to suppress evidence because it was illegally seized. Upon defendant's arrival at the police station on 12 May 1978, arresting officer Longmire took defendant's wallet. Defendant was taken to another room and questioned by detective Turnage of the Raleigh Police Department about the break-ins in April. Defendant told detective Turnage that a key to the victim's apartment was in his wallet and that he would show the officer where it was. Detective Turnage then retrieved the wallet from officer Longmire in the other room. Defendant pointed out where the key was. At that point, detective Turnage searched the entire wallet and found a pawn ticket that contained the name of Donald Morgan. Pursuant to a trace on the ticket, the black and white television stolen from Michael Moses was found.

At trial, defendant's counsel moved to suppress the pawn ticket, the black and white television, and any and all evidence obtained as a result of the seizure of the pawn ticket. Defendant contends the evidence was illegally seized because there was no search warrant nor had defendant consented to the search. For purposes of voir dire, defendant stipulated that he made the statement to detective Turnage about the wallet voluntarily, and with knowledge and understanding of his right to make a statement. The trial judge denied defendant's motion, concluding the search of the wallet was incident to a lawful arrest.

[1] "A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest." *State v. Roberts*, 276 N.C. 98, 102, 171 S.E. 2d 440, 443 (1970). A search incident to a *lawful* arrest made without a search warrant is valid as an exception to the warrant requirement of the Fourth Amendment. *United States v. Robinson*, 414 U.S. 218, 38 L.Ed. 2d 427 (1973). During a search incident to arrest, an officer may lawfully take from the person arrested property which he has about his person *and* property "which is connected with the crime charged or

which may be required as evidence thereof." *State v. Roberts, supra.*

> When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be *concealed* or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control' . . .."

United States v. Chadwick, 433 U.S. 1, 14, 53 L.Ed. 2d 538, 550 (1977) (emphasis added). The search incident to a lawful arrest exception has resulted in two different formulae. The first concerns searches of the *person* arrested and the second concerns searches of the *area* within the control of the arrestee. *United States v. Robinson, supra.* The facts of this case involve the search of the person arrested. The trial court found defendant was lawfully arrested and he has not challenged this finding on appeal nor do we find matters of record to the contrary. Because defendant was lawfully arrested, the search of his person and the resultant seizure of his wallet from his person was valid as incident to the arrest. The initial seizure of the wallet being valid, we next consider the question of the subsequent search of the contents of the wallet.

In *United States v. Robinson, supra*, defendant was arrested for driving while his license was revoked. The arresting officer searched the person of the defendant and found a crumpled cigarette package. Upon an inspection of the cigarette package, the officer found that it contained heroin. In holding the search and seizure of the heroin valid, the Court concluded that "[h]aving in the course of a lawful search come upon the crumbled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *United States v. Robinson, supra* at 236, 38 L.Ed. 2d at 441.

In *United States v. Edwards*, 415 U.S. 800, 39 L.Ed. 2d 771 (1974), the Court upheld the inspection of defendant's clothing the morning after his arrest as a lawful search incident to arrest. The Court stated:

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial.

Id. at 807, 39 L.Ed. 2d at 778.

[2] The search and inspection of the contents of the wallet at the police station was valid as incident to the lawful arrest. Where there is a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a reasonable search under that Amendment. *United States v. Robinson, supra.* At the time the wallet was taken from the person of the defendant, the arresting officer was entitled under *Robinson* to inspect the contents of the wallet for weapons and to seize evidence in order to prevent its concealment or destruction. The delay in the search of the contents of the wallet was not remote in time from the arrest, considering that the arrest, questioning and search of the wallet occurred in less than a one-hour period, and the processing of defendant, filing reports, booking and placing defendant in jail, had not been completed. This delay did not vitiate the search as incident to arrest. *United States v. Edwards, supra.* The subsequent search of the wallet was valid.

The pawn ticket was properly admitted even though the present prosecutions are different from that for which the defendant was arrested at the time of seizure. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). According to customary police routine and practice, police officers must search persons taken into custody and seize items that they may have on their persons. These items are to then be inspected for the purposes of inventory to protect the law enforcement personnel against claims by prisoners. Upon inventory, a receipt of items taken is to be given

to the defendant. The evidence is also admissible as the result of an inspection of the wallet for the purposes of inventory of property found on defendant's person. *State v. Jones*, 9 N.C. App. 661, 177 S.E. 2d 335 (1970).

The search of the wallet was lawful and any evidence obtained thereby was properly admitted.

No error.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. HAROLD LAWSON CARSWELL

No. 7927SC2

(Filed 17 April 1979)

1. **Homicide § 12— defendant's county of residence—incorrect allegation—no fatal defect**

In a prosecution for second degree murder, the indictment was not fatally defective because it failed to allege correctly the residence of defendant, since defendant's county of residence is not an element of murder and is not required to be proved at trial.

2. **Criminal Law § 98.2— sequestration of witnesses—assistant district attorney's conversation with witness—no error**

There was no merit to defendant's contention that he was entitled to a new trial because the assistant district attorney talked to a State's witness after the court had entered an order sequestering the witnesses, since there was no evidence that the assistant district attorney, who was entitled to talk to witnesses before placing them on the stand, attempted in any way to influence the witness as to his testimony.

3. **Criminal Law § 102.2— jury argument unsupported by evidence—court's interruption proper**

The trial court in a second degree murder prosecution did not err in interrupting defense counsel's argument to the jury concerning the possibility that deceased had a gun when the fatal shot was fired, since there was no evidence, direct or circumstantial, that deceased had a gun in his possession at the time of the shooting.

4. **Criminal Law § 46.1— walking away from crime scene—flight—instruction proper**

Where the evidence tended to show that defendant walked calmly, rather than ran, from the scene of the shooting, there was sufficient evidence to support an instruction on flight by the defendant.

APPEAL by defendant from *Friday, Judge*. Judgment entered 16 August 1978 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 29 March 1979.

Defendant was indicted for first degree murder of William Leslie Beane. The State placed him on trial for second degree murder, and upon conviction of that charge and a judgment of imprisonment, defendant appealed. We find no error in the trial.

Before pleading to the charge, defendant moved to quash the bill of indictment for the reason that it alleged defendant was "late of the County of Cleveland," when the evidence in support of the motion showed defendant lived in Caldwell County and had never been a resident of Cleveland. The motion was denied, and defendant entered a plea of not guilty.

The State's evidence tended to show that on 8 December 1977 William Leslie Beane was the manager of Hermies, a restaurant on King Street in Kings Mountain, North Carolina. About noon, Shirley Graham saw defendant come into the restaurant, approach the counter, and ask to speak to Beane. She told this to Beane, and he came toward defendant. The defendant asked Beane, "you don't know who I am, do you?" There was a loud noise, a shot, and Beane was then seen lying on the floor behind the counter. He had a red spot on his back. Beane had no weapons about him as he lay on the floor. It was stipulated Beane died from a gunshot wound that entered the chest and exited the left lower back.

After the shot, defendant was standing with a gun in his hand, lowering the gun to his side, with the smoke still spreading in a circular pattern. Defendant then calmly left the building, got in his blue GMC pickup truck and drove away. The defendant did not offer any evidence.

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

Hamrick, Mauney & Flowers, by Fred A. Flowers, for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant argues several assignments of error. First, defendant contends the indictment is fatally defective in failing to cor-

rectly allege the residence of defendant. He relies upon the following portion of N.C.G.S. 15-144:

> Essentials of bill for homicide.—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, ...

This statute was adopted as Chapter 58, Laws 1887, and has remained basically unchanged. In 1890 the Court interpreted this statute in *State v. Arnold*, 107 N.C. 861, 11 S.E. 990 (1890), holding:

> As it may be desirable to settle what are the indispensable requisites of such indictments, it is proper to say that under the decisions and statutes the following is full and sufficient in the body of an indictment for murder: "The jurors for the State on their oaths present that A. B., in the county of E., did feloniously, and of malice aforethought, kill and murder C. D."

Id. at 863, 11 S.E. at 990-91. The Court did not include the defendant's county of residence as an essential part of the indictment. The statute states it is not necessary to allege matter not required to be proved on the trial. Defendant's county of residence is not an element of murder and not required to be proved at trial. The assignment of error is overruled.

Second, defendant contends the case should have been dismissed at the close of the State's case. The evidence, direct and circumstantial, is sufficient to carry the case to the twelve when considered in the light most favorable to the State. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976).

[2] Next, defendant contends he is entitled to a new trial because the assistant district attorney talked to a State's witness after the court had entered an order sequestering the witnesses. Defendant does not contend the substance of the conversation was prejudicial, nor is there evidence that the assistant district attorney attempted in any way to influence the witness as to his testimony. The purpose of a sequestration order is to prevent the

witnesses from hearing the testimony of other witnesses and colluding with each other. *Lee v. Thornton*, 174 N.C. 288, 93 S.E. 788 (1917); *State v. Sings*, 35 N.C. App. 1, 240 S.E. 2d 471 (1978). Attorneys, including the district attorney and his assistants, are entitled to talk with witnesses before placing them upon the witness stand. The assignment of error is without merit.

[3] Fourth, defendant states the court erred in interrupting his counsel during his argument to the jury. Counsel in substance argued that the jury could by conjecture infer that the deceased had the gun when the shot was fired. There was no evidence, direct or circumstantial, that Beane ever had a gun in his possession at the time of the shooting. Senior Associate Justice Higgins said in *State v. Smith*, 279 N.C. 163, 166, 181 S.E. 2d 458, 460 (1971), "[I]t becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." The judge has a duty to do so on his own motion. By so doing, the trial judge did not express an opinion on the evidence. The assignment of error is overruled.

[4] Last, defendant objects to portions of the court's charge to the jury with respect to the instructions on flight by the defendant, intent, the burden of proof on intent, and acting in the heat of passion upon adequate provocation. We find no error in the charge. There was sufficient evidence to support an instruction on flight by the defendant. Merely because he left the scene calmly rather than running does not eliminate the issue of flight. If there is some evidence in the record reasonably establishing the theory of flight by defendant after commission of the crime charged, the instruction is proper. See the analysis of this subject by Justice Copeland in *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

The court's instruction on intent is substantially the same as that approved in *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956). Intent is a mental attitude, and ordinarily must be proven by circumstantial evidence, that is, by proving facts and circumstances from which the intent may reasonably be inferred. *Id.*

The court's instruction as to the defendant acting in the heat of passion upon adequate provocation, if erroneous, was error against the State and in no way prejudicial to the defendant. It was given in submitting the lesser included offense of voluntary manslaughter to the jury as a possible verdict. If there was no

evidence defendant acted in the heat of passion, the court may have erred in submitting voluntary manslaughter as a possible verdict, but such error was in defendant's favor and he is in no position to complain. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973).

Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and ERWIN concur.

BALDWIN MANUFACTURING COMPANY v. HERCULES, INCORPORATED

No. 7820SC532

(Filed 17 April 1979)

Estoppel § 4.7— equitable estoppel—insufficient evidence

The trial court did not err in failing to find that defendant yarn manufacturer was equitably estopped from denying that it guaranteed that the type of yarn used by plaintiff in preparing sample materials would remain in production and available to the plaintiff where plaintiff's evidence revealed that, from the approximate time that the plaintiff placed its first order and continuing until it placed its last order, the plaintiff knew that defendant's salesman could not and did not guarantee the continued availability of the type of yarn which the plaintiff was using in the preparation of its sample materials.

APPEAL by plaintiff from *Hairston, Judge*. Judgment entered 2 February 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 7 March 1979.

The plaintiff, Baldwin Manufacturing Company, is a producer of upholstery material. The defendant, Hercules, Incorporated, is a producer and supplier of textile fibers and yarns. Beginning in August of 1971 and continuing until February of 1972, the plaintiff placed several orders with the defendant for five colors of a specific type of yarn. The plaintiff then used that yarn to manufacture a sample line of materials which it distributed to several of its potential customers.

During March of 1972, the defendant notified the plaintiff that it was replacing with another type of yarn the specific type

of yarn it had previously sold the plaintiff. The defendant also informed the plaintiff that the defendant still had an inventory of four of the five colors of the yarn that it had previously sold the plaintiff. After receiving this information, the plaintiff did not place any additional orders for the type of yarn it had previously purchased from the defendant.

The plaintiff alleged in its complaint that the defendant knew that the plaintiff was preparing sample materials with the type of yarn it had been ordering from the defendant. The plaintiff further alleged that the defendant's discontinuance of that yarn type caused the plaintiff's business to be damaged.

At trial, the plaintiff presented its president, Werner G. Tuerpe, as its only witness. At the close of the plaintiff's case, the defendant presented one of its salesmen, William Setzer, as its only witness. At the close of all of the evidence, the trial court sitting without a jury returned a verdict in favor of the defendant. From the entry of judgment in accordance with the verdict, the plaintiff appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

Johnson, Poole & Webster, by Samuel H. Poole, for plaintiff appellant.

Maupin, Taylor & Ellis, P.A., by Richard C. Titus, for defendant appellee.

MITCHELL, Judge.

The plaintiff assigns as error the failure of the trial court to apply the doctrine of equitable estoppel. In support of this assignment, the plaintiff contends that the trial court should have found that the defendant was estopped from denying that it guaranteed that the type of yarn used by the plaintiff in preparing sample materials would remain in production and available to the plaintiff. We do not agree.

The doctrine of equitable estoppel may be applied to prevent a party to a transaction from maintaining inconsistent positions concerning that transaction to the detriment of another party. *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979). In

discussing the doctrine of equitable estoppel, our Supreme Court has stated:

> This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. . . . In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or, having the means of knowledge of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice.

Boddie v. Bond, 154 N.C. 359, 365-66, 70 S.E. 824, 826-27 (1911). The record before us does not reveal the existence of each of these elements, as would be required in order for the plaintiff to successfully invoke the doctrine of equitable estoppel against the defendant.

The plaintiff's witness Tuerpe gave the following testimony on cross-examination with regard to guarantees that the type of yarn used by the plaintiff in the production of its sample line of materials would remain in production:

> I asked Mr. Setzer about a guarantee for yarn in 1971, and in January and February of 1972—every time he came; every time I saw him in the summer and fall of 1971 to the winter of 1971 and the winter of 1972. Every month that he came there, I told him that we needed a guarantee because he had a new line and we had a new line, and we got to have the knowledge that the yarn will be available for active production in 1972 to '73, and we've got to have that guarantee of availability. I said, "I need a guarantee. Can you give it to me?" He says, "No, that will have to come from authoritative sources in the company and I will get you that which is necessary."

The remainder of the witness' testimony on direct and cross-examination was consistent with this testimony. He further testified that, as late as February of 1972, Setzer had still not given him a guarantee that the availability of the yarn would continue. On each occasion, however, Setzer had indicated that the type of yarn in question was then available.

We find that the plaintiff's evidence at trial revealed that, from the approximate time that the plaintiff placed its first order and continuing until it placed its last order, the plaintiff knew that Setzer could not and did not guarantee the continued availability of the type of yarn which the plaintiff was using in the preparation of its sample materials. Nothing in the evidence before the trial court indicated that Setzer had falsely represented the facts to be otherwise or attempted to conceal those facts from the plaintiff. In light of the plaintiff's knowledge of the actual facts, it would not have been reasonable for the plaintiff to rely upon an assumption that the continued availability of the yarn was guaranteed. Therefore, several of the elements essential to the plaintiff's attempt to invoke the doctrine of equitable estoppel so as to prohibit the defendant from denying that it gave such a guarantee are absent in the present case. The trial court correctly declined to apply the doctrine of equitable estoppel against the defendant, and this assignment of error is overruled.

The judgment of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

ROBERT K. BARBEE v. WALTON'S JEWELERS, INC.

No. 784SC570

(Filed 17 April 1979)

Rules of Civil Procedure §§ 6, 41 — failure to prosecute claim — dismissal — order signed out of session

The trial court properly dismissed plaintiff's claim where plaintiff failed to appear and prosecute his claim and offered no reason as to why he did not appear, and the trial court did not err by signing the order in question out of session.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered 22 April 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 8 March 1979.

Plaintiff filed his complaint alleging that he delivered his gold, antique American Waltham Lady's pendant watch to defendant to repair and clean and that defendant failed to return the watch to him. Defendant answered, alleging that the inner movement of the watch was not returned, because it was lost in transit on return from Waltham Watch Company of New York to defendant. The gold case of the watch was returned to plaintiff, and the value of the movement of plaintiff's watch was $50.00 and not $10,000.00 as plaintiff alleged.

When the case was called for trial at the 28 March 1978 Civil Session of Superior Court, neither plaintiff nor his attorney appeared to go forward with his case. Plaintiff did not make a motion to continue his case. The trial court entered an order that plaintiff's case be dismissed with prejudice by order filed on 26 April 1978. Plaintiff appealed.

Fred W. Harrison, for plaintiff appellant.

Warlick, Milsted, Dotson & McGlaughon, by Marshall F. Dotson, Jr., for defendant appellee.

ERWIN, Judge.

Plaintiff contends that the following question is present on appeal: "Did the Court err by signing the Order of Dismissal out-of-Term, out-of-District and out-of-County?" We have carefully reviewed the record on appeal, and from such, we cannot deter-

mine where the order in question was signed. The parties have not stipulated that the order was signed out of the county and out of the district. In view of the record, we have determined that the only question raised by this record is: Did the trial court err by signing the order in question out of session? We answer, "No."

Plaintiff states that this case "was on the Trial Calendar for trial at the March 28, 1978 Term of the Onslow County Superior Court. Neither Plaintiff nor his counsel were in Court. Defendant and his counsel were in Court and ready for trial." We note that defendant had one witness present from Waltham Watch Company of New York City, a material witness for defendant. We also note that plaintiff did not make any motions for appropriate relief pursuant to G.S. 1A-1, Rule 60, of the Rules of Civil Procedure, which better practice would require in this event. Plaintiff has not offered any reason whatsoever as to why he did not appear at the trial of his case.

G.S. 1A-1, Rule 6(c), of the Rules of Civil Procedure provides:

> "(c) *Unaffected by expiration of session.*—The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session."

We find no error in Judge Brown's signing the order in question out of session. This falls within the authority granted by the above rule.

The order recites that defendant, in open court, moved, under Rule 50(b) of the Rules of Civil Procedure, that the plaintiff's action be dismissed for failure of the plaintiff to appear and prosecute his claim. The motion in question should have been made under Rule 41(b) of the Rules of Civil Procedure. We will consider the motion for dismissal in this case as having been entered pursuant to Rule 41(b). *See Hamm v. Texaco Inc.*, 17 N.C. App. 451, 194 S.E. 2d 560 (1973), and *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970).

Plaintiff contends that:

" '[D]ismissal is proper only when it has been shown that the Plaintiff intentionally delayed the progress of the action to its conclusion.' The record is silent as to why the plaintiff was not in Court; and there is no Finding of Fact in the Order of Dismissal that indicates that the Plaintiff intentionally delayed the Court."

This Court held in *Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672, 197 S.E. 2d 599, 601 (1973):

"Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion. 5 Moore's Federal Practice, Paragraph 41.11[2].

In the instant case plaintiff's failure to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding. Plaintiff assumed that upon filing the action, it would be calendared by the Clerk of Superior Court of Wake County and the Wake County Calendar Committee as provided by Rule 2 of the General Rules of Practice for the Superior and District Courts."

Judge Brown found the following facts:

"3. That the two other cases in which Mr. Harrison appeared were taken off of the tentative trial calendar by the calendar committee at the request of the attorneys for the parties but no request was made to remove the above case from said calendar; that a final trial calendar was prepared and mailed to the attorneys of record on Friday, March 3, 1978, and that the instant case appeared as the first case on Tuesday of the second week (March 28, 1978) of said trial calendar; and,

4. That the plaintiff nor his counsel has made any request to the Court to have this matter continued prior to the call of the case for trial nor has the plaintiff or his attorney advised the Clerk or this Court, or attorney for the defendant, that plaintiff could not be present for the trial of this action; and. . ."

Plaintiff did not except to any findings of fact or conclusions of law made by Judge Brown, nor did plaintiff elect to make any motions under Rule 60(b). We hold in this case that Judge Brown's order is sufficient to comply with Rule 41(b) in view of the record before us.

Judgment affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

ALFRED PRESCOTT NOYES v. ELBERT L. PETERS, JR.

No. 783SC499

(Filed 17 April 1979)

Automobiles § 2.6— driving while license suspended—mandatory revocation of license—review by Division of Motor Vehicles—no jurisdiction in superior court

Where petitioner was convicted of driving while his license was suspended in violation of G.S. 20-28, the revocation of his driver's license was mandatory, and the exercise of the limited discretion by the Division of Motor Vehicles under G.S. 20-28(a), upon recommendation of the trial court and the district attorney, to determine whether the additional period of suspension should be modified did not change the mandatory nature of the revocation; therefore, the superior court had no jurisdiction under G.S. 20-25 to review the additional suspension.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 27 February 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 5 March 1979.

In October of 1976 petitioner's driver's license was revoked for one year. On 22 July 1977 he was charged with driving while license suspended (G.S. 20-28); he entered a plea of nolo contendere and was fined $200 and costs. Pursuant to G.S. 20-28(a) the trial judge and district attorney recommended in writing to the Division of Motor Vehicles that the Division examine the facts of the case and exercise discretion in suspending or revoking petitioner's license for the additional period provided by the statute. The Division held a hearing and revoked the petitioner's license for the additional year provided for by the statute. Petitioner appealed this decision to superior court pursuant to G.S. 20-25,

alleging that the actions of the respondent were "arbitrary, capricious, calloused and intended to deny the Plaintiff due process of law," and that the purported hearing held by respondent was intended merely to comply with the statute, respondent having no intention to modify the period of revocation of petitioner's license. The trial court found that the revocation was justified and dismissed petitioner's action. Petitioner appeals.

Mason & Phillips, by L. Patten Mason, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for respondent appellee.

ARNOLD, Judge.

Petitioner correctly maintains that a plea of nolo contendere in a criminal action cannot be an admission of guilt in additional proceedings. He is also correct in arguing *Winesett v. Scheidt, Comr. of Motor Vehicles*, 239 N.C. 190, 79 S.E. 2d 501 (1954), for the proposition that where the Division has discretion under G.S. 20-16 to suspend driving privileges the Division cannot use a no contest plea as the basis for suspension.

However, as the State points out, the petitioner's license was revoked here pursuant to G.S. 20-28 and not G.S. 20-16. There was thus a mandatory additional revocation of his license. See *Beaver v. Scheidt, Comr. of Motor Vehicles*, 251 N.C. 671, 111 S.E. 2d 881 (1960).

There is no discretion by the Division under G.S. 20-28 unless the judge and district attorney recommend in writing that the "Division examine into the facts." The Division's limited discretion, once such recommendation is made, is not to determine whether petitioner was guilty of violating G.S. 20-28, this determination already having been made before the Division could exercise any discretion. The limited discretion of the Division is then to "examine into the facts . . . and exercise discretion in suspending or revoking the driver's license for the additional periods . . . , and [the Division] may impose a lesser period of additional suspension or revocation . . . or may refrain from imposing any additional period."

Since petitioner was convicted of violating G.S. 20-28 the revocation of his license was mandatory, and the exercise of limited discretion by the Division under G.S. 20-28(a) does not change the mandatory character of the revocation. G.S. 20-25, under which petitioner purported to petition the Superior Court for a hearing in the matter, does not provide for such a hearing "where such cancellation is mandatory under the provisions of this Article." Therefore, there was no jurisdiction under G.S. 20-25 in the Superior Court, or, consequently, in this Court. The appeal is

Dismissed.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. VINCENT CARROLL CONNARD

No. 7827DC1161

(Filed 17 April 1979)

Courts § 15; Infants § 11 — infant defendant — case bound over to superior court — reasons must be stated

While a judge does not have to find facts to support his conclusion that a case involving a child over fourteen years of age should be tried in superior court, G.S. 7A-280 does require that he specify his reasons for the transfer.

APPEAL by defendant from *Bulwinkle, Judge.* Judgment entered 7 September 1978 in District Court, GASTON County. Heard in the Court of Appeals 28 March 1979.

The respondent, who is a juvenile over fourteen years of age, was charged with a felonious breaking or entering and felonious larceny. At the preliminary hearing, the court found probable cause and ordered the respondent bound over for trial as an adult. The court made no finding that the needs of the child or the best interest of the State would be served by trying the defendant as an adult.

Attorney General Edmisten, by Associate Attorney Sarah C. Young, for the State.

Assistant Public Defender Larry B. Langson, for defendant appellant.

WEBB, Judge.

G.S. 7A-280 provides in part:

> If a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony, the judge shall conduct a preliminary hearing to determine probable cause after notice to the parties as provided by this article . . . .
>
> If the judge finds probable cause, he may proceed to hear the case under the procedures established by this article, or if the judge finds that the needs of the child or the best interest of the State will be served, the judge may transfer the case to the superior court division for trial as in the case of adults . . . . [*T*]*he order of transfer shall specify the reasons for transfer.* (Emphasis added.)

We have previously said that while the judge does not have to find facts to support the conclusion that the case should be tried in superior court, the statute requires that he specify his reasons for the transfer. *See In re Bunn*, 34 N.C. App. 614, 239 S.E. 2d 483 (1977) and *In re Smith*, 24 N.C. App. 321, 210 S.E. 2d 453 (1974). The judge failed to state a reason for transfer in this case.

Reversed and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

PLY-MARTS, INC. v. MARCUS C. PHILEMAN AND WIFE, MARY L. PHILEMAN, FIRST ATLANTIC CORPORATION AND ARTHUR J. BAER

No. 7826DC572

(Filed 17 April 1979)

Laborers' and Materialmen's Liens § 8.1— action to enforce lien—necessity of contract with defendants

Plaintiff was not entitled to enforcement of a lien for labor and materials where plaintiff was not entitled to a money judgment against any of the defendants under a contract for labor and materials, plaintiff's contract having been with a prior owner of the property who was not a party to this action.

APPEAL by plaintiff from *Jones (William G.), Judge*. Judgment entered 25 April 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 8 March 1979.

Plaintiff brought this action for damages for labor performed and materials sold and delivered and to enforce a lien on real property. The case was tried without a jury. From a judgment for defendants, plaintiff appeals. We affirm.

Richard A. Cohan and Lacy W. Blue for plaintiff appellant.

Farris, Mallard & Underwood, by Charles H. Cranford, for defendant appellees First Atlantic Corporation and Arthur J. Baer.

Walker, Palmer & Miller, by Bryan W. Pittman, for defendant appellees Marcus C. Phileman and Mary L. Phileman.

MARTIN (Harry C.), Judge.

The trial court found as facts in its judgment the following: Plaintiff had an express contract with Arrowood-Morgan Construction, Inc. to furnish certain labor and materials to be used in the construction of a house by Arrowood-Morgan Construction, Inc. on property owned by it. The labor and materials were provided by plaintiff on 19 May 1976 and 24 June 1976. Later, 25 June 1976, the real property was conveyed by Arrowood-Morgan to defendants Phileman, who, on the same date, gave a deed of trust to defendant Baer, Trustee for defendant First Atlantic Corporation. On 16 August 1976, plaintiff filed a notice of lien against the property conveyed to defendants Phileman based upon the

labor and materials furnished Arrowood-Morgan. None of defendants contracted or promised to pay plaintiff for the labor and materials.

Plaintiff excepted to one finding of fact by the trial court. However, it abandoned this exception in its brief. Where exceptions are not taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962).

Plaintiff does except to the conclusions of law by the trial court that plaintiff is not entitled to a money judgment against any of the defendants; that plaintiff's lien must be based upon a money judgment, and to cancelling the notice of lien and dismissal of plaintiff's case.

Plaintiff alleges an express contract with Arrowood-Morgan for the labor and materials. Arrowood-Morgan was then the owner of the real property upon which the lien is sought and constructed the improvements upon the property. Arrowood-Morgan is not a party to this action. There is no allegation or proof of any judgment against Arrowood-Morgan. Plaintiff has not proven any contractual relationship with any defendant. The trial court was correct in holding plaintiff was not entitled to a money judgment against any of the defendants.

"A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist." *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 174, 84 S.E. 2d 828, 832 (1954). The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but an incident, and cannot exist without the principal. *Brown v. Ward*, 221 N.C. 344, 20 S.E. 2d 324 (1942). Plaintiff must prove it is entitled to damages under a contract for labor and materials before it is entitled to enforcement of the lien. This, plaintiff has failed to do. *Electric Co. v. Robinson*, 15 N.C. App. 201, 189 S.E. 2d 758 (1972).

The trial court's conclusions of law are supported by the findings of fact and are proper. Plaintiff's assignments of error are overruled.

Affirmed.

Judges VAUGHN and ERWIN concur.

PAMELA SHOUSE PACK, ADMINISTRATRIX C.T.A. OF THE ESTATE OF JAMES F. SHOUSE v. ALBERTA M. JARVIS, INTEGON CORPORATION, INTEGON LIFE INSURANCE CORPORATION, AND INTEGON INDEMNITY CORPORATION

No. 7821SC519

(Filed 17 April 1979)

Appeal and Error § 6.9— order sustaining objections to interrogatories—premature appeal

Purported appeal from an order sustaining defendants' objections to seventeen interrogatories directed to defendants is dismissed as premature.

APPEAL by plaintiff from *Rousseau, Judge*. Order entered 9 March 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 March 1979.

Plaintiff seeks to appeal from an order of the trial court sustaining defendants' objections to seventeen interrogatories directed to defendants. Defendants moved to dismiss the appeal as being fragmentary and interlocutory. Plaintiff also petitions for writ of certiorari to review the ruling of the trial court.

F. Mickey Andrews for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper, for defendant appellees.

MARTIN (Harry C.), Judge.

Defendants' counsel concede in their brief and oral argument that the trial court expressly stated the order here appealed did not prohibit plaintiff from further proper discovery, without limitation.

The order of Judge Rousseau did not affect a substantial right of the plaintiff. The appeal is interlocutory, fragmentary and premature and should be dismissed. *Stanback v. Stanback*, 287

N.C. 448, 215 S.E. 2d 30 (1975). The petition for certiorari is denied.

We note that by this process plaintiff has delayed further court proceedings in this case by more than a year.

Petition for certiorari denied. Appeal dismissed.

Judges VAUGHN and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 APRIL 1979

BRIGGS v. WATER CO. No. 7830SC542	Jackson (77CVS165)	Affirmed
BROWN v. SCISM No. 7822SC575	Davie (76CVS174)	New Trial
DUCKWORTH v. CHARLESTON No. 7826SC547	Mecklenburg (76CVS10910)	No Error
IN RE ROMINES No. 788SC619	Wayne (77CVS771)	Affirmed
JENKINS v. FALCONER No. 7830SC601	Swain (72CVS88)	Affirmed
LYON v. LYON No. 7818DC659	Guilford (71CVD3132)	Dismissed
SIMPSON v. SIMPSON No. 7820DC615	Union (78CVD0087)	Affirmed
STATE v. BRAY No. 787SC1156	Wilson (78CRS2621)	No Error
STATE v. COVINGTON No. 7910SC48	Wake (78CRS52559)	No Error
STATE v. JOHNSON No. 795SC37	New Hanover (78CR1873) (78CR1857)	No Error
STATE v. KLUTZ No. 7813SC1154	Columbus (78CRS1029) (78CRS1030)	No Error
STATE v. LEGGETT No. 7818SC999	Guilford (77CRS49245)	No Error
STATE v. LITTLE No. 7821SC1157	Forsyth (70CR25216) (70CR25217) (70CR25218) (70CR25219) (70CR25220) (70CR25305) (70CR25306) (70CR25895) (70CR26047) (70CR26048) (70CR26049)	Affirmed

STATE v. ROCHELLE No. 7812SC1170	Cumberland (78CRS5490)	No Error
STATE v. SANDERS No. 7812SC1152	Cumberland (77CRS33578)	Dismissed
STATE v. SMITH No. 795SC23	New Hanover (77CR20822)	No Error
STATE v. THOMAS No. 7910SC60	Wake (78CRS36003)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

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ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

A collection agency was not entitled to seek a declaratory judgment in superior court as to the validity and applicability of a regulation of the Dept. of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where the agency had not exhausted available administrative remedies. *Porter v. Dept. of Insurance*, 376.

ADVERSE POSSESSION

§ 25.2. Insufficiency of Evidence

Where plaintiff's reservation of an easement by deed was ineffective because the description was insufficient to identify and locate it, plaintiff's claim of adverse possession under color of title was also ineffective. *Adams v. Severt*, 247.

Evidence was insufficient to support a claim of adverse possession where it failed to establish the location on the ground of the boundary lines of the property claimed by defendants. *Stuart v. Bryant*, 206.

ANIMALS

§ 4. Payment of Damages Inflicted by Dogs Out of Dog License Tax

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog, there were material issues of fact as to whether third party defendant's dog was the one which actually inflicted the injuries upon claimant, whether the county had paid the claim, and what amount of damages the county was entitled to recover from the dog owner. *Heath v. Board of Commissioners*, 233.

Neither G.S. 67-13 nor Rule 14(a) made a dog owner automatically liable to county commissioners for the amount awarded for injuries inflicted by the dog in an action against the commissioners. *Ibid.*

APPEAL AND ERROR

§ 6.6. Appeals Based on Motions to Dismiss

An order denying a motion to dismiss for failure to state a claim for relief is interlocutory and not appealable. *O'Neill v. Bank*, 227.

Purported appeal from denial of motion to dismiss for failure to state a claim for relief and failure to join a necessary party was dismissed as premature. *Auction Co. v. Myers*, 570.

§ 6.7. Appeals Based on Amendment to Pleadings

An order allowing amendment of a pleading is interlocutory and not appealable. *O'Neill v. Bank*, 227.

§ 6.9. Appealability of Preliminary Matters

Purported appeal from an order sustaining objections to interrogatories is dismissed as premature. *Pack v. Jarvis*, 769.

§ 6.11. Appealability of Real Property Matters

An order denying a motion to cancel a notice of lis pendens was not immediately appealable. *Auction Co. v. Myers*, 570.

APPEAL AND ERROR—Continued

§ 14. Appeal Entries

Plaintiff's appeal is dismissed where she entered notice of appeal more than 10 days after entry of judgment. *Housing Authority v. Truesdale*, 425.

ARREST AND BAIL

§ 3.8. Legality of Arrest for Drunk Driving

A State trooper had probable cause to believe the defendant had committed the misdemeanor of driving under the influence before the trooper arrived on the scene. *S. v. Matthews*, 41.

§ 5.1. Permissible Physical Force in Effecting Arrest

In a prosecution for assault on police officers, court's failure to instruct on self-defense was not error where the court did instruct that defendant should not be found guilty if the officers used excessive force in effecting the arrest of defendant. *S. v. Robinson*, 514.

§ 6.2. Resisting Arrest; Jury Instructions and Sufficiency of Evidence

Defendant was entitled to an instruction that he was justified in interfering with the arrest of a third person if the arrestee herself was justified in resisting the arrest. *S. v. Anderson*, 318.

Evidence was sufficient for the jury in a prosecution for resisting arrest. *S. v. Spellman*, 591.

ASSAULT AND BATTERY

§ 3.1. Action for Civil Assault

Evidence that defendant smoked a cigar in plaintiff's presence was insufficient to support plaintiff's claim for assault and battery. *McCracken v. Sloan*, 214.

§ 9. Defense of Others

A bystander who comes to the aid of an arrestee will be excused only when the arrestee would himself be justified in defending himself from the conduct of the arresting officers. *S. v. Anderson*, 318.

§ 11.3. Warrant for Assaulting an Officer

A magistrate's order charging an assault on a police officer in violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office. *S. v. Anderson*, 318.

§ 14.1. Sufficiency of Evidence of Assault With a Deadly Weapon

Evidence was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury where it tended to show that defendant struck an officer with the officer's flashlight. *S. v. Spellman*, 591.

§ 14.4. Sufficiency of Evidence of Felonious Assault with Firearm

State's evidence was sufficient for the jury in a felonious assault prosecution. *S. v. Farrington*, 341.

§ 15. Instructions Generally

Trial court did not express an opinion on the evidence in instructing the jury that the striking of a person with a fist or flinging a person against a wall is in fact an assault. *S. v. Robinson*, 514.

ASSAULT AND BATTERY—Continued

Trial court's instruction was proper in a prosecution for communicating a threat. *S. v. Evans*, 730.

§ 15.4. Instructions on Assault on Law Officer

Evidence required trial court to instruct that force used against an officer was justified or excused if it was limited to use of reasonable force by defendant in defending himself from excessive force. *S. v. Anderson*, 318.

§ 15.5. Instruction on Self-Defense Required

Defendant was entitled to an instruction that he was justified in interfering with the arrest of a third person if the arrestee herself was justified in resisting the arrest. *S. v. Anderson*, 318.

§ 15.6. Instruction on Self-Defense

Trial court made it abundantly clear that defendant's right to act in self-defense was not limited to actual necessity. *S. v. Evans*, 390.

§ 15.7. Instruction on Self-Defense not Required

In a prosecution for assault on police officers, court's failure to instruct on self-defense was not error where the court did instruct that defendant should not be found guilty if the officers used excessive force in effecting the arrest of defendant. *S. v. Robinson*, 514.

ATTORNEYS AT LAW

§ 7.3. Compensation in Condemnation Proceeding

In a condemnation proceeding instituted by the Board of Transportation, court erred in awarding attorney fees to defendants after the court denied their motion to strike a second amended complaint filed by the Board. *Board of Transportation v. Royster*, 1.

§ 7.4. Fees Based on Provision in Instrument

Plaintiff was not entitled to recover attorney fees in an action brought upon a lease even though the lease provided for such recovery. *Systems, Inc. v. Yacht Harbor, Inc.*, 726.

AUTOMOBILES

§ 2.4. Proceedings Related to Drunk Driving

A patrolman had probable cause to believe petitioner had been driving while under the influence of intoxicants, and petitioner's driver's license was properly revoked for willfully refusing to submit to a breathalyzer test. *Church v. Powell*, 254.

§ 2.6. Proceedings Based on Driving While License Suspended

Superior court had no jurisdiction under G.S. 20-25 to review the exercise of limited discretion of the Division of Motor Vehicles under G.S. 20-28(a) to determine whether an additional period of suspension for driving while license was suspended should be modified. *Noyes v. Peters*, 763.

§ 45. Relevancy and Competency of Evidence

In an action to recover damages for the wrongful death of a pedestrian who was struck by defendants' vehicle, plaintiff was not prejudiced by the admission

AUTOMOBILES—Continued

§ 117.1. Sufficiency of Evidence of Speeding

Evidence was sufficient for the jury in a prosecution for speeding to elude arrest. *S. v. Spellman*, 591.

AVIATION

§ 3.1. Actions for Injuries to Persons in Flight

In an action to recover for the deaths of two passengers in an airplane crash, trial court erred in giving the jury an instruction which permitted the jury to consider the pilot's own particular experience and training in determining the standard of care required of him. *Heath v. Swift Wings, Inc.*, 158.

BAILMENT

§ 3.3. Sufficiency of Evidence

A jury question was presented in an action to recover damages for loss of a vehicle taken to defendant's place of business for repairs. *Miller v. Motors, Inc.*, 48.

BASTARDS

§ 2. Warrant for Willful Nonsupport of Illegitimate Child

A warrant sufficiently charged defendant with the two essential elements of the crime of willful nonsupport of an illegitimate child. *S. v. Soloman*, 600.

§ 6. Sufficiency of Evidence of Willful Nonsupport of Illegitimate Child

Evidence was sufficient for the jury in a prosecution for willful nonsupport of an illegitimate child. *S. v. Soloman*, 600.

§ 8.1. Verdict on Issue of Paternity

A general verdict of guilty to a valid charge of refusing to support an illegitimate child is adequate as a finding of paternity. *S. v. Golden*, 37.

BETTERMENTS

§ 1. Nature of Claim for Betterments

In an action by plaintiff praying that the court require defendant, an adjoining landowner, to sell to plaintiff at a reasonable price a strip of defendant's land on which plaintiff had inadvertently made improvements, trial court properly granted defendant's motion to dismiss. *McCoy v. Peach*, 6.

BURGLARY AND UNLAWFUL BREAKINGS

§ 6. Instructions Generally

In a burglary prosecution in which the indictment alleged that defendant intended to commit larceny, the court erred in failing to define the term "larceny" in its instructions. *S. v. Foust*, 71.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10.2. Mental Incapacity

Defendants' evidence was sufficient to support their claim that a contract, note and deed of trust were unenforceable because of the mental incapacity of the male defendant to contract at the times in question. *Ludwig v. Hart,* 188.

CHARITIES AND FOUNDATIONS

§ 2. Operation and Solicitation of Funds

Provisions of the Solicitation of Charitable Funds Act constitute an unconstitutional prior restraint on the exercise of religion, constitute an impermissible delegation of legislative powers, violate the Establishment of Religion Clause of the First Amendment, and are a denial of due process and equal protection. *Church v. State,* 429.

CLAIM AND DELIVERY

§ 2. Proceedings in Claim and Delivery

A plaintiff's valuation of property in an affidavit and undertaking in a claim and delivery action is not conclusive. *Systems, Inc. v. Yacht Harbor, Inc.,* 726.

CONSTITUTIONAL LAW

§ 7.1. Delegation of Legislative Powers

Provisions of the Solicitation of Charitable Funds Act constitute an impermissible delegation of legislative powers. *Church v. State.* 429.

§ 21. Right to Security in Person and Property

The right of privacy does not prohibit prosecution of unmarried persons for consensual fellatio done in private. *S. v. Poe,* 385.

§ 22. Religious Liberty

Provisions of the Solicitation of Charitable Funds Act constitute a prior restraint on the exercise of religion, a violation of the Establishment of Religion Clause of the First Amendment, and a denial of due process and equal protection. *Church v. State,* 429.

§ 23. Scope of Due Process

Appellant was not denied her due process rights when her child was declared to be a dependent child and was placed in the custody of suitable persons. *In re Yow,* 688.

§ 24.7. Jurisdiction Over Foreign Corporations

Defendant insurance company which was not licensed to do business in this State had sufficient minimal contacts with this State to justify the court's assertion of in personam jurisdiction over defendant. *Parris v. Disposal, Inc.,* 282.

§ 26.6. Full Faith and Credit in Divorce and Alimony Cases

A Texas court had jurisdiction in a divorce action to order defendant to convey to plaintiff title to realty located in N. C. *Courtney v. Courtney,* 291.

Defendant was estopped from collaterally attacking the validity of a Texas judgment ordering him to convey to plaintiff property located in N. C. where defendant invoked the jurisdiction of the Texas court. *Ibid.*

CONSTITUTIONAL LAW—Continued

§ 28. Due Process in Criminal Proceedings

G.S. 14-177, the crime against nature statute, is not unconstitutionally vague. *S. v. Poe*, 385.

§ 30. Discovery in Criminal Case

Where it became evident at trial that the State had not complied with a discovery order, it was not error for the trial court to declare a recess and give defendant's attorney an opportunity to question the State's witness. *S. v. Mayo*, 626.

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where he was charged with communicating threats and assault by pointing a gun though the two charges arose out of the same incident. *S. v. Evans*, 730.

§ 43. Right to Counsel; What is Critical Stage of Proceedings

Defendant was not entitled to counsel at a show-up where he had not been formally charged with a crime. *S. v. Sadler*, 22.

§ 47. Right to Counsel in Misdemeanor Cases

A defendant charged with willful refusal to support an illegitimate child had a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waived that right, whether or not he was an indigent. *S. v. Lee*, 165.

§ 51. Speedy Trial; Delay Between Offense and Trial

Defendant was not denied his right to a speedy trial despite 5½ years between the offense charged and his trial. *S. v. Williams*, 178.

CONTRACTS

§ 4.1. Consideration Sufficient

Mutual promises to buy and sell land afforded reciprocal considerations and constituted a valid contract binding upon both parties. *Land Co. v. Wood*, 133.

§ 14.2. Contract Not for Benefit of Third Person

Plaintiff's complaint was insufficient to state a claim for breach of an agreement made for the benefit of a third party where plaintiff alleged that an agreement for the issuance of new stock to two of the defendants provided that she should be repaid for a loan to the corporation out of the proceeds. *Snyder v. Freeman*, 348.

§ 18. Waiver

Trial court erred in instructing the jury that it should find a waiver by defendant of his visitation rights under a separation agreement if it found that he intentionally surrendered those rights. *Wheeler v. Wheeler*, 54.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Evidence was sufficient to permit the jury to find that plaintiff breached its contract with defendant by failing to make a reasonable effort to assist defendant in obtaining financing for houses constructed by defendant. *Weyerhaeuser Co. v. Building Supply Co.*, 743.

CONTRACTS—Continued

§ 27.3. Sufficiency of Evidence of Damages

Evidence of damages was sufficient for the jury in an action to recover for the cost of laying water and sewer pipes on defendants' land. *McAdams v. Moser*, 699.

Evidence was sufficient for the jury to find defendant suffered damage in the amount of $100,000 as a result of plaintiff's failure to assist defendant in obtaining financing for houses built by defendant. *Weyerhaeuser Co. v. Building Supply Co.*, 743.

§ 34. Action for Interference With Contract

Trial court properly entered summary judgment for defendant in an action to recover damages for maliciously inducing a realty company to terminate plaintiff's month-to-month lease of office space. *Fitzgerald v. Wolf*, 197.

CORPORATIONS

§ 5.1. Right of Stockholder to Inspect Books and Records

A minority shareholder was entitled as a matter of right to be furnished financial statements of the corporation, but a jury question arose as to whether, pursuant to G.S. 55-38, he wished to examine records of the corporation for a "proper purpose." *Morgan v. McLeod*, 467.

§ 7. Powers and Authority of Officers and Agents

Plaintiff's complaint was insufficient to state a valid claim for breach of trust where she was not repaid a loan from the proceeds of the sale of stock. *Snyder v. Freeman*, 348.

§ 13. Liability of Officers to Third Person for Mismanagement or Fraud

Plaintiffs presented evidence of special circumstances which, if found by the jury to be true, would create a fiduciary duty owed by defendant corporation director to plaintiff shareholders in the purchase of the shareholders' stock, and the director had a duty to disclose certain information to the shareholders. *Lazenby v. Godwin*, 487.

COURTS

§ 4. Minimum Amount Within Original Jurisdiction of Superior Court

An action by plaintiff to recover $6,000,000 from defendant was properly brought in superior court. *Realty Corp. v. Savings & Loan Assoc.*, 675.

§ 15. Criminal Jurisdiction of Juveniles

While a judge does not have to find facts to support his conclusion that a case involving a child over 14 years of age should be tried in superior court, G.S. 7A-280 does require that he specify his reason for the transfer. *S. v. Connard*, 765.

§ 21.7. What Law Governs in Contract Action

In an action to recover the balance due upon contracts for the sale of land, Virginia law governed since the contracts were executed in Virginia. *Land Co. v. Wood*, 133.

CRIME AGAINST NATURE

§ 1. Elements of Offense

The crime against nature includes consensual fellatio between a man and a woman, and the crime against nature statute is not unconstitutionally vague. *S. v. Poe*, 385.

CRIMINAL LAW

§ 18.2. Trial De Novo in Superior Court

Where defendant was convicted of reckless driving in operating a vehicle while directly and visibly affected by the consumption of intoxicating liquor under G.S. 20-140(c), superior court on trial de novo erred in instructing on reckless driving under G.S. 20-140(a). *S. v. Robinson*, 514.

§ 34.5. Evidence of Other Offenses to Show Identity

Evidence of prior occasions of defendant's exposure of his private parts was admissible in an armed robbery prosecution to show identity of defendant. *S. v. Watkins*, 17.

§ 34.7. Evidence of Other Offenses to Show Intent, Motive, Malice, Etc.

In a prosecution for second degree murder and child abuse, evidence of child abuse did not prejudice defendant's trial as it related to second degree murder. *S. v. Vega*, 326.

§ 39. Evidence in Rebuttal

Trial court did not err in permitting a witness to testify for the State on rebuttal after his testimony had been ruled inadmissible when offered by the defense. *S. v. Cody*, 735.

§ 46.1. Evidence of Flight

Where the evidence tended to show that defendant walked calmly, rather than ran, from the scene of the shooting, there was sufficient evidence to support an instruction on flight by the defendant. *S. v. Carswell*, 752.

§ 66.3. Pretrial Confrontations Generally

A pre-arrest viewing of defendant by a robbery victim in a waiting room of the courthouse was not suggestive. *S. v. Watkins*, 17.

§ 66.5. Right to Counsel at Lineup or Show-up

Defendant was not entitled to counsel at a show-up where he had not been formally charged with a crime. *S. v. Sadler*, 22.

§ 66.10. Confrontation at Police Station

The appellate court is bound by the trial court's findings that a police station show-up procedure was impermissibly suggestive and that a witness's in-court identification was based entirely on the show-up where they were supported by competent evidence. *S. v. Sadler*, 22.

§ 66.14. Independent Origin of In-Court Identification

A post-arrest one-on-one confrontation between defendant and a robbery victim at the police station, though suggestive, did not taint the victim's in-court identification of defendant. *S. v. Watkins*, 17.

CRIMINAL LAW—Continued

§ 66.18. Necessity for Voir Dire on Identification Testimony

Failure to hold a voir dire was harmless error where the evidence was clear and convincing that in-court identification of defendant originated with the observation of defendant at the time of the crime. *S. v. Byrd*, 172.

§ 75.7. What Constitutes Custodial Interrogation

Petitioner's statement at a service station to an officer that he had been driving a car at the time it wrecked did not result from custodial interrogation and did not require the Miranda warnings. *Church v. Powell*, 254.

§ 86.5. Cross-Examination of Defendant

Cross-examination of defendant in an embezzlement case about other transactions similar to the one in question was competent to show intent, and cross-examination of defendant about his personal finances was competent to show motive. *S. v. Pate*, 580.

§ 89.8. Impeachment of Witness

Cross-examination of a State's witness as to whether criminal charges were pending against him was competent for the purpose of showing bias. *S. v. Evans*, 623.

§ 91.7. Motion for Continuance on Ground of Absence of Witness

Trial court did not err in denying defendant's motion for continuance made on the ground of the absence of a necessary witness. *S. v. Evans*, 390.

§ 92.2. Consolidation of Offenses for Trial

In a prosecution for second degree murder and child abuse, defendant's contention that superior court was without jurisdiction to hear the misdemeanor charge of child abuse was without merit. *S. v. Vega*, 326.

§ 98.2. Sequestration of Witnesses

There was no merit to defendant's contention that he was entitled to a new trial because the district attorney talked to a State's witness after court had entered an order sequestering the witnesses. *S. v. Carswell*, 752.

§ 99.4. Remarks by Court in Ruling on Objections

Trial court did not express an opinion when defense counsel asked the victim to tell him when six minutes were up, and the court sustained the State's objection and stated that "the clock is there and the time can be counted." *S. v. Cody*, 735.

§ 102.2. Control of Jury Argument by Court

Trial court did not err in interrupting defense counsel's argument to the jury which was not supported by the evidence. *S. v. Carswell*, 752.

§ 102.8. Comment on Defendant's Failure to Testify

Defendant charged with willful nonsupport of an illegitimate child was entitled to a new trial where defendant, during the absence of the judge from the courtroom, objected to the district attorney's argument with regard to defendant's failure to testify, and the judge overruled defendant's objection, denied his motion, and refused to reconstruct the jury argument for appellate review. *S. v. Soloman*, 600.

CRIMINAL LAW—Continued

§ 143.1. Notice of Proceeding to Revoke Probation

An order of arrest for violation of conditions of probation need not inform defendant with particularity of the accusations against him. *S. v. Baines*, 545.

§ 143.9. Revocation of Probation for Change of Residence, Failure to Report to Probation Officer

Even if incompetent evidence was admitted at defendant's probation revocation hearing, competent evidence admitted was sufficient to support the court's revocation of defendant's probation for failing to pay amounts required by the probation judgment, failing to report to his probation officer, and departing the State without notifying his probation officer. *S. v. Baines*, 545.

§ 145.5. Parole

Statutes permitting a trial court which imposes an active sentence to include a recommendation for restitution or reparation as a condition of work release or parole do not unconstitutionally discriminate against indigent defendants. *S. v. Lambert*, 418.

§ 146.7. Jurisdiction of Court of Appeals

No appeal lies to the Court of Appeals from an order entered in the district court finding that defendant had violated the conditions of his suspended sentence. *S. v. Golden*, 37.

§ 166. The Brief

Counsel for appellant is personally taxed with the cost of printing an unnecessary narration of the evidence in the statement of the case in appellant's brief. *S. v. Robinson*, 514.

§ 180. Writs of Error Coram Nobis

A petition for a writ of error coram nobis was the appropriate procedure on 18 November 1977 by which a defendant not in prison could challenge the validity of a criminal judgment on the ground he had been denied his constitutional right to counsel. *S. v. Lee*, 165.

CUSTOMS AND USAGES

§ 1. Generally

In an action to recover for the cost of laying water and sewer pipes on defendants' land, trial court properly permitted plaintiff to testify that it was the custom in the contracting business for "cut sheets" to be furnished and paid for by the owner of the land, not the contractor. *McAdams v. Moser*, 699.

DECLARATORY JUDGMENT

§ 3. Justiciable Controversy

A collection agency was not entitled to seek a declaratory judgment in superior court as to the validity and applicability of a regulation of the Dept. of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where the agency had not exhausted available administrative remedies. *Porter v. Dept. of Insurance*, 376.

DEEDS

§ 7.3. Registration

In an action to set aside a deed on the grounds that it was recorded without plaintiffs' authorization and was not supported by adequate consideration, defendants' contention that they properly exercised an option to purchase the property did not constitute an affirmative defense for which they had the burden of proof. *Davis v. McRee,* 238.

§ 20.1. Restrictive Covenants

Where the original owners of land in a subdivision did not insert a restriction that the lots be used for residential purposes in the deeds they gave their purchasers, the lots were in fact conveyed free and clear of all encumbrances. *Goodnite v. Gurley,* 45.

DIVORCE AND ALIMONY

§ 18. Alimony Pendente Lite Generally

The presumption that the husband is the supporting spouse and thus by definition that the wife is the dependent spouse controls until evidence has been presented tending to show that the wife is not in fact a dependent spouse. *Galloway v. Galloway,* 366.

§ 18.2. Notice and Hearing of Motion for Alimony Pendente Lite

Where the supporting spouse abandons the dependent spouse and leaves the state, notice of hearing on motion for alimony pendente lite is not required nor is service on the supporting spouse's counsel of record required. *Fungaroli v. Fungaroli,* 397.

§ 18.10. Findings Generally as to Alimony Pendente Lite

Where both plaintiff and defendant alleged that they were married to each other, their marital relationship was a judicially established fact and was not required to be stated by the court. *Fungaroli v. Fungaroli,* 397.

§ 18.11. Findings as to Dependency

Trial court properly determined that plaintiff was entitled to temporary alimony where the court found that plaintiff was a dependent spouse, as her monthly expenses exceeded $2000 while her income was $930 per month, even though plaintiff's net worth was $220,000. *Gardner v. Gardner,* 334.

Findings by the trial court were insufficient to support its conclusion that plaintiff was not a dependent spouse since they did not include a finding that plaintiff had a reasonable opportunity to but did not adequately support herself. *Galloway v. Galloway,* 366.

§ 18.12. Findings as to Right to Relief

Trial court properly determined that plaintiff was entitled to temporary alimony where the court found that plaintiff was prima facie entitled to the relief she demanded. *Gardner v. Gardner,* 334.

§ 18.13. Amount and Manner of Payment of Alimony Pendente Lite

Defendants' contention that the trial court was without authority to order a lump sum payment of money constituting support from the date of the parties' separation until the date of the award was without merit. *Gardner v. Gardner,* 334.

DIVORCE AND ALIMONY—Continued

§ 18.14. Possession of Property as Alimony Pendente Lite

Trial court did not abuse its discretion in concluding that a 10 year old automobile purchased by plaintiff was inappropriate for the wife of a wealthy businessman and in concluding plaintiff was in need of an automobile for general transportation. *Gardner v. Gardner*, 334.

§ 21.3. Findings in Enforcing Alimony Awards

Defendant's contention that he did not wilfully violate the court's alimony orders because he was financially unable to pay is without merit where the court made specific findings of ability to pay which were supported by competent evidence. *Roberson v. Roberson*, 193.

§ 21.5. Punishment for Contempt in Enforcing Alimony Award

Where the court found that defendant wilfully violated alimony orders, it did not exceed its authority in ordering defendant confined for a term of four months in jail or until he purged himself of the contempt violation. *Roberson v. Roberson*, 193.

§ 23.9. Evidence in Child Custody Proceeding

In an action to modify a Colorado decree giving custody of the parties' child to defendant, trial court did not err in admitting evidence as to the prior arrest record and abusive behavior of defendant's husband. *King v. Demo*, 661.

§ 24.5. Modification of Child Support Order

Trial court erred in increasing child support payments without making findings of fact which would show a substantial change of condition affecting the welfare of the children. *Ebron v. Ebron*, 270.

§ 24.9. Findings in Child Support Action

Trial court's child support order contained insufficient findings of fact. *Poston v. Poston*, 210.

§ 25.9. Modification of Child Custody

Evidence of changed conditions was sufficient to support the trial court's order changing custody of the parties' minor child from defendant to plaintiff. *Carmichael v. Carmichael*, 277.

§ 25.12. Child Visitation Privileges

Trial court erred in instructing the jury that it should find a waiver by defendant of his visitation rights under a separation agreement if it found that he intentionally surrendered those rights. *Wheeler v. Wheeler*, 54.

Trial court erred in failing to make findings to support its denial of any visitation privileges to defendant during a three year period when she planned to live in Japan. *King v. Demo*, 661.

§ 26.2. Modification of Foreign Custody Order; Changed Circumstances

Plaintiff met his burden of proving a sufficient change of circumstances to warrant a modification of a Colorado custody order entered four years earlier. *King v. Demo*, 661.

§ 26.3. Effect of Child's Presence in Modifying Foreign Custody Order

A minor child's physical presence in N. C. was sufficient to confer jurisdiction upon the trial court to modify a foreign custody decree. *King v. Demo*, 661.

EASEMENTS

§ 4.1. Adequacy of Description

Language in a deed which attempted to reserve a right-of-way across certain land was too ambiguous and uncertain to permit identification and location of the easement. *Adams v. Severt*, 247.

§ 6.1. Creation of Easements by Prescription

Plaintiff's evidence on motion for summary judgment was insufficient to show title to a roadway by prescription since it showed possession for only 18 years as opposed to 20 years. *Adams v. Severt*, 247.

Plaintiff's evidence was insufficient to establish an easement by prescription over the land of defendants where it did not disclose adverse possession. *Watkins v. Smith*, 506.

ELECTRICITY

§ 1. Control and Regulation Generally

Tapoco, Inc. is a "public utility" subject to control by the N.C. Utilities Commission. *Utilities Comm. v. Edmisten*, 109.

§ 3. Rates

The Utilities Commission should determine whether the consuming public would benefit by having the assets and costs of Tapoco, Inc., rolled-in with those of Nantahala Power Co. in determining Nantahala's rate structure. *Utilities Comm. v. Edmisten*, 109.

§ 5.1. Height of Uninsulated Wires

In an action to recover damages for the electrocution of plaintiff's husband, a genuine issue of fact existed as to whether defendant had a duty to insulate high voltage wires in such close proximity to a house. *Hale v. Power Co.*, 202.

§ 7.1. Sufficiency of Evidence of Negligence

Evidence of defendant's negligence was sufficient for the jury where it tended to show that it failed to move a sagging power line over the area where plaintiff was constructing a restaurant. *Partin v. Power and Light Co.*, 630.

§ 8. Contributory Negligence

In an action to recover damages for the electrocution of plaintiff's husband, a genuine issue of fact existed as to whether deceased knew or should have known of the presence of a high voltage wire located three feet, ten inches from the side of his house. *Hale v. Power Co.*, 202.

Where plaintiff was severely burned when he went to the aid of his son who had touched a high voltage wire with a metal rod, the rescue doctrine was applicable to negate contributory negligence by plaintiff as a matter of law. *Partin v. Power and Light Co.*, 630.

§ 9. Intervening Negligence

Where plaintiff went to the aid of his son who had touched defendant's high voltage wire with a metal rod, evidence did not show as a matter of law that the conduct of the son in touching the line intervened to insulate the negligence of defendant. *Partin v. Power and Light Co.*, 630.

EMBEZZLEMENT

§ 5. Competency of Evidence

Cross-examination of defendant in an embezzlement case about other transactions similar to the one in question was competent to show intent, and cross-examination of defendant about his personal finances was competent to show motive. *S. v. Pate*, 580.

§ 6. Sufficiency of Evidence

State's evidence was sufficient to permit the jury to find that defendant was guilty of embezzlement from a finance company by receiving the proceeds of a loan purportedly made to a customer. *S. v. Pate*, 580.

§ 6.1. Instructions

Trial court in an embezzlement case adequately instructed on fraudulent intent. *S. v. Pate*, 580.

EMINENT DOMAIN

§ 6.1. Value at Prior Date

In a highway condemnation action, physical changes in the property during the six-year period the property had been owned by defendants were not so extensive as to render inadmissible evidence of the original purchase price of the property. *Board of Transportation v. Revis*, 182.

§ 7.1. Proceedings to Take Land Generally

In a condemnation proceeding instituted by the Board of Transportation, court erred in awarding attorney fees to defendants after the court denied their motion to strike a second amended complaint filed by the Board. *Board of Transportation v. Royster*, 1.

§ 7.4. Complaint in Condemnation Action

The Board of Transportation had a right to amend its complaint without leave of the court in a condemnation proceeding to add a second tract to the proceeding and to correct a mistake which resulted in a deposit for fair compensation of lands not included in the original complaint and declaration of taking. *Board of Transportation v. Royster*, 1.

ESTOPPEL

§ 4.7. Equitable Estoppel

Defendant yarn manufacturer was not equitably estopped from denying that it guaranteed that the type of yarn used by plaintiff in preparing sample materials would remain in production and available to plaintiff. *Manufacturing Co. v. Hercules, Inc.*, 756.

EVIDENCE

§ 22.1. Evidence at Prior Proceeding Arising From Same Subject Matter

Where claimant obtained a judgment against defendant board of county commissioners for injuries inflicted by a dog, and the county sought to recover that amount from the dog owner, trial court properly granted the dog owner's motion in

FIDUCIARIES

§ 2. Evidence of Fiduciary Relationship

Plaintiffs presented evidence of special circumstances which, if found by the jury to be true, would create a fiduciary duty owed by defendant corporation director to plaintiff shareholders in the acquisition of the shareholders' stock. *Lazenby v. Godwin*, 487.

FRAUD

§ 12.1. Nonsuit

Summary judgment was properly entered for defendant bank on the issue of fraud in procuring the subordination of plaintiffs' purchase money deed of trust to the bank's deed of trust. *Odom v. Little Rock & I-85 Corp.*, 242.

FRAUDULENT CONVEYANCES

§ 3.4. Sufficiency of Evidence

Evidence was sufficient for the jury to find that defendant husband's conveyance of land to his wife and himself as tenants by the entirety was fraudulent as to his creditors. *Nytco Leasing v. Southeastern Motels*, 120.

GARNISHMENT

§ 1. Property Subject to Garnishment

Anticipated retirement pay for a future period of a regular officer, retired from a branch of the military service, is not subject to garnishment. *Harris v. Harris*, 26.

GAS

§ 4. Negligent Installation of Gas Appliances

Trial court erred in granting defendant's motions for summary judgment in an action to recover for personal injuries sustained when gas space heaters sold and installed by defendants exploded. *Moye v. Gas Co.*, 310.

GIFTS

§ 1.2. Gifts of Stock

Plaintiffs stated a claim for relief against a bank for the bank's sale of stock held by a custodian under the Uniform Gifts to Minors Act and pledged by the custodian as security for a personal loan. *O'Neill v. Bank*, 227.

GUARANTY

§ 1. Generally

Guaranty agreements were not revoked by the death of the guarantor. *Love v. Bache & Co.*, 617.

§ 2. Actions to Enforce Guaranty

Under the terms of a guaranty of a corporation's indebtedness to a bank and an agreement authorizing an individual to pledge securities owned by plaintiff's

HUNTING

§ 1. Control and Regulation

The buying and selling of fox furs is legal in N. C. during open season in the county where the sale takes place, and there is no requirement in the game law that a permit be issued for such transactions. *Fur Co. v. Wildlife Resources Comm.*, 609.

Act prohibiting the deliberate shining of an artificial light from a motor-driven conveyance beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals during certain evening hours in specified counties is unconstitutionally overbroad. *S. v. Stewart*, 693.

HUSBAND AND WIFE

§ 10.1. Validity of Separation Agreement

Provision of a separation agreement requiring the husband to pay the wife $700 per month commencing on the date of the agreement and stating that "this amount is established on a temporary basis" was not unenforceable because of uncertainty as to duration. *Medders v. Medders*, 681.

A provision of a separation agreement that the monthly amount paid by the husband to the wife could be revoked "as necessity may dictate" did not make the agreement too indefinite to be enforceable or terminable at will. *Ibid.*

§ 12. Revocation of Separation Agreement

The evidence supported the court's determination that a $700 monthly payment which a separation agreement required a husband to make to the wife was intended as support for the wife and a daughter and that it should be reduced when the daughter no longer resided with the wife. *Medders v. Medders*, 681.

§ 12.1. Waiver of Rights Under Separation Agreement

Trial court erred in instructing the jury that it should find a waiver by defendant of his visitation rights under a separation agreement if it found that he intentionally surrendered those rights. *Wheeler v. Wheeler*, 54.

INDEMNITY

§ 3. Actions for Indemnity

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog, there were material issues of fact as to whether third party defendant's dog was the one which actually inflicted the injuries upon claimant, whether the county had paid the claim, and what amount of damages the county was entitled to recover from the dog owner. *Heath v. Board of Commissioners*, 233.

§ 3.2. Evidence

Where claimant obtained a judgment against defendant board of county commissioners for injuries inflicted by a dog, and the county sought to recover that amount from the dog owner, trial court properly granted the dog owner's motion in limine for an order preventing the county and its witnesses from making references to judgment previously entered for claimant against the county. *Heath v. Board of Commissioners*, 233.

INDIANS

§ 1. Generally

The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. *Sasser v. Beck*, 668.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrants

Defendant's contention that summons was not received within the time mandated by G.S. 15A-301(d)(2) was without merit since service made after the period specified does not invalidate the process. *S. v. Soloman*, 600.

INFANTS

§ 6. Hearing for Award of Custody

Appellant was not denied her due process rights when her child was declared to be a dependent child and was placed in the custody of suitable persons. *In re Yow*, 688.

§ 6.3. Custody Contest Between Parent and Third Person

In a proceeding to declare a child to be a dependent child, the test as to where custody is placed is what best meets the needs of the child. *In re Yow*, 688.

§ 11. Jurisdiction Under Juvenile Court Statutes

While a judge does not have to find facts to support his conclusion that a case involving a child over 14 years of age should be tried in superior court, G.S. 7A-280 does require that he specify his reasons for the transfer. *S. v. Connard*, 765.

§ 18. Sufficiency of Evidence in Juvenile Hearing

Testimony by the prosecuting witness in a juvenile delinquency proceeding as to the identity of respondent as the person who robbed and assaulted her was sufficient to overcome respondent's motion for nonsuit. *In re Vinson*, 423.

INJUNCTIONS

§ 5.1. Unconstitutionality of Rule or Statute

Constitutionality of a policy of a county board of education concerning athletic eligibility for transfer students could not be determined upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing. *Garrison v. Miller*, 393.

INSANE PERSONS

§ 1.2. Findings for Involuntary Commitment

Involuntary commitment order is reversed where the court failed to record sufficient facts to support its findings that respondent was mentally ill and dangerous to himself or others. *In re Caver*, 264.

Trial court's findings that respondent was unable to take care of herself and had no one to care for her were insufficient to support a conclusion that respondent was imminently dangerous to herself. *In re Bartley*, 218.

INSURANCE

§ 121. Provisions of Fire Policy Excluding Liability

Where plaintiff wilfully misrepresented material facts in swearing to proof of loss with respect to personal property, the policy was void with respect to real property as well. *Dale v. Insurance Co.*, 715.

JUDGES

§ 5. Disqualification of Judges

In a prosecution of defendant for second degree murder and child abuse, trial court did not err in failing to disqualify himself though he was the presiding judge at an earlier trial when a mistrial was declared because of an emotional outburst by decedent's mother. *S. v. Vega*, 326.

JUDGMENTS

§ 39. Judgments of Courts of Other States

A Texas court has jurisdiction in a divorce action to order defendant to convey to plaintiff title to realty located in N. C., and defendant was estopped from collaterally attacking the validity of the Texas judgment where he invoked the jurisdiction of the Texas court. *Courtney v. Courtney*, 291.

LABORERS' AND MATERIALMEN'S LIENS

§ 8.1. Enforcement of Lien; Action Against Owner

Plaintiff was not entitled to enforcement of a lien for labor and materials where plaintiff was not entitled to a money judgment against any of the defendants under a contract for labor and materials. *Ply-Marts, Inc. v. Phileman*, 767.

LANDLORD AND TENANT

§ 5. Lease of Personal Property

In an action to recover for breach of an agreement to lease equipment, trial court properly used as a measure of damages the rent for the entire remaining term of the lease less the fair market value of the repossessed equipment. *Systems, Inc. v. Yacht Harbor, Inc.*, 726.

§ 13.2. Extensions of Lease

An extension of a lease applied to the entire lease agreement, including the option to purchase, and not only to the period of occupancy of the leased premises. *Davis v. McRee*, 238.

LARCENY

§ 7.8. Sufficiency of Evidence of Breaking and Entering and Larceny

Evidence was sufficient for the jury where it tended to show that defendant who had broken into a school moved cans from a pantry to the kitchen. *S. v. McCullough*, 620.

§ 8. Instructions

Trial court's instructions with respect to the taking of property were sufficient, *S. v. McCullough*, 620.

MASTER AND SERVANT

§ 10. Termination of Contract of Employment

Provision of an operations manual stating that a manager of one of defendant's restaurants could be discharged after "one verbal and one written warning" was not the exclusive way for discharging employees. *Williams v. Biscuitville, Inc.*, 405.

§ 68. Occupational Diseases

Plaintiff hair stylist did not have a compensable disability where her incapacity to earn wages was the result of her personal sensitivity to chemicals used in her work. *Sebastian v. Hair Styling*, 30.

§ 80. Workmen's Compensation Rates

Findings by the Comr. of Insurance that a workmen's compensation rate filing was defective because it relied on national distribution tables in calculating the effect of statutory changes on the rate structure, it relied on countrywide expense data, national credibility factors were used to supplement N.C. credibility factors, the expense allowance was based solely upon the expenses of stock companies without consideration of mutual companies, and it did not contain a breakdown of incurred losses were not supported by substantive evidence. *Commissioner of Insurance v. Rate Bureau*, 85.

The Comr. of Insurance could properly consider investment income in determining whether a 2.5% margin for underwriting was reasonable in a workmen's compensation rate hearing, but the Comr. erred in requiring that investment income be considered at a risk-free rate of return rather than the rate of return actually experienced by the companies. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 2. Purchase-Money Mortgages

Summary judgment was properly entered for defendant bank on the issue of fraud in procuring the subordination of plaintiffs' purchase money deed of trust to the bank's deed of trust. *Odom v. Little Rock & I-85 Corp.*, 242.

§ 24.1. Parties in Foreclosure Action

A judgment directing foreclosure of a deed of trust and the sale of property described therein was void where the trustee was not made a party to the action. *Ludwig v. Hart*, 188.

NARCOTICS

§ 4.3. Sufficiency of Evidence of Constructive Possession

State's evidence was insufficient to show defendant had constructive possession of cocaine found in a woman's coat in the bedroom closet of an apartment leased to a female friend of defendant, was sufficient for the jury to find that defendant did have constructive possession of marijuana found in a shoebox on the kitchen table in the apartment, but was insufficient to show an intent to sell the marijuana. *S. v. Moore*, 613.

NEGLIGENCE

§ 5. Dangerous Instrumentalities; Strict Liability

The doctrine of strict liability in tort is inapplicable in an action against a manufacturer based on defects in design. *Fowler v. General Electric Co.*, 301.

NEGLIGENCE—Continued

§ 7. Willful or Wanton Negligence

Evidence was insufficient to support a jury verdict finding that plaintiff was injured as a result of willful or wanton conduct on the part of defendants in an action to recover for injuries sustained by minor plaintiff when he drove his motorcycle into a cable gate on a private driveway. *Starr v. Clapp*, 142.

§ 10.1. Intervening Causes

Where plaintiff went to the aid of his son who had touched defendant's high voltage wire with a metal rod, evidence did not show as a matter of law that the conduct of the son in touching the line intervened to insulate the negligence of defendant. *Partin v. Power and Light Co.*, 630.

§ 17. Doctrine of Rescue

Where plaintiff was severely burned when he went to the aid of his son who had touched a high voltage wire with a metal rod, the rescue doctrine was applicable to negate contributory negligence by plaintiff as a matter of law. *Partin v. Power and Light Co.*, 630.

§ 29.1. Sufficiency of Evidence of Negligence

Evidence of defendant's negligence was sufficient for the jury where it tended to show that it failed to move a sagging power line over the area where plaintiff was constructing a restaurant. *Partin v. Power and Light Co.*, 630.

§ 48. Condition of Entrance to Building

In an action to recover for personal injuries sustained by plaintiff when she slipped and fell in the entrance to defendant's store, trial court properly granted summary judgment for defendant. *Jacobson v. Penney Co.*, 551.

In an action to recover for personal injuries sustained by plaintiff when she fell in the entranceway of defendant's veterinary hospital, trial court erred in granting defendant's motion for summary judgment. *Durham v. Vine*, 564.

§ 57.4. Falls by Invitees on Stairs

Plaintiff's evidence was insufficient for the jury in an action to recover for injuries suffered when she slipped and fell while descending a stairway in defendant's store. *Hedgepeth v. Rose's Stores*, 11.

PARENT AND CHILD

§ 2.2. Child Abuse

Evidence was sufficient for the jury in a prosecution for abuse and murder of a four year old child. *S. v. Vega*, 326.

PARTNERSHIP

§ 1.2. Existence of Partnership

Evidence that plaintiff received a share of the profits in a restaurant he managed was insufficient to make out a prima facie case of partnership where all the evidence showed that the profit sharing was only a part of his wages as an employee. *Williams v. Biscuitville, Inc.*, 405.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 17. Sufficiency of Evidence in Malpractice Action

Plaintiff's evidence was insufficient for the jury in an action for malpractice in the treatment of a wound to plaintiff's hand. *Cameron v. Howard*, 66.

§ 20. Causal Connection Between Malpractice and Injury

In an action to recover damages for medical malpractice where plaintiff alleged that her child was stillborn, plaintiff failed to show a connection between her injury and defendants' action or inaction, but the court on appeal, instead of directing entry of judgment n.o.v. for defendants, granted plaintiff a new trial. *Lindsey v. The Clinic for Women*, 456.

PLEDGES

§ 2. Construction and Operation

Under the terms of a guaranty of a corporation's indebtedness to a bank and an agreement authorizing an individual to pledge securities owned by plaintiff's testator as collateral for any indebtedness of the individual to the bank, plaintiff's consent was unnecessary to extensions of time for payment of the secured debts or for payment of the proceeds from the sale of testator's securities held by the bank to satisfy the debts of the corporation and the individual. *Love v. Bache & Co.*, 617.

PROCESS

§ 13. Service of Process on Agent of Foreign Corporation

Defendant insurance company which was not licensed to do business in this State had sufficient minimal contacts with this State to justify the court's assertion of in personam jurisdiction over defendant. *Parris v. Disposal, Inc.*, 282.

Plaintiff's service of process by serving alias and pluries summons on defendant's statutory agent for service of process in Connecticut was sufficient. *Ibid.*

§ 14.4. Service on Foreign Corporation: Contract Made or to be Performed in this State

Where plaintiff alleged that it made a construction loan to a hotel in reliance upon the nonresident defendant's commitment to provide permanent financing, the N. C. courts had personal jurisdiction over defendant. *Realty Corp. v. Savings & Loan Assoc.*, 675.

§ 15. Service on Insurance Companies by Service or Insurance Commissioner

Service of summons upon the N. C. Commissioner of Insurance as defendant insurance company's statutory process agent was ineffective since defendant was not licensed to do business in this State. *Parris v. Disposal, Inc.*, 282.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

Plaintiff failed to show that defendant was negligent in the installation or servicing of a furnace in her mobile home. *Plyler v. Moss & Moore*, 720.

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

In an action by plaintiff praying that the court require defendant, an adjoining landowner, to sell to plaintiff at a reasonable price a strip of defendant's land on which plaintiff had inadvertently made improvements, trial court properly granted defendant's motion to dismiss. *McCoy v. Peach*, 6.

§ 5. Recovery of Payments

In an action to recover a sum of money allegedly lent by plaintiffs to defendant, their former daughter-in-law, for use in a chicken business operated by defendant and her husband, there was no promise to repay implied as a matter of law or implied in fact, nor did defendant promise to repay when she signed a separation agreement in which she agreed to assume the lawful debts of the business. *Blanton v. Blanton*, 221.

RECEIVING STOLEN GOODS

§ 4. Competency of Evidence

Defendant was not prejudiced by the owner's testimony of the value of part of the stolen property, even if the owner was not properly qualified to give such testimony. *S. v. Whitaker*, 251.

REFERENCE

§ 7. Report of Referee

Report of a certified public accountant appointed as a referee to determine the value of plaintiff's stock in a corporation in accordance with a stock redemption agreement was not defective because the referee did not follow certain procedures. *Godwin v. Clark, Godwin, Harris & Li*, 710.

RULES OF CIVIL PROCEDURE

§ 4. Process

Trial court erred in holding that defendant had offered evidence sufficient to rebut the presumption that she had been served with process. *Hasty v. Carpenter*, 261.

Trial court erred in determining that an alias summons issued more than 90 days after the original summons was issued could relate back to the date of issue of the original summons so as to keep alive the action originally instituted. *Lackey v. Cook*, 522.

Plaintiff could amend its summons so that defendant's name appeared differently since defendant showed no prejudice resulting therefrom. *Realty Corp. v. Savings & Loan Assoc.*, 675.

§ 8.2. The Answer

A defense based on waiver or release is an affirmative defense for which the defendant bears the burden of proof. *Lyon v. Shelter Resources Corp.*, 557.

§ 13. Counterclaims

Trial court did not abuse its discretion in denial of defendant's motion to amend its answer to add a counterclaim. *Garage v. Holston*, 400.

RULES OF CIVIL PROCEDURE—Continued

§ 14. Third-Party Practice

Neither G.S. 67-13 nor Rule 14(a) made a dog owner automatically liable to county commissioners for the amount awarded for injuries inflicted by the dog in an action against the commissioners. *Heath v. Board of Commissioners*, 233.

§ 15. Amendment of Pleadings

Plaintiff could amend its complaint so that defendant's name appeared differently since no responsive pleading had been filed. *Realty Corp. v. Savings & Loan Assoc.*, 675.

§ 32. Use of Depositions in Court Proceedings

Trial court did not err in admitting depositions of defendants though both were in court and available to be called as witnesses. *Nytco Leasing v. Southeastern Motels*, 120.

§ 41. Dismissal of Actions

Trial court sitting without a jury should have treated defendant's motion for directed verdict as a motion for involuntary dismissal and should have made findings of fact and stated his conclusions separately. *Joyner v. Thomas*, 63.

Trial court did not err in entering out of session an order dismissing plaintiff's action for failure to prosecute. *Barbee v. Jewelers, Inc.*, 760.

§ 50.2. Directed Verdict Against Party With Burden of Proof

Trial court erred in granting a directed verdict in favor of the party having the burden of proof. *Ludwig v. Hart*, 188; *Stuart v. Bryant*, 206.

§ 50.3. Grounds for Directed Verdict

Defendant could not assert grounds for his motion for judgment n.o.v. which had not been included in the motion for directed verdict. *Lee v. Tire Co.*, 150.

Though G.S. 1A-1, Rule 50(a) provides that a motion for directed verdict state specific grounds therefor, the court need not inflexibly enforce the rule when the grounds are apparent to the court and the parties. *Lindsey v. The Clinic for Women*, 456.

§ 52. Findings by Court

The trial court was not required to make findings and conclusions with respect to an unappealable interlocutory order denying a motion to dismiss for failure to state a claim for relief. *O'Neill v. Bank*, 227.

§ 53. Referees

Report of a certified public accountant appointed as a referee to determine the value of plaintiff's stock in a corporation in accordance with a stock redemption agreement was not defective because the referee did not follow certain procedures. *Godwin v. Clark, Godwin, Harris & Li*, 710.

§ 60. Relief from Judgment or Order Generally

A rule 60(b) motion for relief from an order denying a motion to dismiss for failure to state a claim for relief was improper since Rule 60(b) has no application to an interlocutory order. *O'Neill v. Bank*, 227.

§ 60.2. Grounds for Relief from Order

Trial court erred in setting aside default judgment against the individual defendant on the ground of excusable neglect where the evidence tended to show

SEARCHES AND SEIZURES—Continued

§ 36. Search Incident to Arrest

A pawn ticket seized from defendant's wallet within an hour after his arrest was properly seized as an incident of his arrest. *State v. Nesmith*, 748.

§ 43. Motions to Suppress Evidence

An order denying defendant's motion to suppress prior to his first trial which ended in a mistrial could be brought forward as a part of defendant's appeal from a judgment of conviction at his retrial. *S. v. Grogan*, 371.

§ 44. Findings of Fact on Admissibility of Seized Evidence

Trial court erred in failing to make written findings of fact and conclusions of law in an order denying defendant's motion to suppress evidence. *S. v. Grogan*, 371.

§ 47. Competency of Evidence on Motion to Suppress

G.S. 15A-978(a) permits a defendant to challenge only whether the affiant acted in good faith in the use of information employed to establish probable cause in the issuance of a search warrant and not to attack the factual accuracy of the information supplied by an informant to the affiant. *S. v. Winfrey*, 266.

TAXATION

§ 40. Foreclosure of Tax Certificate

A sheriff's sale of plaintiff's property on a tax judgment was invalid where there was no evidence when the sheriff's notice was posted at the courthouse door and the sheriff failed to mail notice of sale to the listed taxpayer at her last known address. *Annas v. Davis*, 51.

Where the trial court found that a sheriff's deed to defendants, based upon execution sale on a judgment for taxes, was void, trial court erred in denying defendants reimbursement for the taxes they paid on the property in question, but the court properly denied defendants reimbursement for the costs of the sale. *Ibid.*

§ 41.2. Notice of Foreclosure

Statute requiring that notice of a foreclosure sale be mailed to the property owner 20 days prior to the sale does not apply to a tax foreclosure sale. *City of Durham v. Keen*, 652.

§ 44.1. Grounds for Attack on Foreclosure Sale

A showing of inadequacy of price alone was an insufficient basis for setting aside a tax foreclosure sale. *City of Durham v. Keen*, 652.

TRIAL

§ 3.2. Grounds for Continuance

Trial court did not err in denying defendant's motion to continue a contempt hearing, though plaintiff's counsel stated he had been employed only 30 minutes, since plaintiff had had notice of the hearing for 10 days. *Fungaroli v. Fungaroli*, 397.

§ 42.1. Inconsistency of Verdict

The fact that the jury awarded plaintiff a sum greater than that which defendants claimed was due on a contract account and less than that which plaintiff claim-

WORD AND PHRASE INDEX

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