

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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1. Resigned 20 August 1979.

2. Appointed Associate Justice of the Supreme Court 2 August 1979.

3. Appointed by Gov. James B. Hunt, Jr. and took office 20 August 1979.

4. Deceased 20 July 1979.

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### EMERGENCY JUDGE

ALBERT W. COWPER	Wilson
------------------	--------

- 
1. Appointed 3 August 1979 to succeed Robert R. Browning whose term expired 2 August 1979.
  2. Appointed 3 August 1979 to succeed William Thomas Graham whose term expired 2 August 1979.
  3. Appointed 3 August 1979 to succeed David I. Smith whose term expired 2 August 1979.
  4. Appointed 3 August 1979 to succeed Ronald Barbee whose term expired 2 August 1979.
  5. Appointed 20 August 1979 to succeed Ralph A. Walker whose term expired 19 August 1979.

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1. Appointed 31 August 1979.
  2. Appointed 29 August 1979.
  3. Retired 31 July 1979.
  4. Appointed Chief Judge 1 August 1979.
  5. Appointed 15 August 1979.
  6. Appointed Special Judge Superior Court 3 August 1979.
  7. Appointed Chief Judge 3 August 1979.
  8. Appointed 17 August 1979.

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State v. Thompson	40 N.C. App. 281	Denied, 297 N.C. 617
State v. Tyndall	41 N.C. App. 406	Denied, 297 N.C. 617
State v. Ward	41 N.C. App. 768	Denied, 297 N.C. 699
State v. Williams	41 N.C. App. 287	Denied, 297 N.C. 699
State v. Woodall	41 N.C. App. 192	Denied, 297 N.C. 617
Wilson v. Wilson	41 N.C. App. 404	Denied, 298 N.C. ---
Wolfe v. Hewes	41 N.C. App. 88	Denied, 298 N.C. ---

DISPOSITION OF APPEALS OF RIGHT TO  
THE SUPREME COURT UNDER G.S. 7A-30

<i>Case</i>	<i>Reported</i>	<i>Disposition on Appeal</i>
Harris v. Latta	40 N.C. App. 421	Pending
In re Vinson	40 N.C. App. 423	Pending
Kinlaw v. Long Mfg.	40 N.C. App. 641	Pending
Leatherman v. Leatherman	38 N.C. App. 696	297 N.C. 618
Smith v. State	36 N.C. App. 307	298 N.C. ---
Starr v. Clapp	40 N.C. App. 142	Pending
State v. Clay	39 N.C. App. 150	297 N.C. 555
State v. Haywood	39 N.C. App. 639	297 N.C. 686
State v. Winfrey	40 N.C. App. 274	Pending
Utilities Comm. v. Telephone Co.	35 N.C. App. 588	298 N.C. ---
Wood v. Stevens & Co.	36 N.C. App. 456	297 N.C. 636



CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
**NORTH CAROLINA**  
AT  
**RALEIGH**

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JAMES W. ENGLISH AND WIFE, SUSAN P. ENGLISH PLAINTIFFS CHARLES  
G. GEGICK AND WIFE, SHARON F. GEGICK, INTERVENOR-PLAINTIFFS v.  
HOLDEN BEACH REALTY CORPORATION

No. 7813SC595

(Filed 1 May 1979)

**1. Rules of Civil Procedure § 23— class action— fourteen subdivision lot owners— failure to give proper notice**

In an action by lot owners in a subdivision to have defendant enjoined from constructing a road across their property, the trial court erred in allowing plaintiffs' motion that the action be maintained as a class action, though the court did not abuse its discretion in determining that the class of fourteen lot owners was "numerous" and that it would be difficult, inconvenient, and detrimental to an expeditious resolution of the controversy to join all the owners in this action, since the trial judge failed to provide the members of the class with adequate notice.

**2. Estoppel § 1; Trespass § 7— continuing trespass—building of road—summary judgment improper**

In an action by lot owners in a subdivision to have defendant enjoined from constructing a road across their property, the trial court erred in granting partial summary judgment for plaintiffs where a genuine issue of material fact was raised by competent, sworn testimony by a surveyor that the roadway in question did not encroach on any lots other than those owned by defendant; furthermore, defendant's allegation that a mistaken course was shown on the map from which plaintiffs' deed was drawn which precluded the true intent of the parties from being realized raised a genuine issue of fact with respect to estoppel by deed.

**3. Injunctions § 3— mandatory injunction— ancillary remedy to action for continuing trespass**

Plaintiffs could properly request a mandatory injunction as an ancillary remedy to their action for continuing trespass.

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APPEAL by defendant from *Herring, Judge*. Orders entered 31 March 1978 *nunc pro tunc* as of 27 February 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 27 March 1979.

On 12 September 1977 plaintiffs filed a complaint "on behalf of themselves and all others similarly situated," as lot owners in a subdivision known as Holden Beach West in Brunswick County, alleging that defendant-developer had trespassed upon their lands by laying out and grading a roadway. Plaintiffs alleged that they had given defendant notice of the wrongful entry and that defendant continued to build the road. Plaintiffs prayed for compensatory and punitive damages and for a permanent and mandatory injunction to stop the building of the road, to remove the road, and to repair any damages.

Defendant filed answer admitting that plaintiffs owned lot number 7 of the subdivision but alleged that the class of lot owners was not so numerous as to require a class action. Defendant further alleged as a defense that there was an error in the recorded 1963 map of the subdivision; plaintiffs' deed described the property as lot number 7 of the subdivision as shown on the erroneous map. With respect to the map, defendant alleged that: The surveyors in 1977 properly located *on the ground* the right of way of the street as it was intended and drawn on the 1963 map; that the road has been constructed on the ground within the right of way reserved to the defendant on the recorded map; that the 1963 map was drawn without actual survey upon the ground, without the lots or road right of way being staked and without certification by the surveyor that the map was in all respects correct; that the "azimuths or courses shown upon said map were at the time of recording, and now totally incorrect and inaccurate"; that the 1963 map showed the right of way of the street in correct spatial relationship to natural boundaries in that the right of way was to run parallel to the Atlantic Ocean and its frontal dunes, but because of the error in the stated azimuth or course, said road cannot be laid out upon the ground pursuant to that azimuth or course; that defendant did, however, correctly build the road in accordance with the true and correct relation to, and distance from, the natural monument as shown on the 1963 map; that defendant did not discover the error in the 1963 map until 1977 when beginning work on the road. Defendant further alleged

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that it was the intention of the purchasers of the first 16 lots in the subdivision and the defendant for each purchaser to receive a residential lot fronting on a 60' wide street right of way, extending in an east-west course, parallel to the Atlantic Ocean, and northward from the Atlantic Ocean so that each lot was 175' in depth to a possible high-water line at the ocean front dunes; each conveyance of the first 16 lots was described by reference to the recorded 1963 map; that by reason of the incorrect azimuths and courses (resulting from failure of the surveyor to stake on the ground), the conveyances resulting were not those *mutually intended by the parties*; that plaintiffs were advised of the error when it was discovered in 1977 and requested to join in filing a corrected map, which they refused to do; that in order for the actual intent of the parties to be realized it is necessary to amend the 1963 map in accordance with a 1977 survey. Defendant prayed for the complaint to be dismissed and, alternatively, that the error in the 1963 map be amended to reflect the correct azimuth and course as shown by the 1977 survey. Also (and again, alternatively) defendant prayed that the true and correct boundary between lands of plaintiff and defendant be established.

On 6 February 1978 plaintiffs moved for the court to determine the action to be a proper class action.

On 17 February 1978 plaintiffs filed a motion for summary judgment.

On 27 February 1978 intervenor-plaintiffs, also lot-owners in the subdivision, filed a motion to intervene.

On 27 February 1978 the trial court entered orders (1) allowing the action to be pursued as a class action, (2) allowing the intervention of intervenor-plaintiffs, and (3) granting partial summary judgment to both plaintiffs and intervenor-plaintiffs on the issue of liability as to trespass, retaining the amount of damages for jury determination. In the latter order, the court also ordered a mandatory injunction requiring defendant to remove the road to the location shown on the 1963 map within 120 days.

Plaintiffs submitted three affidavits in support of their motion for summary judgment.

Gerrit C. Greer deposed that he is a registered land surveyor with 19 years experience; that he prepared the 1963 map of the

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subdivision; that he located the street in question by transposing and extending the same road from its location in another area of Holden Beach, "to the best of my memory"; that the center line of the road in this subdivision should be the same course and distance as the center line of the road in the other area, "to the best of my memory"; that he did not stake the individual lot corners at the request of defendant and so stated on the map; that he surveyed the subdivision according to defendant's instructions.

Jan K. Dale deposed that he is a registered land surveyor with 8 years experience; that he has examined the 1963 map; that he prepared a survey of plaintiffs' lot in 1977; that he resurveyed the lot for plaintiffs subsequent to 28 April 1977 and found that a marl roadbed designated as Ocean View Boulevard *had been constructed across the northern portion of plaintiffs' property*; that his surveys were done according to the 1963 map.

James W. English, the male plaintiff, deposed that defendant had conveyed lots in the subdivision by reference to the 1963 map; that subsequent to having his property surveyed he noted the construction of the roadway on his property; that defendant refused to comply with his request to remove the roadbed; that defendant continues to trespass on his property.

Defendant submitted four affidavits in opposition to the motion for summary judgment:

Jim D. Griffin, Jr. deposed that he is a licensed building contractor and in July of 1974 hired Dale to survey a lot in Holden Beach; that Dale made a mistake of approximately 20' in the lot boundary line.

Jim D. Griffin, Jr. also deposed in a separate affidavit that the road in this subdivision is not a continuation or extension of the courses of a street in another area of Holden Beach; that this street was laid out and dedicated along a new course running parallel to the sand dunes at the Atlantic Ocean.

Ferd F. Hobbs deposed that he is a registered land surveyor and has been engaged in that practice since 1958; that he surveyed the subdivision "on the ground" in January, 1978; that he has studied the 1963 map and other maps of the area and is satisfied that his 1978 map "is in accordance with" the 1963 map; that the *roadway in question does not encroach on any lots in*



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*Holden Beach West which are not owned by defendant; that Dale resurveyed plaintiffs' lot number 7 after the roadway was graded and the stakes placed the second time bore no relationship to the original stakes, being off by as much as nine feet at one point.*

Defendant appeals from the orders approving the action as a class action and allowing the motion for partial summary judgment which also ordered the mandatory injunction. Its motion for stay of execution on the mandatory injunction was allowed and defendant posted bond in the amount of \$10,000 pending final determination.

*Lovelace, Gill & Snow, by James E. Gill, Jr., for plaintiff appellees.*

*Tuggle, Duggins, Meschan, Thornton & Elrod, by Thomas S. Thornton, for intervenor-plaintiff appellees.*

*Manning, Fulton & Skinner, by Catherine C. McLamb and John B. McMillan, for defendant appellant.*

CARLTON, Judge.

The record discloses that appellant has grouped twenty exceptions under thirteen assignments of error. In its brief, defendant brings forward nine "questions involved." The remaining assignments of error are deemed abandoned. Rule 28, N.C. Rules of Appellate Procedure.

From the arguments in the briefs presented by the parties, we group the questions involved into three issues for discussion:

1. Did the trial court err in allowing the action to be maintained as a class action?
2. Did the trial court err in granting partial summary judgment for the plaintiffs?
3. Did the trial court abuse its discretion in granting a mandatory injunction against the defendant?

We discuss the questions *temporum ordo*:

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1. CLASS ACTION

We first discuss whether the trial court properly concluded that the action be maintained as a class action pursuant to G.S. 1A-1, Rule 23(a) which provides as follows:

(a) *Representation* — If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

Our G.S. 1A-1, Rule 23(a) is closely patterned after Rule 23 of the Federal Rules of Civil Procedure as it existed prior to 1966 (the year of the Federal Rule revision) and our former G.S. 1-70. We rely on decisions interpreting those statutes in interpreting G.S. 1A-1, Rule 23(a). We find the following salient principles applicable to G.S. 1A-1, Rule 23(a):

1. "Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a 'class.' Whether a class exists is a question of fact that will be determined on the basis of the circumstances of each case." 7 Wright and Miller, Federal Practice and Procedure: Civil § 1760, p. 579. A "class" for purposes of representation is a group of persons whose interests are so closely similar that an adequate representation of the legal position of one of them will accomplish the same purpose as would be achieved were all of them present and participating in the proceeding. 35A C.J.S., Federal Civil Procedure § 63, p. 116. "Apparently any group of persons having a community of interest in a particular matter constitutes a class and one or more of the group may sue or be sued on behalf of all." Shuford, N.C. Civil Practice and Procedure, Class Actions, § 23-3, p. 199 and cases cited therein.

2. The fact that some members of the class are located outside the court's jurisdiction does not prevent the institution of a class action so long as there are class members within the jurisdiction who adequately represent those outside. *Vann v. Hargett*, 22 N.C. 31 (1838).

3. The class must be so "numerous as to make it impracticable to bring them all before the court." The legal test of "impracticability" of joining all members of a class, thus warranting a

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representative or class suit by or against some of the members, is not "impossibility" of joinder, but only difficulty or inconvenience of joining all members of the class. There is no hard and fast formula for determining what is a "numerous" class. The number is not dependent upon any arbitrary limit but rather upon the circumstances of each case. See 7 Wright and Miller, Federal Practice and Procedure: Civil § 1762, p. 592 *et seq.*; 35A C.J.S., Federal Civil Procedure, §§ 70, 71, pp. 120, 121; Shuford, *supra*, § 23-3, p. 200; *In re Engelhard*, 231 U.S. 646, 34 S.Ct. 258, 58 L.Ed. 416 (1914).

4. More than one issue of law or fact common to the class should be present in order to maintain a class action. In general, courts focusing on Rule 23 have given it a permissive application so that common questions have been found to exist in a wide range of contexts. 7 Wright and Miller, Federal Practice and Procedure: Civil § 1763, pp. 603-605. See also *Gordon v. Forsyth County Hosp. Authority, Inc.*, 409 F. Supp. 708 (D.C.N.C. 1976).

5. The party or parties representing the class must be such "as will fairly insure the adequate representation of all." This requirement of the statute is also one of due process. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Those purporting to represent the class must show that they have a personal, and not just a technical or official, interest in the action. *Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745 (1932). Plaintiff has the burden of showing that the alleged representatives are members of the class and that the interests of absent class members will be adequately protected. 7 Wright and Miller, Federal Practice and Procedure: Civil § 1765, p. 626. It must not appear that there is a conflict of interest between members of the class who are not parties and those members who are representing the class as parties. *Thompson v. Humphrey*, 179 N.C. 44, 101 S.E. 738 (1919). This requirement is not necessarily one of numbers, but is dependent on the adequacy and vigor with which those parties will protect the interests of the class. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968); See *Carswell v. Creswell*, 217 N.C. 40, 7 S.E. 2d 58 (1940).

6. "The party who is invoking Rule 23 has the burden of showing that all of the prerequisites to utilizing the class action procedure have been satisfied." 7 Wright and Miller, Federal

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Practice and Procedure: Civil § 1759, p. 578. The pleadings should disclose the number and make-up of the class, the impracticability of bringing them all before the court and the personal interest in the action of the parties representing the class. *See Rossin v. Southern Gas Co.*, 472 F. 2d 707 (10th Cir. 1973); *Hughes v. Teaster, supra*.

7. While Rule 23(a) does not require it, we believe that fundamental fairness and due process dictate that adequate notice, determined in the discretion of the trial court, be given to members of the class. Federal Rule 23(c)(2) now requires notice to members of the class in most instances. The court is required to direct to members of the class "the best notice practicable under the circumstances." This includes individual notice to all members who can be identified through reasonable effort. The notice must be adequate to satisfy constitutional due process requirements. *See* 35A C.J.S., Federal Civil Procedure, § 72, (3d Ed. Supp. 1978) and cases cited therein. As stated in 7A Wright and Miller, Federal Practice and Procedure: Civil § 1788, p. 163: "Thus, notice must be sent long before the merits of the case are adjudicated and, indeed, probably should be sent as soon as possible after the action is commenced; as a practical matter, this means as soon as the court determines that the class action is proper . . . ."

Moreover, the necessity for this kind of notice has been acknowledged in North Carolina. *See* 9 Strong, N.C. Index 3d, Notice, § 1, p. 516. Notwithstanding the silence of a statute, notice of motion is required where a party has a right to resist the relief sought by the motion and principles of natural justice demand that his rights be not affected without an opportunity to be heard. *Hagins v. Redevelopment Comm. of Greensboro*, 275 N.C. 90, 165 S.E. 2d 490 (1969). While our Supreme Court has not been called on to hold that notice to class members is essential to maintenance of a class action, it has pointedly indicated the importance of such a procedural requirement. In *Cocke v. Duke University*, 260 N.C. 1, 131 S.E. 2d 909 (1963) the Court stated:

It is appropriate also, we think, in considering the demurrer to take note of the cautionary steps taken by the court to see that all possible beneficiaries had notice of the pendency of the action. Letters were mailed to all known potential bene-

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ficiaries of each class and notice of the institution and purpose of the action was given by publication.

8. Our Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions. *See* 35A C.J.S., Federal Civil Procedure, § 64, p. 117. It provides a ready means for dispatch of business. *Cocke v. Duke University, supra*. The rule has as its objectives "the efficient resolution of the claims or liabilities of many individuals in a single action" and "the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief." 7 Wright and Miller, Federal Practice and Procedure: Civil § 1754, p. 543.

9. In deciding whether an action may be maintained as a class action, the trial court is accorded a degree of discretion. *In re Engelhard, supra*; 35A C.J.S., Federal Civil Procedure, § 65, p. 118. "A court has broad discretion in deciding whether to allow the maintenance of a class action and therefore also may take account of considerations not expressly dealt with in the rule in reaching a decision . . ." 7A Wright and Miller, Federal Practice and Procedure: Civil § 1785, p. 134.

Applying these principles to the case *sub judice*, we find it necessary to discuss only the third and seventh principles enumerated above.

[1] The third requirement is that the class must be so "numerous as to make it impracticable to bring them all before the court." In applying the rules with respect to this requirement, as stated above, to the facts disclosed by the record before us, we cannot find that the trial court abused its discretion in determining that this class was "numerous." While it would clearly not be impossible, and perhaps not impracticable, to join the 14 lot owners in this action, the trial court apparently concluded that it would be difficult, inconvenient, and detrimental to an expeditious resolution of the controversy. The location of the road could, and probably would, affect the property lines of all lot owners in the subdivision. A determination of front, back and sidelines for each lot would involve countless lawsuits. Pretrial proceedings could easily drag on for years. It would appear that a determination of the proper location of the roadway, which would obviously affect all lot owners, could most expeditiously be done in one action.

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The benefits of such an approach would inure to the defendant as well, since it would not be called on to defend a multiplicity of suits.

We do not find, however, that the trial judge provided adequate notice to members of the class as required by the seventh principle above. On the same day that the trial court granted partial summary judgment and ordered by mandatory injunction that defendant remove the road within 120 days, it also allowed the motion that the action be maintained as a class action and *then* ordered that notice be given to the class members. The most substantial, and in all likelihood, the most important part of the merits of the controversy, *i.e.*, the location of the roadway, had thus been adjudicated before the class members were given notice. Class members were clearly precluded from asserting their rights with respect to the location of the road. The trial court should have ordered that notice be given class members as soon as the court determined that the class action was proper and certainly before a conclusive determination on the merits.

This assignment of error is sustained and the trial court's order that the action be maintained as a class action is reversed.

## 2. PARTIAL SUMMARY JUDGMENT

We next turn to the question of whether the trial court properly allowed partial summary judgment for the plaintiffs. Ordinarily, the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). Here, however, the mandatory injunction ordering defendant to remove the roadway, as part of the order for partial summary judgment, clearly affected a "substantial right" of the defendant. G.S. 1-277; G.S. 7A-27.

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.

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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).

[2] We are unable to agree with the trial court that there is no genuine issue as to any material fact arising from the pleadings and the affidavits submitted by the parties.

The plaintiffs alleged, and defendant denied, that defendant was trespassing on plaintiffs' property. The affidavit of Ferd F. Hobbs, a registered land surveyor, presented by defendant raises a clear issue of material fact. It is in direct conflict with the affidavit of Jan Dale, submitted by plaintiffs. Hobbs deposed that the roadway in question did not encroach on any lots other than those owned by defendant. His conclusion was based upon a survey done by him and an examination of the 1963 map and other maps of the area. In this action based on alleged trespass, we can think of no more pointed way to raise a genuine issue as to a material fact than to have competent, sworn testimony that there has been no trespass.

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Plaintiffs argue that the doctrine of estoppel by deed prevents the defendant from denying or asserting any boundaries other than those shown on the 1963 map from which the description in the deed was drawn. Hence, summary judgment was proper because there was no issue of material fact with respect to boundaries. We do not agree.

It is generally held that a recital inserted in a deed through mistake will not be permitted to operate as an estoppel so as to exclude the truth. 31 C.J.S., Estoppel, § 43, p. 348. Here, defendant alleged a mistaken course was shown on the 1963 map from which plaintiffs' deed was drawn, precluding the true intent of the parties from being realized.

Moreover, it is an established rule of law that estoppel, or the existence thereof, is generally a question of fact for determination by the jury. 31 C.J.S., Estoppel, § 163, p. 784. The rule has been approved in North Carolina. *Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979); *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955).

Defendant's brief presents numerous other reasons to support its argument that the granting of partial summary judgment was improper. Since we hold that the granting of the motion was erroneous for the reasons stated above, it is unnecessary for us to discuss these remaining arguments. The order of the trial court granting partial summary judgment for plaintiffs is reversed. This holding also disposes of defendant's second assignment of error; that portion of the order granting partial summary judgment to the *intervenor*-plaintiffs is also reversed.

### 3. MANDATORY INJUNCTION

[3] We next turn to the defendant's contention that the trial court improperly ordered a mandatory injunction requiring defendant to remove the roadway and replace it according to the 1963 map. We do not agree with defendant that a mandatory injunction is improper in actions such as this, but for reasons stated *infra*, we must vacate this portion of the trial court's order and remand for further proceedings.

We note the following well-established principles with respect to an action of this nature:



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1. Equitable relief in the form of a mandatory injunction will lie in cases of continuing trespass in order to avoid a multiplicity of actions at law for damages. *Conrad v. Jones*, 31 N.C. App. 75, 228 S.E. 2d 618 (1976); *Collins v. Freeland*, 12 N.C. App. 560, 183 S.E. 2d 831 (1971); *Young v. Pittman*, 224 N.C. 175, 29 S.E. 2d 551 (1944); 7 Strong, N.C. Index 3d, Injunctions, § 7.1, p. 240.

2. Injunction is a proper remedy for relief against continuing trespass either where perpetual injunction is sought in an independent action or where (as here) the injunction is ancillary to an action in which the title to land or the right to its possession is at issue. *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E. 2d 143 (1939).

3. "Injunctive relief is not a matter of right, but its grant or refusal usually rests in the sound discretion of the court, exercised in harmony with well established principles." 43 C.J.S., Injunctions, § 14, p. 768. Where the granting of relief in an action is dependent on the sound discretion of the court, summary judgment should be cautiously entered. *Booth v. Barber Transp. Co.*, 256 F. 2d 927 (8th Cir. 1958). "Accordingly, while it may be proper to grant a summary judgment in an action for injunction, the court should proceed cautiously before applying summary judgment procedure where injunctive relief is sought." 35B C.J.S., Federal Civil Procedure, § 1139, p. 534.

4. In all actions tried without a jury it is the duty of the trial judge to find the facts specially, state separately its conclusions of law, and enter the appropriate judgment. G.S. 1A-1, Rule 52(a)(1). It is also the duty of the trial judge to make findings of fact determinative of the issues raised by the pleadings and the evidence. *McCormick v. Proctor*, 217 N.C. 23, 6 S.E. 2d 870 (1940); *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802 (1936).

Applying the foregoing principles to the facts before us, we find that plaintiffs properly requested the court for a mandatory injunction as an ancillary remedy to its action for continuing trespass. We also find nothing improper in plaintiffs' motion for summary judgment in an action of this nature. The trial court may properly consider such a motion in an injunction action provided it diligently applies caution as noted in the third principle above. Here, however, the mandatory injunction was ordered as a part of the order granting partial summary judgment on the issue of trespass. Since we have earlier held that the motion for partial

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summary judgment was improvidently allowed, the order for a mandatory injunction is left unsupported by any findings of fact or conclusions of law.

We are mindful that, ordinarily, findings of fact are not necessary to resolve the question of whether there exists a genuine issue as to a material fact and that the trial court is not required to make findings in allowing a motion for summary judgment. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 56.5, p. 360. Here, however, in light of our reversal of the order for partial summary judgment, findings of fact and conclusions of law would be necessary for a mandatory injunction to stand, in accordance with the fourth principle above. Clearly, plaintiffs will not be entitled to the injunction until questions of boundary, title and possession have been resolved. There are no findings or conclusions to resolve these questions as a consequence of our reversal of the order for partial summary judgment.

For the reasons stated, that portion of the court's order directing a mandatory injunction is vacated and remanded to the trial court for further proceedings consistent with this portion of our opinion.

It is unnecessary for us to decide whether plaintiffs would have been entitled to summary judgment had the mandatory injunction been pursued as a remedy independent of the action for continuing trespass. We have noted cautions in this respect above and observe that summary judgment is a drastic remedy, and there must be a cautious observance of its requirements in order that no person might be deprived of a trial on a genuinely disputed factual issue. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 56, p. 350.

#### RESULT

Reviewing our decision contextually, we find the following result: The order of the trial court allowing the action to be maintained as a class action is reversed. Since the basis for our holding is lack of notice to members of the class, we see no reason why plaintiffs cannot renew this motion on remand if they so desire. Should the trial court rule in their favor, notice should be given as noted above. Otherwise, the plaintiffs may proceed as hereinafter noted. No appeal was taken from the trial court's order to allow the intervenor-plaintiffs to join the action. They

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are therefore joined with the plaintiffs for any subsequent proceedings.

We also note that we are unable to determine from the record whether the class members were actually given notice of the court's rulings as ordered. If so, they should be given notice of this Court's decision and the proper status of the action on remand. The burden for such notice is on the plaintiffs.

That portion of the trial court's order granting partial summary judgment for plaintiffs and intervenor-plaintiffs is reversed.

That portion of the trial court's order providing for a mandatory injunction requiring defendant to remove and relocate the road is vacated and remanded for proceedings consistent with section three of this opinion.

Reversed in part.

Vacated and remanded in part.

Judges PARKER and HEDRICK concur.

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RICHARD R. TIGHE, INDIVIDUALLY AND AS SOLE EXECUTOR OF THE LAST WILL AND TESTAMENT OF VIRGINIA FLEMMING YANCEY MICHAL, DECEASED PLAINTIFF v. WILLIAM N. MICHAL, ADMINISTRATOR C.T.A. OF THE ESTATE OF JAMES W. MICHAL, DECEASED; CAROLINE Y. TIGHE, AMELIA YANCEY BOND, RUTH G. RAY AND FLORENCE Y. CONNALLY, DEFENDANTS v. WILLIAM N. MICHAL AND MARTHA MICHAL WOOD, ADDITIONAL DEFENDANTS

No. 7829SC461

(Filed 1 May 1979)

**1. Wills § 67— ademption defined**

An ademption is the extinguishment of a testamentary gift, and it generally occurs whenever the subject matter of a specific devise or bequest is not found in the estate of the testator at the time of his death.

**2. Wills § 67— ademption—rule of law—intent of testator**

The principle of ademption is a rule of law which operates without regard to the testator's intent. However, the principle of ademption does not apply when the testator intends that the beneficiary of a specific gift shall have

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other property in the event the property which is the subject matter of the specific testamentary gift no longer remains in his estate *in specie* at the time of his death and specifically says so according to established rules of law; in such cases, the beneficiary is enabled to claim the substitute or contingent gift as a separate specific testamentary gift by the testator.

**3. Wills § 67—ademption— incompetency of testatrix—sale of subject matter of gifts by trustees**

The principle of ademption did not apply when the testatrix became incompetent and remained incompetent until her death and the subject matter of specific testamentary gifts was sold by her trustees during her incompetency. In such case, the beneficiaries of the specific gifts are not limited to the proceeds of the sales of the subject matter which are traceable into her estate but are entitled to the entire proceeds of the sales of such gifts unless it is necessary to abate all of testatrix's testamentary gifts.

**4. Wills § 58.1—gift of stock— incompetent testatrix—purchase of additional stock by trustees—amount of stock to be received by beneficiary**

Where testatrix bequeathed all of her stock in a certain oil company to her sister, shares of stock in the oil company purchased by testatrix's trustees after she became mentally incompetent did not pass to her sister under terms of the will, since the testatrix did not intend for her trustees to be able to increase one of her testamentary gifts at the expense of another by using funds in the estate to purchase property of the same description as other property which formed the subject matter of a specific testamentary gift.

**5. Wills § 52—residuary clause—life estate—lapsed gifts**

Where testatrix's will left the residue of her estate to her husband for his lifetime or until he remarried and left specific items of property to named beneficiaries upon the husband's death or remarriage, gifts which lapsed by reason of the deaths of the beneficiaries prior to the death of the testatrix passed to testatrix's husband under the residuary clause and by intestate succession after his death or remarriage.

**6. Wills § 61.6—husband's dissent from will—absence of right to dissent when will written or when testatrix became incompetent**

The fact that the husband of the testatrix had no right to dissent at the time testatrix's will was written or at the time she became mentally incompetent did not bar his right to dissent given him by G.S. 30-1.

**7. Wills § 61.6—husband's dissent from will—effect of husband's subsequent death**

The valid exercise of a right to dissent by testatrix's husband did not terminate upon his death but passed to his estate.

APPEAL by defendants from *Ervin, Judge*. Judgment entered 31 December 1977 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 28 February 1979.

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Virginia Flemming Yancey Michal executed her Last Will and Testament on 22 April 1958. Approximately one year later, Mrs. Michal was adjudged to be mentally incompetent as a result of a cerebral hemorrhage and never again regained competency. During her period of incompetency, various persons and corporations were appointed to act as her trustees. Those trustees managed her business affairs until her death on 13 July 1974. Shortly thereafter, Mrs. Michal's will was admitted to probate. Her husband, James W. Michal, filed a dissent from the will on 23 October 1974. However, before Mrs. Michal's estate could be settled, Mr. Michal died.

The executor of Mrs. Michal's estate filed a complaint on 28 December 1976 by which he sought a declaratory judgment construing the provisions of the will of the testatrix. The will contained several specific testamentary gifts of real and personal property. Some of the subject matter of those specific gifts had been sold by the trustees during the period of Mrs. Michal's incompetency. Additionally, various corporate stocks which formed the subject matter of certain specific testamentary gifts had undergone changes as a result of mergers, reorganizations and other such corporate activity during the incompetency of the testatrix. These facts gave rise to the issue of whether there had been an ademption of any of the specific bequests and devises.

By her will, the testatrix left all of her shares of stock in the Standard Oil Company of New Jersey to her sister, Caroline Yancey Tighe. After she executed her will and before her death, however, those shares of stock were converted into shares of stock of the Exxon Corporation as a result of corporate mergers and reorganization. On 13 September 1973, the testatrix's trustees purchased 40 additional shares of stock in the Exxon Corporation. This created an issue concerning whether those 40 shares passed to Caroline Yancey Tighe by the terms of the testatrix's will.

An issue was also presented concerning whether the dissent of the testatrix's husband from her will was valid and, if so, whether by virtue of his death he or his estate lost all rights to take a portion of the testatrix's estate pursuant to that dissent.

The trial court concluded: (1) That there had not been an ademption of any of the testamentary gifts, (2) that the 40 shares

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of stock in the Exxon Corporation that had been purchased by the testatrix's trustees did not pass to Caroline Yancey Tighe by virtue of the provision of the will leaving her all of the testatrix's shares in the Standard Oil Company of New Jersey, (3) that the testatrix's husband was not barred from dissenting from the will, and (4) that the valid exercise of the right of dissent by the testatrix's husband did not terminate upon his death. Based upon its conclusions, the trial court entered an order directing the clerk of court to conduct further proceedings according to law with regard to the right of dissent of the testatrix's husband. From the entry of that judgment, the defendants appealed.

*Story, Hunter & Goldsmith, P. A., by Paul J. Story, for plaintiff appellee.*

*Everette C. Carnes for defendant appellee Caroline Yancey Tighe.*

*Van Winkle, Buck, Wall, Starnes, Hyde & Davis, P. A., by Roy W. Davis, Jr., for defendants appellants-appellees William N. Michal and Martha Michal Wood.*

*Dameron & Burgin, by Charles E. Burgin, for defendant appellant Amelia Yancey Bond.*

MITCHELL, Judge.

[1] This appeal presents several issues involving the principle of ademption. An ademption is, quite simply, the extinguishment of a testamentary gift. Although a determination of when an ademption has taken place is often difficult, an ademption generally occurs whenever the subject matter of a specific devise or bequest is not found in the estate of a testator at the time of his death. *E.g., Starbuck v. Starbuck*, 93 N.C. 183 (1885).

In determining whether an ademption has occurred, it must first be determined whether the principle of ademption is a rule of law or a rule of construction. If it is a rule of law, then it should be applied without regard for the testatrix's intent; if it is a rule of construction, then the testatrix's intent should be a guide to the application of the principle. *See generally, Note, Ademption and the Testator's Intent*, 74 Harv. L. Rev. 741 (1961).

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The English common law term "ademption" was taken from the Roman civil law. Page, *Ademption by Extinction: Its Practical Effects*, 1943 Wisc. L. Rev. 9 (1943). According to the civil law, the intention of the testator determined whether a legacy was extinguished by the sale of the subject matter of the legacy by the testator prior to his death. *Id.* at 14. However, in 1786, Lord Thurlow indicated that the civil law concerning ademption was never adopted by the English courts. *Ashburner v. Macquire*, 29 Eng. Rep. 62, 63 (1786). Three years later Lord Thurlow concisely stated his view of the principle of ademption as it existed in the English common law:

When the case of *Ashburner v. M'Gwire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death . . . . And I do not think that the question in these cases turns on the intention of the testator.

*Stanley v. Potter*, 30 Eng. Rep. 83, 84 (1789).

In *Snowden v. Banks*, 31 N.C. 373 (1849), the Supreme Court of North Carolina apparently applied the principles set forth in Lord Thurlow's statement of the law concerning ademption. In that case, Chief Justice Ruffin indicated that, if the subject matter of a specific testamentary gift was not found in the testator's estate, the gift would fail. He also indicated that the intent of the testator would not prevent the ademption of a specific testamentary gift, unless that intent was so clearly stated as to itself form an express substitute or contingent testamentary gift which would prevent issues of ademption from arising.

In *Starbuck v. Starbuck*, 93 N.C. 183 (1885), the Court reaffirmed its position with regard to the rule of ademption. The Court indicated that an ademption occurred "when in the lifetime of the testator the particular thing bequeathed is lost, destroyed, or disposed of, or it is changed in substance or form, so that it does not remain at the time the will goes into effect in specie, to pass to the legatees." *Id.* at 185. Although one of the parties in that case contended that the testator did not intend that there be an ademption of the gift, the Court said that, "it is not sufficient

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that a testator intended to make a particular bequest; he must have done so according to established rules of law, else his purpose must fail." *Id.* at 187.

In *Rue v. Connell*, 148 N.C. 302, 62 S.E. 306 (1908), the Court apparently adopted another view of the rule of ademption, although it did not expressly overrule any of the prior cases. There, the Court described an ademption as "the act by which a specific legacy has become inoperative on account of the testator having parted with the subject of [the legacy]." *Id.* at 304, 62 S.E. at 307. The Court additionally made the following remarks concerning ademption:

There must be an alteration in the character of the subject-matter of a specific legacy made or authorized by the testator himself after making his will, or it will not operate as an ademption. If the change on the form of the property is brought about by the act of another, it will not effect an ademption of the legacy if the property in its new form is in the possession of the testator at his death. . . .

Where the intention of the testator with regard to the effect of his subsequent act is reasonably clear, such intention will largely govern.

*Id.* at 305, 62 S.E. at 307.

Apparently following its position in *Rue*, the Court indicated in *King v. Sellers*, 194 N.C. 533, 140 S.E. 91 (1927), that the intention of the testator should be considered in deciding whether an ademption had occurred. In that case, the Court defined ademption as "the destruction, revocation or cancellation of a legacy in accordance with the intention of the testator and results either from express revocation or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy." *Id.* at 535, 140 S.E. at 92. That definition was again recited by the Court in *Tyer v. Meadows*, 215 N.C. 733, 3 S.E. 2d 264 (1939).

In the later case of *Green v. Green*, 231 N.C. 707, 58 S.E. 2d 722 (1950), the Court appeared to have returned to the common law view of ademption. There, the Court stated:



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The principle of ademption is firmly imbedded in the law of wills, and is recognized in this jurisdiction as applicable to specific legacies as a rule of law rather than of particular intent on the part of the testator. *Grogan v. Ashe*, 156 N.C. 286 (291), 72 S.E. 372; Page on Wills, sec. 1527. It applies to defeat a bequest where the subject of a specific legacy has been withdrawn, disposed of, or has ceased to exist during the lifetime of the testator. . . . Said *Chief Justice Pearson* in *Chambers v. Kerns*, 59 N.C. 280, "These are well settled principles of law, and if by their application the intention of the testator is disappointed, the Court can say it is not the fault of the law, but the neglect of the testator in not adding a codicil to set out his intention, made necessary by the alteration in the condition of his estate caused by his act."

*Id.* at 709, 58 S.E. 2d at 723-24.

More recently, the Court recognized the seeming inconsistency in the two lines of authority relating to ademptions and pointed out that:

The history of this Court's decisions reflects the difficulties of application of this principle and reveals conflict upon the matter of whether ademption by extinguishment or alienation depends upon the intention of the testator or simply operates as a matter of law, depending entirely on whether the specific property given by the testator remains *in specie* in the estate at the time of the testator's death.

*Grant v. Banks*, 270 N.C. 473, 477, 155 S.E. 2d 87, 90 (1967). The Court then sought to bring the two lines of authority into harmony and to make each line of authority consistent with the other when it stated that:

The cases where the Court has looked to the intent of the testator were not overruled, but were distinguished by *Green v. Green, supra*, on the ground that "those cases and others of similar import illustrate the modification of the rule when the language of the devise is sufficiently comprehensive to prevent the application of the principle of ademption."

*Id.* at 481, 155 S.E. 2d at 92-93.

[2] Therefore, we think the teaching of *Grant* is that the principle of ademption is a rule of law which operates without regard to

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the testator's intent. We further think that case teaches that, when the testator's intent is so clearly set forth in the will as to become a part of it and to specifically state that the beneficiary of a specific testamentary gift shall have other property in the event the property which is the subject matter of the specific testamentary gift no longer remains in his estate *in specie* at the time of his death, the principle of ademption does not apply. In other words, to prevent the application of the principle of ademption, the testator must *both* intend that the beneficiary of the specific gift have other property *and specifically say so* according to established rules of law. *See Starbuck v. Starbuck*, 93 N.C. 183, 187 (1885). In such cases, the beneficiary is enabled to claim the substitute or contingent gift provided for him as a separate specific testamentary gift by the testator which does not give rise to issues concerning the principle of ademption.

In the present case, the testatrix entirely failed to provide in her will for the possibility that the subject matter of her specific gifts might no longer remain *in specie* in her estate at the time of her death. Therefore, if the subject matter of any specific testamentary gift was not found *in specie* in her estate at the time of her death, that gift would ordinarily be defeated as a matter of law by the principle of ademption.

So long as a testator remains mentally competent until his death, an application of the principle of ademption can be rationalized on the theory that the testator would have changed his will upon the sale, loss, or destruction of any of the subject matter of his specific testamentary gift if it had been his intention that the beneficiary should receive any substitute or contingent gift. Such view would be entirely proper, as a will generally reflects the testator's testamentary intent as of the date of his death. G.S. 31-41. When a person becomes mentally incompetent, however, that person ceases to be able to form testamentary intent. In such cases, it would defy reason to hold that a testator's will reflected his testamentary intent as of the date of his death, even though it had been legally determined that the testator was incapable of forming a testamentary intent for many years prior to that date.

We do not think that the legislature intended that G.S. 31-41 require any such result. Although that statute ordinarily requires

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that a will be construed as though executed immediately prior to the testator's death, our Supreme Court has indicated on several occasions that the statute will not be applied in a blind or mechanical manner and that other appropriate factors may be considered. *E.g.*, *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973); *Trust Co. v. Green*, 239 N.C. 612, 80 S.E. 2d 771 (1954); *Tyer v. Meadows*, 215 N.C. 733, 3 S.E. 2d 264 (1939); *Hines v. Mercer*, 125 N.C. 71, 34 S.E. 106 (1899). Additionally, the majority rule is that the principle of ademption does not apply when the testator becomes incompetent and the subject matter of a specific bequest or devise is sold by a guardian. Wiggins, *Wills and Administration of Estates in North Carolina*, § 143, p. 463. We think that our Supreme Court's overriding concern that a trustee not have the power to substitute his will for that of a testator as expressed in *Grant v. Banks*, 270 N.C. 473, 155 S.E. 2d 87 (1967) would lead it to follow the majority rule here.

[3] In the present case, we find that the will of the testatrix spoke as of the last date upon which she was capable of forming a testamentary intent. The rule of law of ademption does not apply so as to extinguish specific testamentary gifts, when the subject matter of those gifts has materially changed during the time that a testatrix is mentally incompetent if, as here, she remains incompetent until her death.

When the principle of ademption does not apply as a matter of law to a specific testamentary gift and the subject matter of the specific testamentary gift is not found in the testator's estate at the time of his death, the beneficiary is entitled to the proceeds from the sale of the subject matter of the testamentary gift. The beneficiary should not, however, be limited to the receipt of the traceable proceeds from the sale of the object of the testamentary gift, as the funds would cease to be traceable once the trustee commingled them with other funds.

In *Grant v. Banks*, 270 N.C. 473, 155 S.E. 2d 87 (1967), the Court was faced with a factual situation involving a sale of real property by a trustee pursuant to court order for the necessary support of the incompetent, which would have been a necessary and unavoidable act on the part of the incompetent if *sui juris*. At the time of the incompetent's death, a significant part of the proceeds from the sale of the real property had apparently been used

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for her support. Based upon the narrow facts of that case, the Court indicated that only such part of the proceeds of the sale of the real property as were traceable into the estate and had neither been used to support the incompetent nor were required to meet debts or the costs of administration would be regarded as retaining the character of realty and pass to the beneficiary of the specific gift. We do not think that case argues against our conclusion that the beneficiaries of the specific testamentary gifts of the testatrix in the present case should not be limited to the receipt of those proceeds of the sale of the subject matter of such specific testamentary gifts as are traceable into her estate. Instead, we find support in the Court's reasoning that:

In his limited capacity as custodian or conservator, the trustee has no power to change the will of his ward by merely commingling assets in his hands. To so hold would reach the preposterous result of allowing a guardian or trustee to rewrite and alter the provisions of a will so as to destroy the testamentary intent of the testator by merely commingling funds.

*Id.* at 485, 155 S.E. 2d at 95-96.

We find that the specific gifts of the testatrix in the present case must be treated as though they had been demonstrative gifts in the first instance. The beneficiaries should receive the entire proceeds of the sales of such gifts unless it should become necessary to abate the testamentary gifts of the testatrix. Should this situation arise, all of the testatrix's testamentary gifts would abate in accordance with the provisions of G.S. 28A-15-5. Therefore, we find the trial court's ruling on the issue of ademption without error.

[4] The appellants also raise issues relating to the trial court's ruling concerning the 40 shares of stock in the Exxon Corporation purchased by the trustees of the testatrix during her incompetency. The testatrix provided in her will that her sister, Caroline Yancey Tighe, would receive all of her shares of stock in the Standard Oil Company of New Jersey. Prior to the death of the testatrix, all of her shares in that company were converted to shares of stock in the Exxon Corporation as a result of corporate mergers and reorganization. As we have previously pointed out, the specific gift of stock to Caroline Yancey Tighe was not

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adeemed. However, the trial court correctly concluded that the 40 shares of stock in the Exxon Corporation purchased by the testatrix's trustees after she became incompetent did not pass to Caroline Yancey Tighe under the terms of the testatrix's will. At the time the testatrix became incompetent, she ceased to be able to form testamentary intent. At no time did she ever intend that another person should have control over the testamentary disposition of her property. The testatrix clearly did not intend for her trustees to be able to increase one of her testamentary gifts at the expense of another by using funds in the estate to purchase property of the same description as other property which formed the subject matter of a specific testamentary gift. To find that Caroline Yancey Tighe should take these additional shares of stock would be tantamount to allowing the trustees of the testatrix to alter her will. Any such result is to be avoided. Therefore, the trial court's ruling with regard to these shares was correct.

[5] The trial court in its judgment indicated that certain gifts which had lapsed by reason of the deaths of the beneficiaries prior to the death of the testatrix passed to her heirs upon her death, as the will contained no residuary clause. We do not agree with this portion of the declaratory judgment of the trial court and find that it must be modified.

Item Nine of the will of the testatrix gave her husband James W. Michal "all the rest and residue of my property of every kind, character and description, including real, personal and mixed, wheresoever located, situated, or found, together with any increment thereupon added thereto" for his lifetime or until he remarries. Item Nine further directed that Ruth Alice Yancey Ray, Richard Rollins Tighe, Samuel Motz Yancey, Jr., and Amelia Whitaker Yancey were to receive specific items of property upon the death or remarriage of James W. Michal. However, the will did not contain any provision for the disposition of the remainder of the residue upon the death or remarriage of James W. Michal.

Several of the parties to this action contended that, upon the death of James W. Michal, the other beneficiaries named in Item Nine of the will were to take the residue of the estate in equal shares. The intention of the testatrix as expressed in the will does not support any such construction. The specific contingent gifts were given to the beneficiaries "in the quantity and quality set forth." Nothing in the will tends to indicate that the testatrix

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intended that the named beneficiaries receive anything more than those specific gifts. Therefore, neither Ruth Alice Yancey Ray, Richard Rollins Tighe, Samuel Motz Yancey, Jr., nor Amelia Whitaker Yancey were entitled to take the remainder interest in the residue after the life estate therein of James W. Michal.

Item Nine comprises a residuary clause in that it provides for the disposition of the entire residue of the testatrix's estate, albeit for a limited period of time. Those gifts of the testatrix which lapsed by reason of the beneficiaries predeceasing the testatrix and which were not otherwise provided for in the will form a part of the residue of the testatrix's estate. *See* G.S. 31-42(c)(1)(a). Therefore, such lapsed gifts passed to James W. Michal for his lifetime or until his remarriage. To the extent that the declaratory judgment entered by the trial court is inconsistent with this result, it must be modified.

Item Nine of the will, which we have found to be a residuary clause, made no further provision, however, for the disposition of that part of the property which would remain in the testatrix's estate after the death of James W. Michal and after the specific contingent gifts in Item Nine had been satisfied. Any interest in property not disposed of by a testator's will passes by intestate succession. G.S. 31-42(c)(1)(b). Therefore, if the testatrix was not survived by a child, children, any lineal descendant of a deceased child or children, or a parent, then James W. Michal, the testatrix's surviving spouse, or his estate would take the remainder interest in the residue of the testatrix's estate according to the laws of intestate succession. G.S. 29-14(4).

The remaining issue raised on appeal involves the right of a surviving spouse to dissent from the will of a deceased spouse. The trial court in its judgment concluded that the testatrix's surviving spouse, James W. Michal, properly filed his dissent to her will with the clerk. The trial court further concluded that the right of dissent survived the death of James W. Michal and is now in full force and effect for the benefit of his estate. We agree.

The right to dissent from a will under certain specified circumstances is conferred upon a surviving spouse by G.S. 30-1. If that right was properly exercised in the present case according to the statutory requirements, the testamentary disposition of the testatrix could be altered by statute. It is entirely within the

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power of the legislature to enact statutes which cause such alterations of a testator's testamentary disposition of property. *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969); *Fullam v. Brock*, 271 N.C. 145, 155 S.E. 2d 737 (1967).

[6] G.S. 30-1 was enacted as a part of an act passed by the General Assembly. 1965 N. C. Sess. Laws Ch. 849. Under the terms of that act, G.S. 30-1 became effective upon its ratification on 8 June 1965. *Phillips v. Phillips*, 296 N.C. 590, 252 S.E. 2d 761 (1979). From that date forward, the right to dissent from the will of a deceased spouse was guaranteed to surviving spouses under the circumstances specified in G.S. 30-1. "The power of the Legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted." *Bennett v. Cain*, 248 N.C. 428, 431, 103 S.E. 2d 510, 513 (1958), *quoted in Fullam v. Brock*, 271 N.C. 145, 149, 155 S.E. 2d 737, 740 (1967). Therefore, the fact that the husband of the testatrix in the present case may not have had the right to dissent at the time her will was written or at the time she became incompetent is not determinative.

A surviving husband has the right to dissent from his deceased wife's will if the value of the property he would otherwise receive from her estate is less than a specified portion of her estate. G.S. 30-1(a). The value of all of the property in a deceased spouse's estate is determined as of the date of death. G.S. 30-1(c). Thus, although a surviving spouse's right to dissent may not be established until a mathematical computation of the value of the deceased spouse's estate is made, the right to dissent generally arises as of the date of the death of the deceased spouse or it never arises. See *In re Cox*, 32 N.C. App. 765, 233 S.E. 2d 926, *review denied*, 292 N.C. 729, 235 S.E. 2d 783 (1977).

If the surviving spouse of the testatrix had the right to dissent, he could properly exercise that right by filing a dissent in accordance with the requirements of G.S. 30-2. If he filed a dissent, but the mathematical computation of the testatrix's estate revealed that he did not have the right to dissent, his dissent would not conform to the requirements of G.S. 30-2 and would be invalid. If it is established, however, that the surviving husband of the testatrix had the right to dissent, he would take that portion of the testatrix's estate specified in G.S. 30-3.

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[7] Although the right to take property after dissenting from a will must be established, it is not a contingent right. The timely and correct filing of a proper dissent constitutes an exercise of the right to dissent and creates a vested property right in the dissenting spouse. A vested property right is alienable and descendible. Therefore, the trial court correctly concluded that the filing of a dissent by the surviving spouse of the testatrix caused him to have a vested right of dissent, if the mathematical computations which must be made pursuant to applicable statutes and the principles recently set forth in *Phillips v. Phillips*, 296 N.C. 590, 252 S.E. 2d 761 (1979) reveal that he was otherwise entitled to dissent at the time of the testatrix's death. As the issues involved came before the trial court in an action for declaratory judgment, those computations, and the resulting determinations to be made, must be made by the trial court upon remand of this case and not by the clerk. *Id.* at 603, 252 S.E. 2d at 769. The trial court correctly concluded that, if the surviving spouse of the testatrix had properly exercised the right of dissent, it was not extinguished by his death and passed to his estate.

For the reasons previously set forth, the judgment of the trial court is

Affirmed in part, modified in part and remanded.

Judges MARTIN (Robert M.) and WEBB concur.

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SNML CORPORATION, D/B/A SNML, INC. v. BANK OF NORTH CAROLINA, N.A., GOLDEN EAGLE OF RALEIGH, INC., C. D. SPANGLER CONSTRUCTION COMPANY, C. D. SPANGLER, SR., AND C. D. SPANGLER, JR.

No. 7810SC675

(Filed 1 May 1979)

**1. Principal and Surety § 1— surety defined**

A surety is one who becomes responsible for the debt, default or miscarriage of another; but in a narrower sense, a surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance.



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**2. Guaranty § 1— guaranty defined**

A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.

**3. Guaranty § 1; Principal and Surety § 1— guaranty and surety distinguished**

Guaranty is distinguishable from suretyship in that the former is a collateral and independent undertaking creating a secondary liability, while the latter is a direct and original undertaking under which the obligor is primarily and jointly liable with the principal.

**4. Principal and Agent § 1— agent defined**

An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it.

**5. Guaranty § 1; Principal and Agent § 10— bank holding stock as security for lessee's performance—agent of lessor—fiduciary duty**

Under an "Escrow Agreement" by which defendant bank held stock certificates as security for defendant lessee's performance of a lease and was not to release the stock until it determined that all covenants contained in the lease had been met, including the lessee's agreement to pay ad valorem taxes on the leased premises, defendant bank was not a guarantor or surety of the lessee's performance but was an agent of plaintiff lessor and owed a fiduciary duty to the lessor; therefore, a consent judgment which released the lessee from liability for ad valorem taxes did not relieve defendant bank of its responsibility under the "Escrow Agreement," and the bank is liable to plaintiff lessor for damages caused by its release of the stock to its owners when ad valorem taxes for 1973 and 1974 had not been paid on the leased premises.

**6. Principal and Agent § 10— agent's breach of fiduciary duty—release of collateral—damages—value of collateral**

Where defendant's breach of its fiduciary duty to plaintiff lessor consisted of wrongfully releasing stock held as collateral security for a lessee's breach of its obligations under the lease, the value of that collateral was necessary to a determination of plaintiff lessor's damages.

APPEAL by defendant, Bank of North Carolina, N.A., from *Smith (Donald L.), Judge*. Judgment entered 12 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1979.

A chronological summary of the complicated factual situation disclosed by the record best postures this civil action on appeal:

1. On 20 January 1966 defendant, Golden Eagle of Raleigh, Inc. (GOLDEN EAGLE), as lessee, acquired from Frances W.

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Crowder and Frank M. Williams, as lessors, a 75-year leasehold estate (GROUND LEASE) in certain real property located in the city of Raleigh, Wake County, North Carolina (SUBJECT PREMISES).

2. On 23 August 1966, GOLDEN EAGLE entered into a sublease agreement for the SUBJECT PREMISES to Sir Walter Inn, Inc. (SIR WALTER).

The lease agreement (GOLDEN EAGLE/SIR WALTER LEASE) provided for SIR WALTER to lease from GOLDEN EAGLE the SUBJECT PREMISES for a term of 20 years for an annual rental of \$125,400. Other pertinent portions of the GOLDEN EAGLE/SIR WALTER LEASE called for GOLDEN EAGLE to construct a 114-unit motel on the SUBJECT PREMISES complete with certain furnishings and equipment. Certain interior furnishings were to be provided by SIR WALTER. As tenant, SIR WALTER was to operate a motel and restaurant facility on the SUBJECT PREMISES. The lease agreement dealt with other matters such as repairs, utilities, taxes, insurance, payments, destruction of improvements, condemnation, default, abandonment, subordination, security interest, quiet enjoyment, successors and assigns, investment credit, assignment and subletting, notices, and curing of default.

3. On 27 December 1966 GOLDEN EAGLE conveyed to First National Bank of Eastern North Carolina Employees' Profit Sharing and Pension Trust (PROFIT SHARING PENSION TRUST) certain of its assets, including its leasehold estate in the SUBJECT PREMISES under the GROUND LEASE subject to the GOLDEN EAGLE/SIR WALTER LEASE.

4. On 1 July 1967, by assignment of lease, GOLDEN EAGLE became the successor in interest of SIR WALTER INN, INC. under the GOLDEN EAGLE/SIR WALTER LEASE.

5. On 14 November 1967 the defendants C. D. Spangler Construction Company, C. D. Spangler, Sr., and C. D. Spangler, Jr. (SPANGLERS) entered into an agreement with PROFIT SHARING PENSION TRUST.

The pertinent parts of the SPANGLER/PROFIT SHARING PENSION TRUST agreement provided as follows: That the PROFIT SHARING PENSION TRUST did not have sufficient as-

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sets to borrow a sufficient amount of cash in order to fully pay cash for the GOLDEN EAGLE assets and therefore SPANGLERS agreed to lend, set over and assign 8,193 shares of common stock of First National Bank of Eastern North Carolina "as a loan and as collateral security for the purpose of pledging and borrowing against"; that SPANGLERS had in fact pledged the 8,193 shares of stock as additional security to the faithful performance of the obligations assumed by SIR WALTER INN; that the SPANGLERS now desire to amend and broaden the original stock pledge agreement and do so by extending the guarantees of faithful performance of all the covenants and agreements in the GOLDEN EAGLE/SIR WALTER LEASE for a period of three years beyond the guarantee contained in that agreement, that is, the said guarantee to begin on 1 January 1967 and end on 31 December 1974.

The pertinent provision of the agreement provided as follows:

2. As soon as practical after January 1, 1968, and as soon as practical on each January 1 of each subsequent year thereafter, the PLAN AND PENSION TRUST shall to its complete satisfaction determine that all covenants and agreements as contained in that certain lease agreement dated August 23, 1966, by and between Golden Eagle of Raleigh, Inc. and Sir Walter Inn, Inc., have been fully performed. If and when this has been done the PLAN AND PENSION TRUST shall release and deliver to the OWNER, [SPANGLERS] (each year) ONE THOUSAND (1,000) shares of the originally pledged EIGHT THOUSAND ONE HUNDRED AND NINETY-THREE (8,193) shares of common stock of First National Bank of Eastern North Carolina.

Pursuant to this agreement, SPANGLERS delivered the shares of common stock to PROFIT SHARING PENSION TRUST.

6. On 29 December 1967, PROFIT SHARING PENSION TRUST assigned to Samuel Leder the GOLDEN EAGLE/SIR WALTER LEASE and the GROUND LEASE.

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7. In December 1968, Samuel Leder assigned to SNML the GOLDEN EAGLE/SIR WALTER LEASE and the GROUND LEASE. (SNML is a North Carolina corporation and the plaintiff in this action.)

8. At this point in time, GOLDEN EAGLE has acquired the status of tenant of plaintiff.

9. On 16 October 1977 PROFIT SHARING PENSION TRUST and First National Bank of Eastern North Carolina entered into an agreement which provided in pertinent part as follows:

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) and in further consideration of the mutual promises, said parties do hereby agree that the FIRST NATIONAL BANK OF EASTERN NORTH CAROLINA TRUST DEPARTMENT shall accept and hold 10,386 number of shares of Financial Corporation subject to the terms of an agreement by and between C. D. Spangler, Sr., C. D. Spangler, Jr., and C. D. Spangler Construction Co., Inc., all for the benefit of SNML Corporation in place of the PLAN AND PENSION TRUST and the ESCROW AGENT shall follow all of the terms of the agreement as originally set forth.

10. The defendant, BANK, and its Trust Department is the successor in interest of First National Bank of Eastern North Carolina and its Trust Department.

11. The 10,386 shares of Financial Corporation owned by SPANGLERS and then in the custody of First National Bank of Eastern North Carolina, upon execution and delivery of the agreement referred to above, were thereupon "deemed and held subject to the conditions of that agreement."

12. The ad valorem taxes on the SUBJECT PREMISES in the amount of \$13,344.76 for the year 1973 were not paid by GOLDEN EAGLE.

13. The ad valorem taxes on the SUBJECT PREMISES in the amount of \$13,712.39 for the year 1974 were not paid by GOLDEN EAGLE.

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14. The ad valorem taxes on the SUBJECT PREMISES for the year 1975 were not paid in the prorated amount of \$8,204.88 by GOLDEN EAGLE.

15. The total amount of ad valorem taxes on SUBJECT PREMISES for the years 1973, 1974, and prorated amount for the year 1975, with interest and penalties in the total amount of \$39,476.28 were paid by the plaintiff, SNML, in August 1975.

16. Of the 10,386 shares of Financial Corporation held by Trust Department of BANK, 2,000 shares were released to the owners (SPANGLERS) in January, 1971, and 2,000 shares were released to the owners in January, 1972, and the remaining 6,386 shares were returned to the owners in January, 1975.

17. SNML and GOLDEN EAGLE, among others, were parties respondent in a special proceeding in the General Court of Justice, Superior Court Division, Wake County, North Carolina, entitled "CITY OF RALEIGH, Petitioner vs. FRANCES W. CROWDER, CAROLYN C. BARBOUR and Husband, DE VAN BARBOUR, HELEN C. GLASCOCK and Husband, SPENCER GLASCOCK, SARA C. SPURLIN and Husband, WILLIAM SPURLIN, MACON C. MOORE and Husband, G. S. MOORE, JR., FRANCES C. JONES and Husband, EDWIN JONES, SNML CORP., d/b/a SNML, INC., GOLDEN EAGLE OF RALEIGH, INC., CAROLINA POWER & LIGHT COMPANY, SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, C. M. ALLRED, Trustee, NORTH CAROLINA NATIONAL BANK, B. A. JONES, Trustee, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH, Respondents," No. 74SP135, instituted on or about 31 October 1974, by the City of Raleigh for the acquisition by it, under its power of eminent domain, of fee simple title to the real property therein identified.

18. The real property affected by and identified in said special proceeding is the SUBJECT PREMISES herein.

19. A consent judgment, dated 12 August 1975, executed on behalf of SNML and GOLDEN EAGLE and the other respondents therein named was entered and filed in said special proceeding on 12 August 1975, which consent judgment is in full force and effect.

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20. Pursuant to the provisions of the consent judgment the sums of money therein directed to be paid to and for the account of SNML, GOLDEN EAGLE, and others therein named were each duly and timely paid in full.

21. The pertinent provision of the consent judgment provides as follows:

4. That upon the disbursement of funds as provided in the foregoing subparagraphs (a), (b), (c), (d) and (e) *the interest of all respondent parties, through these disbursements, in and to the property involved in this proceeding shall be terminated and any lease agreement between these parties shall be terminated; and any and all obligations and liability of any party hereto for the payment to or for the account of any party to any such lease agreement of any rent, taxes, or other claims for or with respect to the subject property shall be terminated, released and discharged.* (Emphasis added.)

22. On 19 December 1975 plaintiff instituted this action seeking to recover, *inter alia*, the amount paid by it to the City of Raleigh for ad valorem taxes for the years 1973, 1974, and the prorated amount for the year 1975. Each defendant alleged in its answer that it had been released from liability to plaintiff by plaintiff's execution of the consent judgment referred to above and by the consent judgment itself.

The parties stipulated to the facts hereinabove set forth and the trial court heard the matter on the pleadings and stipulations. It made findings of fact and conclusions of law as follows: That the 16 October 1970 "Escrow Agreement" established a fiduciary relationship between the plaintiff and the defendant BANK and the BANK became the ESCROW AGENT of the plaintiff and not a guarantor or surety; that as ESCROW AGENT the BANK was obligated to perform certain tasks and among those was the ascertainment of whether the defendant GOLDEN EAGLE had fully performed all of its covenants and agreements as contained in the 23 August 1966 lease; that the defendant BANK held the stock certificates as security for performance of the lease and was not to release the stock unless all covenants and agreements contained in the lease had been met; that defendant GOLDEN EAGLE did not meet the covenants and agreements of the lease as it did not pay its ad valorem taxes for the years 1973 and 1974;

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that defendant BANK released the collateral in January 1975 while ad valorem taxes for the years 1973 and 1974 were still outstanding thereby violating its agreement with plaintiff; that plaintiff paid the ad valorem taxes in question; that the consent judgment released defendant GOLDEN EAGLE from any liability to plaintiff; that the total amount paid for 1973 and 1974 was \$27,057.15 and plaintiff was damaged in that amount and should recover that amount from the defendant BANK; that the action against all other defendants be dismissed. From the foregoing judgment, the defendant BANK appealed.

*Sheldon L. Fogel, for plaintiff appellee.*

*Poyner, Geraghty, Hartsfield & Townsend, by John J. Geraghty and Cecil W. Harrison, Jr., for defendant appellant Bank of North Carolina, N.A.*

CARLTON, Judge.

The first question for determination is whether appellant BANK properly released the shares of common stock of the BANK held as "collateral security" in January 1975 while ad valorem taxes for the years 1973 and 1974 were still outstanding. The trial court held that the BANK'S release of the stock was improper in that the "Escrow Agreement" of 16 October 1970 between the PROFIT SHARING PENSION TRUST and the BANK'S Trust Department established a fiduciary relationship between the plaintiff and appellant BANK and appellant BANK therefore became ESCROW AGENT for the plaintiff corporation and not a guarantor or surety. The trial court found that the 14 November 1967 agreement was incorporated into the ESCROW AGREEMENT and obligated the appellant to ascertain whether defendant GOLDEN EAGLE had fully performed all its covenants and agreements in the 23 August 1966 lease agreement, including the payment of ad valorem taxes and that the appellant should not have released the collateral security in January 1975 while ad valorem taxes for the years 1973 and 1974 were still outstanding.

Appellant BANK contends that the true relationships of the parties were that SPANGLERS, by reason of their pledge of stock, were to serve as sureties for the performance of GOLDEN EAGLE, the principal obligor, with the PROFIT SHARING PENSION TRUST, and subsequently the plaintiff, occupying the sta-

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tus of beneficiary of the pledge. Therefore, appellant argues, the release by the consent judgment of the primary obligor, GOLDEN EAGLE, also operated to discharge the appellant BANK of its duty to retain the collateral security. Put another way, appellant argues that when a creditor gives the principal debtor an unconditional release of liability, the underlying obligation has been satisfied, and the guarantor of that obligation is no longer liable on the guaranty. The crucial question, therefore, is whether the true role of appellant BANK was that of a surety/guarantor or that of an agent/fiduciary. We agree with the trial court's ruling.

[1] A surety is one who becomes responsible for the debt, default or miscarriage of another; but in a narrower sense, a surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance. 72 C.J.S., Principal and Surety, § 2, p. 515. *See also Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951).

[2, 3] A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance. Although the contracts of guaranty and suretyship are to some extent analogous, and the terms are sometimes used interchangeably, there are nevertheless important distinctions between the two undertakings which are recognized in almost all jurisdictions. Guaranty is distinguishable from suretyship in that the former is a collateral and independent undertaking creating a secondary liability, while the latter is a direct and original undertaking under which the obligor is primarily and jointly liable with the principal. 38 C.J.S., Guaranty, §§ 1, 6, pp. 1129, 1136; *see also Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972).

[4] An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed by his principal primarily to bring about business relations between the latter and third persons. 2A, C.J.S., Agency, § 4, p. 554.



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[5] Clearly, the role of the appellant BANK was not that of guarantor or surety. Appellant was not an endorser of any instrument in the transaction. The ESCROW AGREEMENT referred to appellant BANK as the "Escrow Agent." Appellant was charged with determining if the provisions of the 23 August 1966 lease were complied with. It did not undertake to act as a surety or guarantor in any sense in the event the lessee failed to perform. Appellant simply agreed not to release any security it held unless the lessee performed its agreement under the lease agreement. From the facts before us, we must conclude that the true role of the appellant BANK was that of an agent.

An agent is a fiduciary concerning the matters within the scope of his agency. The very relation implies that the principal has placed trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer. The fiduciary relationship existing between an agent and his principal has been compared to that which arises upon the creation of a trust. The rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer applies whether the agency is one coupled with an interest, the compensation given the agent is small or nominal, or it is a gratuitous agency. "Furthermore, it has been held that the duty of an agent to be faithful to his principal does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation; it is as sacred and inviolable after as before the expiration of the agency." 3 Am. Jur. 2d, Agency, § 199 *et seq.*, p. 580, and cases cited therein.

We interpret the various instruments to cast the appellant BANK in the role of an agent charged with the responsibility of determining that all the provisions of the 23 August 1966 lease were annually complied with. Among those provisions was the requirement that annual property taxes be paid. The agency relationship was to terminate on 31 December 1974. The record clearly disclosed that ad valorem taxes were not paid on the property in 1973 and 1974, prior to expiration of the agreement and that appellant BANK released the collateral security to SPANGLERS with the taxes unpaid. Indeed, appellant BANK admits that the taxes were unpaid and that the stock was delivered back to the SPANGLERS. In so doing, they violated the responsibility cast

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upon them as agents. The consent judgment, in which appellant BANK was in no way a part, did not relieve appellant BANK of its responsibility under the agreement.

For the reasons stated, this assignment of error is overruled.

[6] We next turn to appellant's contention that the trial court erred in awarding an amount of damages for which there was no evidence to support.

The trial court ordered that the plaintiff recover of appellant the sum of \$27,057.15, the precise amount of ad valorem taxes for the years 1973 and 1974 which plaintiff was required to pay after all other parties failed to pay. The trial court was undoubtedly following the general rule that plaintiff was entitled to damages, in an action of this nature, which naturally and proximately are caused by the breach of defendant's duty to plaintiff.

However, it is also the rule in this jurisdiction that damages are never presumed and the burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule, and when compensatory damages are susceptible of proof with approximate accuracy, they must be so proved. 5 Strong, N.C. Index 3d, Damages, § 15, p. 44.

[W]here actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered. *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E. 2d 2, 5 (1955).

In the instant case, the court did not have before it sufficient data from which to compute damages to the plaintiff. It is true that the court had evidence, by way of stipulation, of the amount of ad valorem taxes which were paid by the plaintiff. However, the court did not have evidence by way of stipulation or otherwise, of the value of the collateral security released by appellant. Without such evidence, there was no way to accurately determine how much the release of the collateral harmed the plaintiff. Since defendant's breach consisted of wrongfully releasing the collateral

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security, the value of that collateral was necessary to determine plaintiff's damage. Obviously, plaintiff may not be entitled to the full amount of taxes paid if the value of the released collateral would have been insufficient to pay those taxes.

This assignment of error is sustained. This part of the judgment must be vacated and remanded for further proceedings consistent with this portion of our opinion. On remand, the superior court will only give further consideration to the amount of plaintiff's damages. Plaintiff should not again be put to trial on the question of entitlement. *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658 (1956).

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

Affirmed in part, vacated in part and remanded.

Judges PARKER and HEDRICK concur.

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E. RAY ETHERIDGE, EXECUTOR OF THE ESTATE OF ANNIE MAE G. ETHERIDGE, DECEASED v. DOC HORACE ETHERIDGE, JR., EXECUTOR OF THE ESTATE OF DOC HORACE ETHERIDGE, SR., DECEASED, AND DOC HORACE ETHERIDGE, JR., INDIVIDUALLY

No. 781SC342

(Filed 1 May 1979)

**1. Evidence § 11— action to recover rental value of land— Dead Man's Statute**

In an action by the executor of testatrix to recover the reasonable rental value of farmland for the year prior to testatrix' death, an affidavit by defendant who had rented and cultivated the land concerning the amount of land involved and the agreed rental price was inadmissible because of the Dead Man's Statute, G.S. 8-51; however, the trial court erred in excluding an affidavit by defendant's son concerning the rental contract since the son was not a party to the action or a person interested in the event of the action, nor was he testifying in his own behalf or that of a party succeeding to his interest, nor was he testifying as to a personal transaction or communication between himself and the deceased.

**2. Executors and Administrators § 8— action to recover rental value of land—summary judgment improper**

In an action by plaintiff executor to recover the reasonable rental value of testatrix' farmland which was rented and cultivated by defendant, the son of testatrix, the trial court erred in granting partial summary judgment for plain-

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tiff where interrogatories to and answers of defendant, to which plaintiff made no objection, raised genuine issues of material fact as to whether there was an express contract for the rental of the farm at \$30 per acre and as to whether the estate of testatrix' husband was liable to plaintiff for any rent money received by the husband from defendant son.

APPEAL by defendants from *Cowper, Judge*. Judgment entered 12 December 1977 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 29 January 1979.

E. Ray Etheridge and defendant Doc Horace Etheridge, Jr. (Doc, Jr.) are brothers. Annie Mae G. Etheridge (Annie) and Doc H. Etheridge, Sr. (Doc, Sr.) are the parents of E. Ray Etheridge and Doc, Jr. Annie died testate 18 January 1975. Doc, Sr. dissented from Annie's will 4 February 1975. Doc, Sr. died testate 15 November 1975.

Plaintiff sued to recover the reasonable rental value of 297 acres of farmland in Currituck County for the year 1974. Doc, Jr. had rented and cultivated Annie's land for several years prior to 1974. Doc, Jr. admitted he had cultivated and rented farmland owned by Annie, but denied that the amount of land was as much as plaintiff alleged. Doc, Jr. claimed the agreed rental for the land was \$30 per acre and that it had been paid in full.

Alternatively, plaintiff sued the estate of Doc, Sr., pleading that if \$30 per acre rental was paid by Doc, Jr. to Doc, Sr. before his death, the estate of Doc, Sr. must account to plaintiff for the rent paid.

Plaintiff moved for summary judgment and offered his verified complaint. Defendants' answer was unverified. Defendants offered an affidavit to verify the answer. The court refused to allow this affidavit. Defendants further offered the affidavit of James Owen Etheridge (Owen), son of Doc, Jr., concerning the existence of an express contract for rental of the farmland. This affidavit was also refused by the court. The parties stipulated that plaintiff timely objected to the affidavits and the objections were sustained based upon N.C.G.S. 8-51, the "Dead Man Statute." The court also had before it the interrogatories to, and answers of, Doc, Jr. The record contains no objections by any party to the admission of the interrogatories.

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Partial summary judgment was granted plaintiff on all issues except damages, based upon the fair rental value of the farmland. The judgment established that Doc, Jr. had not paid rent as he alleged; rental of the land was not to be \$30 per acre, but was to be the fair rental; all land alleged in the complaint was to be included in determining damages. Defendants appeal.

*White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for plaintiff appellee.*

*Twiford, Trimpi & Thompson, by John G. Trimpi, for defendant appellants.*

MARTIN (Harry C.), Judge.

The Supreme Court in *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), held the order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment, is not appealable. The same procedure appears to be involved in the case at bar. However, this appeal was argued 29 January 1979, prior to the filing of *Industries, supra*. We therefore treat the appeal as a petition for certiorari, allow the petition, and consider the questions presented.

[1] Defendants argue the court erred in holding the affidavits offered were inadmissible because of the Dead Man Statute. N.C. Gen. Stat. 8-51. This statute prohibits a party, or interested person, from testifying in his own interest against the personal representative of a deceased person about a personal transaction or communication between the witness and the deceased. To determine whether testimony is incompetent under N.C.G.S. 8-51, these four questions must be answered affirmatively:

1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?

2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?

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3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?

4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

*Peek v. Shook*, 233 N.C. 259, 261, 63 S.E. 2d 542, 543 (1951); *Brown v. Green*, 3 N.C. App. 506, 165 S.E. 2d 534 (1969).

Applying the above standards to the answer of defendants, it was not admissible as evidence, even if verified.

The affidavit of Owen contained testimony that the farm rental was set at \$30 per acre; his father, Doc, Jr., did not have to pay that amount on land that he cleared; rental could be paid to the grandfather; his grandmother, Annie, knew the rent for 1974 had been paid, and she did not mind her husband holding and cashing the rent checks.

Owen is the son of Doc, Jr. and the grandson of Annie Mae G. Etheridge and Doc Etheridge, Sr. Owen was entitled to nothing under his grandmother's will. *In re Etheridge*, 33 N.C. App. 585, 235 S.E. 2d 924, *dis. rev. denied*, 293 N.C. 253, 237 S.E. 2d 535 (1977). In Doc, Sr.'s will, Owen is a legatee as a member of the class, "grandchildren living at the time of my death." As such, he is entitled to share the cash residuary of this estate after specific bequests, debts, and expenses have been paid.

In this case, the affidavit of Owen was admissible. Owen is not a party to this action, nor is he a person interested in the event of the action. A person interested in the event of an action must have a "direct legal or pecuniary interest" in the outcome of the litigation. *Burton v. Styers*, 210 N.C. 230, 231, 186 S.E. 248, 249 (1936). The amount of money in the grandfather's estate may be enhanced by this lawsuit, thereby affecting how much, if anything, Owen will take. Although Owen's interest is pecuniary, it is not direct and is too remote and speculative to constitute a direct pecuniary interest. Owen's interest will not be affected by the outcome of this litigation. He will be entitled to take under his grandfather's will no matter what the outcome of this action. His legal rights will not be determined in this lawsuit. Even if

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defendants are successful in this action, it is possible that after payments of debts and specific bequests, there would be no residuary cash for the grandchildren. Owen is not testifying in his own behalf or that of a party succeeding to his interest. Further, Owen, except for paragraph 4 of the affidavit, is not testifying as to a personal transaction or communication between himself and the deceased. A personal transaction or communication within the purview of the statute is anything done or said between the witness and the deceased tending to establish the claim against the personal representative of the deceased person. *Peek v. Shook, supra*. Since all four questions for determining the incompetency of Owen as a witness under N.C.G.S. 8-51 cannot be answered affirmatively, his affidavit should have been admitted at the summary judgment hearing.

[2] The affidavit of Owen raises a genuine issue of material fact in the suit between the plaintiff and the defendant Doc Etheridge, Jr., individually, as to whether there was an express contract for the rental of the farm at \$30 per acre. The affidavit also raises a genuine issue of material fact in the suit between the plaintiff and the defendant Doc Etheridge, Jr., executor of the estate of Doc Etheridge, Sr., as to whether the estate of Doc Etheridge, Sr. is liable to the plaintiff for any rent money received from Doc, Jr.

At the summary judgment hearing, the court had before it plaintiff's interrogatories to Doc, Jr. and his sworn answers. None of the parties objected to the admission or consideration by the court of this evidence. In order to have the benefit of N.C.G.S. 8-51, a party must lodge a proper objection at the time the incompetent testimony is offered. *Smith v. Allen*, 181 N.C. 56, 106 S.E. 143 (1921); *Meroney v. Avery*, 64 N.C. 312 (1870). The objecting party has the burden of establishing the incompetency of the evidence. *Sanderson v. Paul*, 235 N.C. 56, 69 S.E. 2d 156 (1952).

By this evidence Doc, Jr. states he did not farm all of Annie's cleared land; he farmed 223.1 acres, rather than the 297 acres alleged by plaintiff; that he has the cancelled check dated 30 December 1974 payable to D. H. Etheridge, Sr. for \$6113.34; the farmland was rented directly from his father as Annie's agent with her full knowledge, approval, and acquiescence.

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This evidence controverts the evidence contained in plaintiff's complaint used as an affidavit. Genuine issues of material facts are raised.

There being genuine issues of material facts, the order for partial summary judgment was improvidently granted.

The order granting partial summary judgment is

Reversed.

Chief Judge MORRIS and Judge CARLTON concur.

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E. RAY ETHERIDGE AND FRED G. ETHERIDGE v. DOC HORACE  
ETHERIDGE, JR.

No. 781SC341

(Filed 1 May 1979)

**1. Tenants in Common § 3; Evidence § 11— action to recover rents and profits—affidavits—exclusion by Dead Man's Statute—relevancy**

In an action to recover for rents and profits for the two years after the death of a landowner, who was the mother of plaintiffs and defendant, an affidavit by defendant which incorporated by reference the averments contained in defendant's unverified answer was inadmissible under the Dead Man's Statute, G.S. 8-51; and though an affidavit by defendant's son concerning a contract to rent the land prior to landowner's death was not inadmissible pursuant to the Dead Man's Statute, it was not relevant to this action and was properly excluded by the trial court.

**2. Tenants in Common § 3— action to recover rents and profits—ouster—amendment of counterclaim properly denied**

In an action to recover rents and profits for the two years after the death of the landowner, who was the mother of plaintiffs and defendant, the trial court did not abuse its discretion in denying defendant permission to amend his counterclaim to allege ouster from the homeplace, since defendant took nothing under his mother's will and took pursuant to his father's will only that property which his father was allotted after the father's dissent from the mother's will, and that property did not include the homeplace.

**3. Tenants in Common § 3— action to recover rents and profits—proof of ouster not required**

Proof of ouster of a tenant in common is not a requisite to recovery of rents and profits from a cotenant; therefore, the trial court erred in denying plaintiffs' motion for summary judgment on the ground that a genuine issue of



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fact existed as to whether plaintiffs were ousted from possession of the farmlands by defendant cotenant.

APPEAL by defendant from *Cowper, Judge*. Judgment entered 12 December 1977 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 29 January 1979.

This case was consolidated for argument with the case of *E. Ray Etheridge, Executor of the Estate of Annie Mae G. Etheridge v. Doc Horace Etheridge, Jr., Executor of the Estate of Doc Horace Etheridge, Sr., and Doc Horace Etheridge, Jr., Individually*, Case No. 781SC342. This is an action brought by E. Ray Etheridge and Fred G. Etheridge against their brother Doc Horace Etheridge, Jr., alleging that during the years 1975 and 1976 Doc, Jr., appropriated the Annie Mae G. Etheridge farmland to his sole and exclusive use and wrongfully dispossessed and wrongfully excluded plaintiffs as tenants in common from possession and has retained all of the rents and profits from his farming operation. Plaintiffs pray that Doc, Jr., be ordered to make an accounting for and pay "the rents and profits due them in accordance with the co-tenancy in said lands for 1975 and 1976", plus interest, and an order enjoining defendant from excluding plaintiffs-cotenants from the land.

Defendant Doc Horace Etheridge, Jr., answered the complaint denying that he collected any rents from the land and alleging by way of defense that his occupancy was under lease with Annie Mae G. Etheridge and that a specified rental had been set by and paid to Doc, Sr., with the full approval and acquiescence of Annie Mae G. Etheridge. Defendant averred that the basis for the contractual arrangement made through Doc, Sr., was due to the fact that the land here in question originally was purchased by Doc, Sr., and the father of Annie Mae G. Etheridge, but legal title was placed solely in the name of her father. Nevertheless, defendant avers, Doc, Sr., was considered one-half owner of the property, thus explaining why rental payments were made to Doc, Sr. Defendant alleges, in the form of a counterclaim, that he is entitled to the value of improvements he placed on the land. Furthermore, he alleges that he is entitled to his share of the rental value of the house which has been occupied by plaintiff E. Ray Etheridge since 15 November 1975.

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*Etheridge v. Etheridge*

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The record indicates that Annie Mae died testate 18 January 1975 leaving the homeplace and farm to Doc, Sr., for life while granting E. Ray Etheridge the right to occupy the house and curtilage jointly along with Doc, Sr., the remainder interest in the house and curtilage to pass to E. Ray Etheridge in fee at Doc, Sr.'s death. Doc, Sr., dissented from the will 5 February 1975 (this right established by consent judgment 25 November 1975) and died testate 15 November 1975.

Annie Mae's will provided that in case of dissent by Doc, Sr., the defendant and his two sons would take nothing under that portion of the will which devised part of the real estate to Doc, Jr., for life, remainder to his sons. The portion of the will divesting Doc, Jr., and his sons of their interest was declared valid by this Court as was the trial court's order directing that commissioners be appointed to take Doc, Sr.'s statutory share first from that portion of the real estate divested from Doc, Jr., and his sons. *In re Etheridge*, 33 N.C. App. 585, 235 S.E. 2d 924 (1977), *cert. denied*, 293 N.C. 253, 237 S.E. 2d 535 (1977).

Doc, Sr.'s will provided in pertinent part:

“ITEM TWO

I will and bequeath the sum of One Hundred (\$100.00) Dollars, each, to my sons E. Ray Etheridge and Fred G. Etheridge; and after paying my just indebtedness and the cost of the administration of my estate, I bequeath the remainder of my cash or monies that I may own at the time of my death be equally divided among my grandchildren living at the time of my death.

ITEM THREE

I will and bequeath the remainder of all my personal property of every kind and description to my son, Doc Horace Etheridge, Jr.

ITEM FOUR

I will and devise all of my real property, wherever same may be located, to my son, Doc Horace Etheridge, Jr.”

Doc, Jr., was appointed executor of the estate.

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On 22 November 1977, plaintiffs filed a motion for summary judgment alleging (1) their entitlement as a matter of law to an accounting from defendant for rents and profits for 1975 and 1976, and (2) relying on the will of Annie Mae G. Etheridge and the decision of this Court in *In Re Etheridge*, supra, that they are entitled to a dismissal of defendant's counterclaim.

Upon the hearing on the motion, defendant tendered two affidavits. His own affidavit was intended essentially as a verification of the allegations of the answer and counterclaim. The affidavit by his son James Owen Etheridge stated that he had personal knowledge of the agreement between Doc, Jr., and his paternal grandparents. The agreement provided that Doc, Jr., was to farm the land for \$30 per acre per year, rental to be paid directly to Doc, Sr. The affidavit stated that the arrangement was with the consent and acquiescence of Annie Mae. The trial court held the affidavits inadmissible under G.S. 8-51, the "Dead Man's Statute", and denied defendant's motion to amend the counterclaim to allege ouster by Ray Etheridge. The court then granted summary judgment dismissing defendant's counterclaim and denied summary judgment on plaintiffs' cause of action on the grounds that genuine issues of material fact exist with respect to the alleged ouster of plaintiffs by defendant.

Defendant appeals from the entry of judgment dismissing his counterclaim. Plaintiffs thereafter filed a petition for writ of certiorari to this Court to review the trial court's denial of their motion for summary judgment. This Court entered an order 31 January 1978 reserving consideration of the petition for the panel assigned to this case.

*White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for plaintiff appellees.*

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

MORRIS, Chief Judge.

We will first discuss the questions presented by defendant's appeal and then we will address plaintiffs' petition for certiorari.

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**Etheridge v. Etheridge**

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**Defendant's Appeal**

[1] Prior to the hearing on plaintiffs' motion for summary judgment, defendant filed two affidavits for consideration by the court. At the hearing, the court refused to allow them into evidence. Defendant excepted to the ruling as to each affidavit. These exceptions form the basis of his assignment of error No. 1.

The first affidavit was by Doc Horace Etheridge, Jr., and incorporated by reference the averments contained in his unverified answer. This question was answered in *Etheridge v. Etheridge*, No. 781SC342 filed 1 May 1979. What was said there is applicable here. The affidavit was not admissible as evidence. The second affidavit was that of Owen Etheridge, son of defendant. This question also was raised in *Etheridge v. Etheridge*, No. 781SC342, and the affidavit was held to be admissible. What was said there with respect to its admissibility is also true here. However, even if the court erred in failing to admit the affidavit, no prejudice resulted to defendant in this case. The affidavit is directed to conversations had with affiant's grandmother, Annie Mae G. Etheridge. It refers to events occurring prior to her death. Affiant said that he "was personally acquainted and frequently saw and conversed with my said grandmother, both in her presence alone, and in the presence of her and my father"; and "*That prior to her death, I knew and had personal knowledge of the agreement between her, my grandfather and my father that all their land would be farmed by my father for \$30.00 per acre*"; and "*That I know to my own knowledge by conversations I had had with my grandmother that she knew the rent for 1974 had been paid by my father, and that she indicated no disapproval of this arrangement, which on information and belief, has been going on for many years prior. That by her actions and conversations with me she approved and acquiesced in the holding and cashing of the rent checks by my grandfather.*" (Emphasis added.)

This suit is for rents and profits for the years 1975 and 1976—after the death of Annie Mae Etheridge. *Etheridge v. Etheridge*, No. 781SC342 involved the year 1974. While the admissibility of the affidavit would not be prohibited by the Dead Man's Statute, and this plaintiffs concede, it is not relevant to this action, and the court properly excluded it. This assignment of error is overruled.

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Etheridge v. Etheridge

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[2] At the hearing on plaintiffs' motion for summary judgment, defendant moved for permission to amend his counterclaim to allege ouster from the homeplace. The court denied the motion, and defendant excepted. He concedes that he must show abuse of discretion. In his brief, defendant contends that there was abuse of discretion "because the motion was denied at the summary judgment stage well in advance of trial", and "because the nature of the counterclaim was not significantly changed to either prejudice or surprise plaintiffs". We fail to see abuse of discretion here. While it may be true that where the relief sought is fair rental value for a cotenant's occupancy of the house, ouster must be shown, the question is not before us. Defendant correctly states that the dissenting spouse, upon filing dissent to the will, becomes vested, *eo instante*, as of the date of the testator's death, with title to the intestate share of the testator's realty which is allowed by the statutes providing for dissent. G.S. 30-1 *et seq.*; *Bank v. Melvin*, 259 N.C. 255, 130 S.E. 2d 387 (1963). "All rents accruing from the use and occupancy of his realty after the death of an intestate become the property of the heirs entitled to the real property." 259 N.C. at 263, 130 S.E. 2d at 394. Defendant contends that because this is so, Doc, Sr., became vested with title to 1/3 of the realty of Annie, including 1/3 interest in the homeplace; that, assuming ouster, Doc, Sr., was, therefore, entitled to 1/3 rental value until his death and defendant, Doc, Jr., by virtue of Doc, Sr.'s will succeeded to that right. Even if ouster is assumed, there is no entitlement to rents and profits in Doc, Sr., or Doc, Jr. We think the rights devolving after the allocation by the commissioners of the spouse's share after a dissent is analagous to the rights which devolved upon a widow in the allocation of her dower before its abolishment. The principle was enunciated in *Reitzel v. Eckard*, 65 N.C. 673 (1871). There the Court, speaking through Pearson, Chief Judge, to the question of whether dower could be allowed out of dower where there were successive widows, said:

"*Dos de dote peti non debet*, is a maxim of the common law. The principle upon which it rests is this: although by the descent, the seizure is cast upon the heir, yet when dower is assigned to the widow, her estate is an elongation of the estate of the husband; and *her seizure relates back, so as wholly to defeat the seizure of the heir; . . .*" (Emphasis added.)

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*Etheridge v. Etheridge*

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*See also Rook v. Horton*, 190 N.C. 180, 129 S.E. 450 (1925), and cases there cited. So it is here. When the lands were allotted to Doc, Sr., by the commissioners, Doc, Sr.'s seizure related back to the death of Annie. He was not allotted any interest in the homeplace, this Court having held that the tracts devised to Doc, Jr., Joe, and Owen Etheridge (sons of Doc, Jr.) should be the first tracts set aside for the purpose of determining which tracts should be used to comprise the intestate share. *In re Etheridge*, supra. It is obvious that an allegation of ouster would not save defendant's counterclaim. This assignment of error is overruled.

Defendant's final assignment of error is directed to the court's signing and entering summary judgment against defendant and in dismissing with prejudice his counterclaim for "relief in the way of setoff for the labor and materials Doc, Jr. expended and performed incident to the cultivation and harvesting of the crops grown on the farmlands during 1975 and 1976." We think clarity would be better served by including these contentions in a discussion of the question posed by plaintiffs' petition for a writ of certiorari. In our discretion, we have allowed the petition, issued the writ, and will consider the question presented on its merits.

Plaintiffs' Appeal

[3] Plaintiffs filed their motion for summary judgment on 22 November 1977. The motion was based upon the premise that "there is no genuine issue as to any material fact with respect to defendant having farmed all of the cleared land referred to herein during the years 1975 and 1976, and that plaintiffs, as a matter of law, are entitled to a true and accurate accounting from the defendant for the rents and profits received by him for the years 1975 and 1976 and plaintiffs are entitled to payment by the defendant for the amount of rents and profits due them in accordance with their cotenancy, . . ." On 12 December 1977, after a hearing on the motion, the court entered its order, the pertinent portion of which is as follows: "it appearing to the Court that there is a genuine issue of material fact on the issue of whether or not plaintiffs were ousted from possession of the farmlands by defendant in 1975 and 1976 and that plaintiffs are not entitled to judgment because of this one issue of fact." It, therefore, clearly appears that if plaintiffs are not required to show ouster in these

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*Etheridge v. Etheridge*

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circumstances, they would be entitled to summary judgment requiring an accounting by defendant for rents and profits.

At common law, as it existed prior to the enactment of the Statute of Anne in 1705, one tenant in common was not accountable to the other for the use by him of the common property, nor was he accountable for the rents he had received from third persons. *Annot.* 51 A.L.R. 2d 388 *et seq.* That statute provided “ ‘Actions of Account shall and may be brought and maintained’ by one joint tenant, or tenant in common, his executors and administrators ‘against the other, as Bailiff for receiving more than comes to his just Share or Proportion.’ ” *Id.* at 394-395.

In *Chambers v. Chambers*, 10 N.C. 232 (1824), the Court had before it “[a]ssumpsit for use and occupation, of money had and received” brought by one tenant in common against the other who had taken possession of a messuage and adjoining land and received the whole profits. There was no lease or other agreement. Taylor, Chief Judge, wrote,

“But when one tenant in common secured the rents and profits of a real estate, the other could not bring an action of account against him at common law, unless the latter was appointed bailiff. This is remedied in England by the statute of Anne, which, however, has not, I believe, been e[x]tended by construction to an action on the case. In this State, the law remains as it was when Lord Coke wrote: ‘Albeit one tenant in common take the whole profits, the other has no remedy by law against him, for the taking of the whole profits is no ejectment.’ Co. Lit., 199b.” *Id.* at 233.

Hall, Judge, concurred and noted that in the event of an ouster by one tenant in common of the other, after judgment for the other in ejectment, “trespass would lie for the mesne profits”, but no recovery could be had in assumpsit. However, in *Wagstaff v. Smith*, 17 N.C. 264 (1832), an action for an accounting of rents and profits was allowed, and on rehearing of the case, the Court said:

“At common law, a tenant in common, unless where he had made his companion bailiff, could not have an action of account, but by the statute 4 Anne, Ch. 16, it was enacted that an action of account may be maintained by one tenant in common against the other, *as bailiff*, for receiving more than his

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share. It was doubted by the plaintiff's counsel, in the argument, whether this statute was in force here—but we see no foundation for that doubt. It is avowedly an 'act for *the amendment of the law* and the better advancement of justice,' and one of those statutes for the amendment of the law repeatedly recognized as in force by our Colonial Legislature, and so declared in the Act of 1777, the court law." *Wagstaff v. Smith*, 39 N.C. 1, 2 (1845).

By the time *McPherson v. McPherson*, 33 N.C. 391 (1850), was heard, the statute had been adopted, (R.S. c. 31, § 104; *see also* Rev. Code, ch. 31, § 99) and the action was brought under its provisions. No proof of ouster was required. The Court said:

"Every tenant in common who has been in the enjoyment of the property is liable to account, but no recovery can be had against him unless, upon taking the account, it is shown that he has received more than his just share. The mode of enjoyment is not material. It makes no difference whether he uses it merely for shelter and as a means of supporting himself and family, or makes money by selling the products, or receives money as rent; in either case he is bound to come to an account with his fellows, and can only avoid it by averring and proving that he has already accounted." 33 N.C. at 401-02.

Again, in *Northcot v. Casper*, 41 N.C. 303 (1849), the Court held that one tenant in common was required to account to his cotenant for all his shares of the profits, no matter when received except that the statute of limitations would begin to run from the time of demand and refusal thereof or, if there is an ouster, from the time of ouster. No requirement of pleading or proving ouster in order to maintain the action appears.

That proof of ouster is not a requisite to recovery of rents and profits is clearly pointed out in *Roberts v. Roberts*, 55 N.C. 129 (1855).

"The relation of tenants in common being admitted, an account is an order of course, for the purpose of ascertaining what rent or benefit each had derived from the common fund. But it does not follow that upon the coming in of the report, the plaintiff is entitled to a decree for a ratable part of the



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amount charged against each: That depends upon whether one has received more than his just share." *Id.* at 130-31.

*See also Jolly v. Bryan*, 86 N.C. 457 (1882); *Boone v. Peebles*, 126 N.C. 824, 36 S.E. 193 (1900); *Smith v. Smith*, 150 N.C. 81, 63 S.E. 177 (1908).

We do not find that the rule has been changed in more recent decisions. In *Whitehurst v. Hinton*, 209 N.C. 392, 184 S.E. 66 (1936), plaintiffs sought an accounting from defendants for rents and profits received by defendants for lands described in the complaint and owned by plaintiffs and defendants as tenants in common since the death of their common ancestor in 1910. In affirming the trial court's entry of judgment that plaintiffs, as tenants in common with defendants, were entitled to an accounting from defendants for the rents and profits received and collected by defendants from the lands owned by them and plaintiffs as tenants in common, the Court, speaking through Justice Connor, said:

"One who has received more than his share of the rents and profits from lands owned by him and others as tenants in common is accountable to his cotenants for their share of such rents and profits. In the absence of an agreement or understanding to the contrary, he is ordinarily liable only for the rents and profits which he has received. He is not liable for the use and occupation of the lands, but only for the rents and profits received." 209 N.C. at 403, 184 S.E. at 73.

*See also Lovett v. Stone*, 239 N.C. 206, 79 S.E. 2d 479 (1953); *Hunt v. Hunt and Lucas v. Hunt*, 261 N.C. 437, 135 S.E. 2d 195 (1964); *Watson v. Carr*, 9 N.C. App. 217, 175 S.E. 2d 733 (1970), where we held that the rule of *Whitehurst, supra*, limits the recovery to the rents and profits actually received and not the reasonable rental value.

In his answer, defendant averred that, over a period of years, and under an agreement with his mother, who then owned the land, he spent much time and money clearing and taking in for farming "many acres of land". We assume that defendant used that land in his farming operation to produce crops for sale. In any event, he properly does not seek credit therefor. He does, however, by way of "counterclaim" seek credit for sums of money

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spent by him for machinery, labor, equipment, fertilizer, etc., necessary in the production of crops and in the "betterment of the property". Of course, G.S. 1-340 *et seq.* having to do with betterments and value of improvements to land are not applicable to tenants in common, *Layton v. Bird*, 198 N.C. 466, 152 S.E. 161 (1930), but "[i]f one tenant in common makes improvements upon the common property he will be entitled, upon actual partition, to have that part of the property which he has improved allotted and assigned to him, and its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of his cotenants", *Jenkins v. Strickland*, 214 N.C. 441, 444, 199 S.E. 612, 614 (1938), a situation not present in the case before us. The only improvement to the land averred by defendant is the clearing of "many acres of land". This was, according to defendant's own averment, with the consent of his mother and obviously done during her lifetime. Clearly defendant has had the advantage of his labor and expense. While other expenditures are included in his "counterclaim", they are expenditures which would ordinarily be taken into account in arriving at whether defendant as tenant in common with plaintiffs, has had more than his "just share or proportion" of the rents and profits which defendant has collected and received from the common property.

The matter is remanded to the Superior Court of Currituck County for further proceedings in accord with this opinion.

Judges MARTIN (Harry C.) and CARLTON concur.

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BRADY H. JOHNSON v. R. G. LOCKMAN AND PILOT LIFE INSURANCE COMPANY

No. 7822SC538

(Filed 1 May 1979)

**Fraud § 5; Insurance § 44—insured's cancellation of health and disability policy—agent's misrepresentation of coverage—reasonableness of reliance—jury question**

In an action to reinstate a health and disability insurance policy and to recover payments allegedly due under the policy which plaintiff cancelled as the result of a misrepresentation by defendant insurer's agent that his back condition was not covered by the policy, the evidence on motion for summary

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judgment presented a jury question as to whether plaintiff reasonably relied on the agent's misrepresentation when he could have discovered by reading the policy that his condition was covered by the policy, and summary judgment was improperly entered for defendant agent and defendant insurer.

APPEAL by plaintiff from *Hairston, Judge*. Judgment entered 20 March 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 7 March 1979.

Plaintiff seeks reinstatement of a health insurance policy which he cancelled as the result of alleged fraudulent misrepresentation by defendant, R. G. Lockman, acting as insurance agent of defendant, Pilot Life Insurance Company. Plaintiff seeks \$11,500 as accrued payments due under the allegedly wrongfully cancelled policy, \$189,000 for future payments due under the policy, and \$100,000 punitive damages. Defendant Pilot Life answered averring that, because plaintiff should have known by reading his insurance policy that his condition was actually within the policy's coverage, it was not reasonable for plaintiff to have relied upon the representations of Lockman which were in fact contrary to what Lockman had been advised by Pilot Life. Defendant Pilot Life has not contested the existence of Lockman's agency on this appeal.

The matter was heard in the trial court on defendant's motion for summary judgment. The pleadings, interrogatories, depositions, and affidavits establish the following facts which are undisputed for purposes of this appeal: On 25 February 1971, plaintiff purchased Pilot Life health insurance policy No. H-166841 insuring plaintiff from loss due to sickness or injury at the rate of \$500 per month from the date of disability until death. The application for that policy inquired:

"10. Have you ever been treated for or had any known indication that you have had or presently have any other disease or disorder of:

i. back or spine?"

Plaintiff's application contained a negative response. Nevertheless, plaintiff's own evidence indicates that he had suffered from a "catch" in his back on previous occasions and had, in fact, consulted a chiropractor for treatment of the problem.

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The record indicates that prior to July of 1974, plaintiff suffered an injury to his back. He delayed a day or so before seeking treatment. He eventually was referred to the Miller Clinic in Charlotte and informed that surgery was necessary. Upon the advice of a physician and family friend, plaintiff attempted to contact his insurance agent to make sure that he was covered by the policy. Because his agent, Jack Annas, had recently left Pilot Life, plaintiff was put in touch with R. G. Lockman on 1 July 1974.

Plaintiff informed Lockman that he was inquiring as to his coverage for back surgery because he had been informed that surgery would be necessary to treat his condition. Lockman questioned plaintiff with respect to whether he previously had ever suffered any back trouble. He replied that he had experienced a "catch" in his back now and then, and that he had been to a chiropractor. Lockman noted that plaintiff had made no mention of any prior back condition in his insurance application. Lockman then said in substance that Johnson might not be covered by the policy, but that he would consult the company for a definite answer.

Lockman contacted plaintiff several weeks later, around 31 July 1974, and notified him that a response had been received from Pilot Life. Pilot Life's response outlined three alternative courses of conduct: (1) Correct the mistake by adding a rider to the policy, (2) Refund the premiums upon plaintiff's surrender of the policy or (3) "Since the policy is more than two years old, the statements contained in the application are incontestible and no unilateral action can be taken by the Company", which requires no conduct by either party. The incontestibility clause in the policy provides as follows:

**"INCONTESTIBILITY:** (a) After the policy has been in force two years during your lifetime (excluding any period during which you are disabled) it shall become incontestible as to the statements contained in the application."

In contrast, however, Lockman informed plaintiff that he had no coverage under the policy. Plaintiff, therefore, reasoned that it would be foolish to continue the policy, and Lockman agreed, then stated: "Don't hold me to this, but I will try to get you all the premiums you've paid in this policy back." Plaintiff responded, "Great day, Russ, that's—well, that's great. I'd appreciate it if

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you can." Lockman said he'd find out from the home office, and a few days later, brought the check to plaintiff. At Lockman's request, plaintiff signed a paper which Lockman said was just to show he had received the money. In fact, the paper was a memo to Lockman dated 29 July 1974, which read in part:

"In accordance with the policyholder's request to cancel his policy, we have done so and enclose the check for \$1,084.60, representing the premiums paid. Please do not deliver the check unless Mr. Johnson fully understood the options given in my letter of July 18th. If we can be of any further service in this matter, please let us know."

At the bottom of the page was printed:

"Dated 7-31-74. I fully understand the options explained to me."

Plaintiff's signature thereafter appears on the memo. He did not, however, read the memo before signing it. Lockman told him when he handed the paper to him for his signature, "I've got an appointment; I'm late already." Plaintiff subsequently learned that he was in fact entitled to coverage under the policy, and brought suit to reinstate the policy.

Defendants moved for summary judgment 16 January 1978. The motion was heard 20 March 1978 and the trial court entered judgment for defendants 21 March 1978 dismissing plaintiff's action. Plaintiff appeals.

*Bondurant & Lassiter, by T. Michael Lassiter, for plaintiff appellant.*

*Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and William C. Raper, for defendant appellants.*

MORRIS, Chief Judge.

Plaintiff assigns error to the entry of summary judgment for defendants on the ground that genuine issues of material fact remain to be resolved, *i.e.*, whether Lockman made a factual misrepresentation to the plaintiff, and if so, whether plaintiff reasonably relied upon that representation. Defendants essentially concede for purposes of their motion for summary judgment that a misrepresentation was made by defendant Lockman.

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Therefore, the sole question for resolution in this matter concerns whether, as a matter of law and based upon the undisputed facts in this record, plaintiff reasonably relied upon the representations of Lockman. Plaintiff contends that the question of reasonable reliance is a question reserved for the jury; whereas, defendants maintain that plaintiff was charged with the duty to read the contract of insurance which he accepted, and his failure to do so will bar his right to reinstatement of the policy.

The essential elements of actionable fraud in North Carolina are these:

“(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.” *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E. 2d 444, 446 (1955) (quoting *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953)).

*Keith v. Wilder, supra*, also stands for the proposition that “one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon.” 241 N.C. at 675, 86 S.E. 2d at 447 (quoting *Gray v. Edmonds*, 232 N.C. 681, 62 S.E. 2d 77 (1950)). Therefore, there is no doubt, as defendants contend, that the law imposes upon the individual the duty to exercise ordinary prudence in relying upon persons with whom they conduct their business affairs. Nevertheless, whether such reliance is reasonable is ordinarily a question for resolution by a jury. *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E. 2d 522 (1965); *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965); *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E. 2d 382 (1962); *Roberson v. Williams*, 240 N.C. 696, 83 S.E. 2d 811 (1954); *Gray v. Jenkins*, 151 N.C. 80, 65 S.E. 644 (1909); *Tuggle v. Haines*, 26 N.C. App. 365, 216 S.E. 2d 460 (1975), *cert. denied*, 288 N.C. 253, 217 S.E. 2d 681 (1975). For example, in *Cowart v. Honeycutt, supra*, the issue was

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whether a release signed by plaintiff, and allegedly procured through the fraud of defendant's insurance company, barred plaintiff's suit. The defendant in that action argued, as do defendants here, that "the evidence, even when taken in the light most favorable to the plaintiff, establishes as a matter of law that the plaintiff was not justified in relying upon the representations and that [his] reliance thereon was not reasonable." 257 N.C. at 141, 125 S.E. 2d at 386. Plaintiff, without reading it, had signed a document which released her rights to sue for personal injuries. She signed the release upon the representation that it only applied to past hospital and doctor's bills which were coming due for payment. The Court noted the general rule that there is a duty to read a release from liability unless the failure to read it was due to some artifice or fraud chargeable to the party released. The Court found that there was evidence which would permit a jury to find that plaintiff's failure to read was due to defendant's representations. In response to the defendant's contention that reliance was not reasonable, the Court determined that conflicting evidence presented a question for the jury, and quoted the Court in *Roberson v. Williams, supra*:

"The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man or else trade and commerce could not prosper." 240 N.C. at 702, 83 S.E. 2d at 815 (*paraphrasing Gray v. Jenkins, supra*.)

Similarly, in *Johnson v. Owens, supra*, the question of reasonable reliance on alleged misrepresentations arose in connection with an action to recover damages where plaintiff purchased a house from defendant which had a defective heating system. Plaintiff alleged that because of defendant's actions and representations that the furnace was in good working condition, plaintiff purchased the house without first having the heating system inspected. The heating system was in fact defective beyond repair and required complete replacement. The language used by the Court, written in the context of a case involving misrepresentation in the sale of land, is instructive. We quote:

"Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of

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law, bar recovery for fraud is frequently very difficult to determine. This case presents that difficulty. In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.' Courts should be very loath to deny an actually defrauded plaintiff relief on this ground. When the circumstances are such that a plaintiff seeking relief from alleged fraud must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him. In such a case the doctrine is the specific remedy for a complainant who is, so to speak, malingering. A plaintiff who, aware, has made a bad bargain should not be allowed to disown it; no more should a fraudulent defendant be permitted to wriggle out on the theory that his deceit inspired confidence in a credulous plaintiff." 263 N.C. at 758, 140 S.E. 2d at 314.

The Court then concluded that whether plaintiff reasonably relied upon the defendant's representations is a question of fact for the jury.

Defendants rely upon *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962), for the proposition that defendant Lockman was under no obligation to inform the plaintiff of his available options under the insurance policy. As we explain below, that decision does not support defendants' position. In *Setzer*, plaintiff sued for the reformation of a credit life insurance policy procured through his creditor Statesville Production Credit Association. Plaintiff five times had borrowed from the credit association, and each time had applied for and received credit life insurance. Each policy, in addition to insuring plaintiff's life, provided indemnity coverage for the loss of one or both eyes, hands, or feet. Upon obtaining a sixth loan from the credit association, plaintiff again applied for credit life insurance just as he had done the previous five times. This time, however, the policy did not provide indemnity for loss of sight, hand, or feet. The lender made no mention of that fact. Plaintiff subsequently lost his right arm in a farm-



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tractor accident and discovered the loss was not covered by the sixth policy.

The plaintiff in *Setzer* based his right to reformation upon silence as actionable fraud when defendant failed to inform him that coverage under the sixth policy differed from coverage under the five previous policies. The Court noted that the policy was not a renewal but an entirely new contract, and that "[i]t is a matter of common knowledge that insurance companies from time to time change the terms of their policies." 257 N.C. at 403, 126 S.E. 2d at 140. The Court then concluded that in order for silence under these facts to constitute actionable fraud, defendant must have violated some duty to speak arising out of a relationship of trust or confidentiality. No such relationship existed there and thus there was no duty to speak. In contrast, however, the case at bar involves an affirmative misrepresentation with respect to an existing policy, not the breach of a duty to disclose the terms of a new policy. Defendants also rely heavily on *McLain v. Insurance Co.*, 224 N.C. 837, 32 S.E. 2d 592 (1945). That decision held that, as a matter of law, plaintiff had proven no actionable fraud in the procurement of a release from double indemnity liability where her own evidence showed she failed to read the insurance policy. The language of that decision is in conformity with other decisions rendered by our Supreme Court, yet the result appears inconsistent. Although the decision has not been overruled, it has not been relied upon in recent decisions of that Court, and we believe should be read narrowly based on the particular facts of that case. We have been unable to reconcile that decision with the many decisions rendered both before and since that case which conclude that reasonable reliance is a question for the jury.

The case at bar is before this Court on an appeal from a motion for summary judgment. The determinative question is essentially whether the plaintiff exercised reasonable care in relying on the representations of defendant Lockman. The rule in North Carolina has become well settled that only in exceptional cases involving the question of reasonable care will summary judgment be an appropriate procedure to resolve the matter. See our discussion in the recent decision in *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978). Even in cases in which there may be no dispute as to the essential facts, where reasonable men could differ with respect to whether a party

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acted with reasonable care, it remains in the province of the jury to apply the reasonable man standard. *See Gladstein v. South Square Assoc., supra; Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971), *cert. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971). Therefore, we conclude that based upon this record there is sufficient evidence upon which reasonable men could differ concerning whether plaintiff reasonably relied upon the representations of Lockman. Plaintiff is entitled to have the reasonableness of his reliance considered by a jury.

Reversed.

Judges CLARK and ARNOLD concur.

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PAUL H. PEARCE v. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY AND JOHN C. WARD, TRADING AND DOING BUSINESS AS JOHN'S PHONE BOOTH SERVICE COMPANY

No. 785SC455

(Filed 1 May 1979)

**1. Negligence § 49— removal of phone booth—duty to remove carefully—breach of duty as jury question**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets embedded in cement adjacent to a sidewalk, the trial court erred in directing a verdict for the individual defendant who left the brackets in the cement when he removed a telephone booth, since defendant was under a duty to remove the booth in a careful and prudent manner so that other persons would not be injured by his acts in removing the booth, and whether he breached his duty by leaving the brackets, which were the same color as the sidewalk, without taking any measures to warn persons using the area that the brackets were present was a jury question.

**2. Negligence § 49; Telecommunications § 4— removal of phone booth—removal by agent or independent contractor—summary judgment properly denied**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets left in a sidewalk after removal of a telephone booth, the trial court did not err in denying defendant telephone company's motion for summary judgment where a genuine issue of material fact existed as to whether the individual defendant, who actually removed the phone booth, was an independent contractor or an agent.

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**3. Evidence § 36.1— tripping over brackets in sidewalk—statements by agent—admissibility**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets left in a sidewalk after removal of a phone booth, statements made by an agent of defendant telephone company at the scene of the accident shortly after it occurred were properly admitted into evidence, since the declarations were relevant to the issues before the court; the agent arrived at the scene of the accident after a telephone call by plaintiff to defendant's office; and the brackets were removed while the agent was present.

**4. Telecommunications § 4— removal of phone booth—brackets left in sidewalk—notice to phone company—sufficiency of evidence of negligence**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets left in a sidewalk after removal of a phone booth, evidence was sufficient to take the case to the jury on the issue of defendant phone company's negligence unrelated to the negligence of the individual defendant who actually removed the booth where such evidence tended to show that defendant company had been put on notice that the brackets were still in the sidewalk after removal of the booth and that the brackets were dangerous, but defendant failed to remove them until after plaintiff was injured.

Judge VAUGHN dissenting.

APPEAL by plaintiff and defendant Southern Bell Telephone and Telegraph Company from *Smith (David I.)*, *Judge*. Judgment entered 2 February 1978. Appeal by defendant Southern Bell Telephone and Telegraph Company from *Rouse*, *Judge*. Judgment entered 15 March 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 27 February 1979.

On 27 May 1975, plaintiff filed his complaint against defendants seeking to recover damages for personal injury he received when he struck his right foot on a bracket left embedded in the cement adjacent to the sidewalk in Carolina Beach. The bracket had been placed there by defendant Southern Bell as an anchor for one of its telephone booths and had been left there by defendant John C. Ward when he removed the telephone booth some six months before the accident on instruction from defendant Southern Bell.

In its answer, Southern Bell denied its negligence, asserted that John Ward was acting as an independent contractor when he removed the telephone booth and left the brackets; therefore, Southern Bell was not responsible for his negligence. Southern Bell also alleged that plaintiff was contributorily negligent. In his answer, defendant Ward admitted removing the telephone booth

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at the request of Southern Bell, denied negligence, and asserted contributory negligence on the part of plaintiff.

Southern Bell moved for summary judgment on the grounds that it was not liable as a matter of law for the negligence of John Ward, because he was acting as an independent contractor when he removed the phone booth, and such removal was not inherently or intrinsically dangerous as to impose liability on the part of Southern Bell. In support of its motion, Southern Bell filed an affidavit by John Ward stating that he removed the phone booth pursuant to his contract with Southern Bell for the maintenance of phone booths and that in performance of the work, he acted as an independent contractor, furnished his own tools, was not supervised by Southern Bell, and reported his income taxes as a self-employed person. The trial court denied Southern Bell's motion for summary judgment.

At trial, plaintiff's evidence tended to show that: on 4 July 1974, he was walking to a restaurant at Carolina Beach with his wife for lunch; he struck his right foot on a metal bracket adjacent to the sidewalk and fell; when he did so, he lacerated his toe and twisted his knee; the bracket was the same color as the sidewalk; he had trouble seeing the bracket even after he tripped over it and was looking for it; pursuant to a telephone call from plaintiff to Southern Bell, one Robert Rochelle, service foreman, came to the location of the accident in a short period. The brackets were moved by Southern Bell. Plaintiff was later treated by Dr. Weis and Dr. Hundley for his injuries.

Defendant's evidence tended to show that: John C. Ward maintains Southern Bell's phone booths pursuant to a contract with nothing stated about installing or removing phone booths; Ward has his own maintenance business and is not supervised by Southern Bell in his work; sometime prior to 4 July 1974, Southern Bell called Ward and asked him to remove a phone booth at the Battery Restaurant; Ward did not remove the brackets, because he had been told the removal of the booth was temporary; he heard nothing else about the brackets until the date of the accident in question.

At the close of all of the evidence, the court allowed John Ward's motion for a directed verdict and denied Southern Bell's motion for a directed verdict. The jury found negligence on the

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part of Southern Bell, no contributory negligence on the part of plaintiff, and awarded him \$15,000. Southern Bell appealed from the judgment, and plaintiff appealed from the directed verdict as to John C. Ward.

*Brown & Culbreth, by Stephen E. Culbreth, for plaintiff appellant.*

*Stevens, McGee, Morgan & Lennon, by Karl W. McGee and Henry V. Ward, Jr., for defendant Southern Bell Telephone and Telegraph Company, appellant, and defendant John C. Ward, appellee.*

ERWIN, Judge.

Plaintiff's Appeal

Plaintiff's appeal presents one assignment of error: "Did the Court err in granting a directed verdict as to the defendant, John C. Ward, trading and doing business as, John's Phone Booth Service Company, at the close of all the evidence?" We answer, "Yes," and reverse the judgment entered.

On a motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a), of the Rules of Civil Procedure, the court must consider the evidence in the light most favorable to the plaintiff and may grant such motion only, if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Judge Campbell stated for this Court in *Adams v. Curtis*, 11 N.C. App. 696, 697, 182 S.E. 2d 223, 224 (1971):

"[I]n determining the sufficiency of the evidence to go to the jury, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to her, giving her the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in her favor." (Citation omitted.)

Defendant Ward testified:

"Well, any time you remove a phone booth and it is not going back, of course, you clean the area. I guess it is just

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like anything else, if you could leave the brackets and just set the phone booth right back on them within a couple of days and they were working in there and they knowing they were there, it is not going to bother them and it is not protruding out onto the sidewalk; therefore, you wouldn't think that it would be a hazard to the public walking down there. So I cut it aloose from the brackets and left the brackets because within three days period I was supposed to went back and set it back on the brackets, but as it turned out, Mr. Seawell, or whatever his name is, they didn't get back into harmony about putting the phone booth back, and I didn't hear nothing else about it and being busy I didn't think nothing about the brackets because they were off the regular width of the widewalk there, sir."

Our Supreme Court, in *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 140, 146 S.E. 2d 53, 60 (1966), stated with approval the rule found in 38 Am. Jur., Negligence, § 14, pp. 656-57 [now 57 Am. Jur. 2d, Negligence, § 39, p. 387]:

"[T]he law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons or the property of other persons, the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable at law for an injury to person or to property which is directly attributable to a breach of such duty."

In *Honeycutt v. Bryan*, 240 N.C. 238, 240-41, 81 S.E. 2d 653, 655 (1954), Chief Justice Barnhill said:

"Whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other, duty arises to use ordinary care and skill to avoid such danger. *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E. 2d 297."

Plaintiff alleged that defendant Ward was negligent in the following respects:

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"9. The defendant, John C. Ward, trading and doing business as John's Phone Booth Service Company, his agents and employees were negligent in that:

a. He failed to use due diligence in removing the public telephone booth from the premises hereinabove described in that the leaving of the metal anchors or brackets imbedded in the concrete on or immediately adjacent to the public sidewalk constituted a dangerous condition to persons using the premises.

b. He failed to warn the public of the dangerous condition existing when he knew or in the exercise of due care should have known that the dangerous condition existed and had been created by his actions in failing to remove the anchor bolts or brackets.

c. He failed to take adequate precautions to protect the general public from the work in progress on the premises hereinabove described when it was foreseeable that said work created a danger to the general public by leaving the anchors or brackets in place.

d. He failed to exercise reasonable diligence in the correction of the dangerous condition after he had notice of such danger when in the exercise of due care he knew or should have known that such a dangerous condition existed."

[1] There is no question that defendant removed the telephone booth and left the brackets standing near the sidewalk. The brackets were almost the color of the sidewalk making it difficult to see them standing in the concrete. Defendant did not take any measures to warn persons using the area that the brackets were present. Defendant had a duty imposed upon him by law to remove the booth in a careful and prudent manner so that other persons would not be injured by his acts in removing the booth. Whether or not the defendant breached his duty in this event was a jury question.

We hold that the evidence presented by the plaintiff was sufficient to overcome the Rule 50(a) motion of the defendant Ward.

Judgment reversed and remanded for a new trial as to defendant Ward.

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Defendant Southern Bell's Appeal

Defendant Southern Bell brings forward six arguments on appeal, contending that each of them amounts to error entitling it to a new trial. We find no error in the trial of defendant and hold that the trial court did not err in denying defendant's motion for summary judgment, directed verdict, and judgment notwithstanding the verdict.

[2] Southern Bell was required to show that there was no genuine issue as to any material fact and that it was entitled to a judgment as a matter of law in order to prevail on a motion for summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Plaintiff alleged that the telephone booth and brackets in question were owned by Southern Bell and that its agents had been negligent in leaving the anchor brackets. Defendant answered, admitting it had placed the booth on the property, and by its amended answer, admitted that it had caused the booth to be removed by defendant Ward. Southern Bell then alleged that Ward was an independent contractor and offered his affidavit in support of its contentions. Plaintiff contended that whether Ward was, in fact, an independent contractor or an agent was a question for the jury. We note that the contract between Southern Bell and Ward does not refer to removal of telephone booths. Plaintiff's affidavit indicated that the brackets were removed by defendant Southern Bell after his injury. This raised a genuine issue as to a material fact, and summary judgment was properly denied.

[3] After the accident in question, plaintiff called an operator at Southern Bell's office and reported his injury.

Plaintiff testified:

"I saw someone from Southern Bell that day; I believe the gentleman's name was Mr. Rochelle. It wasn't any longer than maybe an hour and a half from the time that I was injured until he was down there. He came into my shop.

Q. And what, if anything, did he say?

MR. WARD: Objection.

COURT: Overruled.

DEFENDANT'S EXCEPTION NO. 2



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A. Well, while he was in the shop talking to me, they were taking the brackets off the sidewalk. It was two gentlemen with a sledge hammer and a chisel. It just all struck me as, really I had never seen that type of service on the 4th of July. It was just, 'too,' they were there within an hour and, 'too,' through with tearing the brackets off the sidewalk. Mr. Rochelle came into the shop and he said, 'Mr. Pearce, I am sorry about —

MR. WARD: Objection.

COURT: Overruled. Go ahead.

DEFENDANT'S EXCEPTION NO. 3

...  
A. 'I am really sorry about the accident. That this is negligence on our behalf. That someone from the phone company will contact you today and let you know what doctor to go to. I am not versed in the medical aspect of this. I am not sure exactly who our physicians are, but someone will contact you today and tell you exactly what physician to go to there will be no trouble about it. That we will take care of everything for you.'

Defendant contends that the admission of these statements into evidence constituted prejudicial error. We do not agree.

In *Hubbard v. R. R.*, 203 N.C. 675, 678, 166 S.E. 802, 804 (1932), Chief Justice Stacy, speaking for the Court, said:

"It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae*, and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer." (Citations omitted.)

We hold that the declarations in question made by R. W. Rochelle, agent of defendant Southern Bell, were properly admit-

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ted into evidence. Plaintiff met fully the threefold test: (1) the admission must be relevant to the issue; (2) the agent must have been acting within the scope of his authority in making the admission; and (3) the transaction to which the admission relates must have been pending at the time when it was made. *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493 (1949). The declarations were relevant to the issues before the court; the agent answered the interrogatories submitted and verified the pleadings for defendant Southern Bell. R. W. Rochelle arrived at the scene of the accident after a telephone call by plaintiff to defendant's office. The brackets were removed while he was present. We overrule this assignment of error of defendant Southern Bell.

[4] We hold that the evidence in the case *sub judice* was ample to submit the case to the jury on defendant's negligence when the evidence is considered in the light most favorable to plaintiff. Plaintiff alleged as to Southern Bell:

"They allowed a dangerous condition to exist with respect to the anchor bolts or brackets which were left imbedded in concrete on or immediately adjacent to the public sidewalk, when in the exercise of due care they knew or should have known that the brackets constituted a hazard to the public.

\* \* \*

They failed to exercise reasonable diligence in the removal of the dangerous condition after they had notice of such danger and after such condition had existed for a sufficient length of time that in the exercise of due care they knew or should have known that the condition existed.

They failed to make a reasonable inspection of the premises to determine if the removal of the telephone booth had been correctly completed and that no danger to the general public had been created by said removal."

Witness Ted Seawell testified:

"When we bought the property, I called the phone company and told them that we would not want to keep the booth there; so after a couple of conversations they came and removed it and put it around behind my building and wanted

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to talk to me again. I made a request to the phone company to remove the clips, and the next time that the subject came up was after Mr. Pearce got hurt, and they did remove them after that. I notified them prior to that that I was afraid someone was going to be hurt.”

To us, this was sufficient to take the case to the jury on the issue of negligence of the defendant unrelated to the negligence of defendant Ward.

Defendants presented request for special instructions in three areas of the law: (1) elements of the principal-independent contractor relationship as distinguished from the employer-employee relationship; (2) contributory negligence; and (3) damages. A directed verdict was entered in favor of defendant Ward; thus the first request for instruction was not required. The case went to the jury on the negligence of defendant Southern Bell.

The trial court instructed the jury on contributory negligence. Defendant does not complain on this charge.

A refusal of a requested instruction is not error where the instructions which are given fully and fairly present every phase of the controversy. *Clemons v. Lewis*, 23 N.C. App. 488, 209 S.E. 2d 291 (1974). Here, the court's charge related to plaintiff's evidence and the law of recovering damages for personal injury. The court charged:

“The plaintiff contends that he is entitled to recover substantial damages for personal injury. The defendant disagrees. I instruct you that if you reach this issue you are not to be governed by the amount of damages suggested by the parties or their attorneys, but you are to be governed exclusively by the evidence in the case and the rules of law I have given you with respect to the measure of damages. If you answer this issue in any amount, you should award such damages as you find from the evidence and by its greater weight is fair compensation for any damage the plaintiff has sustained or will sustain as a proximate result of the defendant's negligence. Your award must be fair and just. You should remember that you are not seeking to punish either party and you are not awarding or withholding anything on the basis of sympathy or pity.”

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Taking the charge as whole and in its entirety, we find no prejudicial error.

We find no error in the trial court's denial of defendant's motions for judgment notwithstanding the verdict and for a new trial.

In the trial, we find no prejudicial error as to Southern Bell.

In the trial of defendant John C. Ward, the judgment is reversed, and plaintiff is awarded a new trial.

Judge MARTIN (Harry C.) concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

There is some evidence of negligence to take the case to the jury as to Ward without regard to whether the jury should find him to have been acting as an employee of the telephone company or an independent contractor. I agree, therefore, that it was error to direct a verdict in his favor.

I conclude, however, that the defendant, Southern Bell, must also be awarded a new trial. In my opinion the judge, in substantially all crucial respects, failed to declare and explain the law arising on the evidence given in the case. For instance, if the jury had been properly instructed, it might well have found that the landowners' negligence, in allowing the dangerous condition to exist for so long after the booth was taken down, was the proximate cause of plaintiff's injury. I concede, however, that our opportunity to review the charge is substantially precluded by the absence of appropriate exceptions. Nevertheless, there is an exception to the court's error in failing to explain how Ward's status as an employee or independent contractor would affect Southern Bell's liability for his acts or omissions. That Ward was no longer a party to the lawsuit did not change the necessity for those instructions.

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**MacEachern v. Rockwell International Corp.**

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ALLEN MACEACHERN *D/B/A* ACCESS v. ROCKWELL INTERNATIONAL CORPORATION

No. 7810DC463

(Filed 1 May 1979)

**1. Contracts §§ 2.1, 27.1— referral by employment agency—applicant later hired for different position—no contract for employer to pay fee**

Where defendant in effect made an oral offer to pay for plaintiff employment agency's services in providing defendant with an applicant which it would hire as a "systems analyst," no contract was formed when plaintiff provided an applicant who was not hired by defendant as a "systems analyst," and defendant was not obligated by contract to compensate plaintiff when it hired such applicant several months later as a "material requirements planning engineer."

**2. Quasi Contracts § 2.1— referral by employment agency—applicant later hired for different position—no recovery in quantum meruit**

Plaintiff employment agency was not entitled to recover a fee under the theory of *quantum meruit* for its services in referring to defendant an applicant for the position of "systems analyst" who was not hired for that position but was hired by defendant some months later for the different position of "material requirements planning engineer" where the two positions required different experience, education and responsibilities; the applicant's employment by defendant came about because he made a favorable impression that prompted defendant to seek his services when a job became available for someone with his qualifications; and no circumstances were shown from which it could be inferred that the services were rendered and received with the mutual understanding that payment would be made for those services.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 31 January 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 28 February 1979.

Plaintiff, trading as "Access Personnel Recruiters" (Access) filed suit against Rockwell International Corporation (Rockwell) after Rockwell refused to pay plaintiff for services allegedly rendered on an implied contract with defendant to pay for services in recruiting Mr. Greg Poupard who was later employed by defendant. Plaintiff contends he is entitled to a fee of \$3,060 plus interest from 7 February 1977. Defendant denies the existence of a contract with plaintiff. In the alternative, defendant alleges that even if there were a contract, plaintiff is not entitled to the fee because the agreement was that plaintiff would be entitled to its fee only if defendant hired Mr. Poupard for the position for which

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he was recruited—"Systems Analyst". Defendant contends that Mr. Poupard was not qualified for the position of "systems analyst", but admits that several months later he was hired to fill a position as a "Materials Requirements Planning Engineer—Materials", which became available subsequent to the time Poupard was interviewed for the job as systems analyst.

Both plaintiff and defendant filed motions for summary judgment. Following a hearing on the motions on 20 January 1978, the trial court denied plaintiff's motion and entered judgment for defendant. Plaintiff appeals.

Other facts necessary for this decision are summarized in the opinion below.

*Brenton D. Adams and Savage and Godfrey, by David I. Godfrey, for plaintiff appellant.*

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

MORRIS, Chief Judge.

The facts in this case are essentially undisputed. The affidavits filed in support of the parties' motions for summary judgment establish that in August or September of 1975, William R. Decker, Assistant Personnel Manager at Rockwell during the time in question, talked with William J. McCombie, then an agent of plaintiff, concerning Rockwell's need for a "systems analyst". Decker's affidavit indicated that he described Rockwell's needs as follows:

"4. I discussed with Mr. McCombie the fact that we needed someone with working knowledge of computer programming languages, preferably COBOL, BAL, Fortran, and Terminal Programming languages and operation. Also I indicated that the job called for a working knowledge of computers, computer peripherals and communication devices and techniques, with strong emphasis on the IBM 360 and 370 series and System/3."

These facts are undisputed. As a result of this conversation, McCombie contacted Greg Poupard, prepared a resume of his qualifications, and arranged an interview for Poupard with

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Rockwell. After the interview, it was determined by Decker and the manager of Rockwell's information systems that Poupard was not qualified for the job of "systems analyst". The job was offered to another applicant on 10 November 1975, but that applicant did not accept the employment with Rockwell. Not until 1 March 1976 was Rockwell able to fill the position available for a "systems analyst". In July of 1976, however, Poupard was employed by Rockwell as a "Materials Requirements Planning Engineer—Materials" in the Systems and Materials Requirements Planning Department. Defendant admits that it referred to the resume of Poupard, prepared in connection with Poupard's application for systems analyst, when it was seeking an applicant to fill the position of "Materials Requirements Planning Engineer" which had become available several months after Poupard's initial referral and interview.

[1] Plaintiff contends that he is entitled to compensation from defendant essentially because he was the procuring cause of defendant's employment of Poupard. See e.g., *Automated Personnel International of New Orleans, Inc. v. Thomas*, 293 So. 2d 669 (La. App. 1974); *H. B. Dawson's, Inc. v. Cherney*, 256 So. 2d 294 (La. App. 1971). Compare the contract in *Management Recruiters of New Orleans v. Brown*, 339 So. 2d 536 (La. App. 1976). Furthermore, in an analogy to traditional real estate brokerage contracts, plaintiff contends that he was entitled to his commission upon providing Rockwell with an applicant who was ready, willing, and able to fill the position as "systems analyst". The short answer to plaintiff's contentions is that he did not so contract. There is no doubt that plaintiff was free to negotiate a contract for services with defendant containing any terms to which the parties would assent. For example, plaintiff could have reached an agreement with Rockwell that compensation would be due plaintiff if he was the "procuring cause" of Poupard's employment. Such an agreement was reached in both *Automated Personnel v. Thomas* and *Dawson's v. Cherney*, *supra*. Similarly, as in *Peter L. Redburn, Inc. v. Alaska Airlines, Inc.*, 20 Wash. App. 315, 579 P. 2d 1354 (1978), plaintiff could have provided defendant with applicants on the condition that its fee would become due if the applicant referred by him was hired within one year from the date of reference, regardless of whether he was the procuring cause of such employment.

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The facts of this case indicate that the communications and actions *inter se* the parties were insufficient to create a contract either express or implied in fact. The communications between Decker and McCombie at best amounted to an offer by Rockwell for a unilateral contract. See discussion in *Automated Personnel v. Thomas, supra*. The offer is for a promise to pay for services in return for the performance of an act. The difficulty in this case centers around determining the precise act necessary for an effective acceptance of the offer. It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed. See *Morrison v. Parks*, 164 N.C. 197, 80 S.E. 2d 85 (1913). And when the offer so provides, it may be accepted by performing a specific act rather than by making a return promise. See *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970).

In our opinion, the conversations between Decker and McCombie amounted to an offer empowering Access to accept by providing Rockwell with an applicant which it would hire as a "systems analyst". Had Access so performed, we would find no difficulty in implying in fact an obligation on the part of Rockwell to pay for those services despite the absence of specific negotiations with respect to compensation. Nevertheless, by failing to provide an applicant which was hired by Rockwell as systems analyst, Access failed to make an effective acceptance of Rockwell's offer. Therefore, no contract was formed and Rockwell was not obligated by contract to compensate Access.

[2] Nevertheless, it is recognized in this State that when a party claiming under a contract alleges and proves acceptance of services and the value thereof, he generally may go to the jury on *quantum meruit*, the measure of any recovery to be the reasonable value of the services rendered by plaintiff and accepted by defendant. See *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Yates v. Body Co.*, 258 N.C. 16, 128 S.E. 2d 11 (1962); *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975). Plaintiff urges this Court that if no obligation is imposed upon Rockwell to pay for the services of Access in this case, employers would open the door to fraud upon employment agencies by regularly hiring applicants for jobs other than those for which they were referred. In this case, although plaintiff



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alleges no bad faith on the part of defendant, he suggests that the distinction between the position for which Poupard was referred and the position for which he was ultimately hired was a distinction without a difference. We cannot accept plaintiff's contention. The affidavit of Doug Garrett, Rockwell's current personnel manager makes apparent the fundamental differences in the experience and educational qualifications as well as the different job responsibilities for each position. Because these differences lie at the heart of this matter, we quote at length from Garrett's affidavit:

"6. The functions of the two jobs are substantially different. The general description of the Systems Analyst position is as follows: to be responsible, under the direction of the Supervisor of Information Systems, for the auditing, analyzing, planning, development, coordination, implementation and maintenance of business and technical systems. The general description of the Material Requirements Planning Engineer—Materials position is as follows: to perform activities contributing to the development, installation, and implementation of the Material Requirements Planning Systems under the management and direction of the Manager, Systems and MRP.

7. Insofar as educational background is concerned, one of the job requirements for the Systems Analyst job is that the applicant have, in addition to a Bachelor's degree, technical training in business application of computer processing. There is no such job requirements with respect to the Material Requirements Planning Engineer—Materials position.

8. There are also differences between the two types of jobs with respect to the salary range. The salary range for a Material Requirements Planning Engineer—Materials is from \$1,134.00 a month to \$1,701.00 per month. The range for a Systems Analyst, however, is from \$1,286.00 per month to \$1,929.00 per month. Thus, the Systems Analyst who is at the maximum salary range makes \$2,736.00 more per year than the Material Requirements Planning Engineer—Materials who is also at the maximum salary range. This difference in pay reflects a difference in the background duties and responsibilities of the two jobs.

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9. The person in the Systems Analyst job reports to the Supervisor of Information Systems Section whereas the person in the MRP job reports to the Manager, Systems and Material Requirements Planning. In addition to the difference between the two jobs with respect to the person to whom to report, there is a difference with respect to the supervisory responsibilities of the two jobs. The person in the MRP job does not supervise anyone, but the person in the Systems Analyst job coordinates Information Systems personnel.

10. Additionally, the Systems Analyst must have a working knowledge of computer programming languages, preferably COBOL, DAL, RPG II, Fortran and Terminal Programming Languages and Operation. Furthermore, the Systems Analyst must have a working knowledge of computers, computer peripherals and communication devices and techniques with strong emphasis on the IBM 360 and 370 series and System/3. There are not prerequisites for the MRP job.”

We reject any basis for recovery on the principles of *quantum meruit*. The burden rests upon plaintiff to show circumstances from which it may be inferred that the services were rendered and received with the mutual understanding that payment would be made for those services. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582 (1963). Plaintiff has produced no evidence from which it can be inferred that Rockwell understood that it would be obligated to pay Access even though Poupard was hired several months later for a different job.

We note that employment agency contracts and business opportunity broker contracts generally provide for compensation if the agency or broker is the procuring cause of the opportunity. See generally *Industrial Maintenance Cleaning Contractors, Inc. v. Sales Consultants of New Orleans, Inc.*, 342 So. 2d 377 (Ala. Civ. App. 1977); *Annot.*, 61 A.L.R. 3d 375 (1975). See also *Annot.*, 24 A.L.R. 3d 1160 (1969). However, merely because an agency has at some time brought an employer and employee together does not entitle the agency to a fee. Indeed, in *Automated Personnel International v. Thomas*, *supra*, a case similar to the case *sub judice* which arose in Louisiana, an applicant and agency entered into an express contract which obligated the applicant to pay a fee for “satisfactory employment procured.” That Court correctly

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stated, while concluding that the applicant was not required to pay a fee when he was hired as a data processing programmer four and one-half months after he was referred to the employer and interviewed for the position as personnel manager, that "a referring employment agency does not become the part-proprietor of either employer or employee". 293 So. 2d at 671. The following comments by that court are equally applicable to this case:

"The new employment came about because . . . the impression defendant made in person caused the employer later to remember him favorably for a [job requiring different qualifications].

The only connection plaintiff had with the employment is that it prompted the first interview . . . . This was not an acceptance of defendant's offer to pay a fee for procuring employment, but merely a nonproductive attempt towards acceptance." *Id.*

The reasoning in that case, although applying to an express contract, leads us to the conclusion that there also could be no recovery under *quantum meruit*. Because Poupard apparently made the personal impression that prompted Rockwell to seek his services when a job became available for someone with his qualifications, it cannot be said that Rockwell so benefited from the services of Access as to create an obligation implied at law to pay the fee, or to prompt the recognition of a quasi-contractual obligation because of any unjust enrichment of Rockwell.

For the foregoing reasons, the order of the trial court entering summary judgment in favor of defendant is

Affirmed.

Judges CLARK and ARNOLD concur.

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STATE OF NORTH CAROLINA v. WENDELL RONNIE BRANCH

No. 7816SC1148

(Filed 1 May 1979)

**1. Constitutional Law § 51— speedy trial—twenty-three months between arrest and trial—no prejudice to defendant shown**

Though a twenty-three month delay between defendant's arrest and trial, seventeen months elapsing after his request for a speedy trial was unduly long, and though defendant did not at any time waive his right to a speedy trial, defendant nevertheless failed to show that the prosecution's unexplained delay in bringing him to trial prejudiced him in his ability to present his defense so as to require dismissal of the charges against him, since the only evidence of prejudice was the unavailability of defendant's father to testify due to a stroke he had suffered, but there was no indication as to what the father's testimony would have been or how it would have related to defendant's defense.

**2. Criminal Law § 79— statements by co-conspirators—prior showing that conspiracy existed**

Once the State has established a prima facie showing of a conspiracy, then the acts or declarations of co-conspirators made in the course of and in furtherance of the conspiracy are admissible to identify others participating in the conspiracy; therefore, the trial court did not err in allowing various statements of defendant's co-conspirators into evidence against him after two persons had given testimony concerning the existence of the conspiracy, and the State had shown the involvement of the witness, whose statements tended to incriminate the defendant, in the conspiracy.

APPEAL by defendant from *Friday, Judge*. Judgment entered 3 August 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals on 27 March 1979.

Defendant was charged in a proper indictment with felonious conspiracy to steal 22,326 pounds of tobacco belonging to J. P. Taylor Tobacco Company, Inc., having a value of \$26,532.01, and a 1969 International Tractor and Trailer belonging to Carroll Transfer, Inc., having a value of \$17,000.00. Upon his plea of not guilty, the State presented evidence tending to show the following:

In August of 1976 Carroll Transfer, Inc., was an interstate trucking firm involved in the business of transporting, among other things, tobacco from tobacco warehouses in North Carolina to tobacco companies for processing. James Earl Roper was employed as a truck driver for Carroll Transfer. On 15 August

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1976, Roper was approached by James Watson, who sought his assistance in stealing a truckload of tobacco. Roper agreed to meet Watson at a truck stop in St. Pauls, North Carolina, on 19 August 1976 and turn over his tractor-trailer loaded with tobacco to Watson and others. Roper was to receive \$2,000 for his part in the transaction. Roper subsequently informed his employer and the State Bureau of Investigation of the contacts made by Watson and was instructed to cooperate with Watson. On 19 August 1976, Watson and James Thomas Jones rode to a farm in Hoke County leased by the defendant Branch. A discussion took place among the three men as to the best route to bring the tractor-trailer of tobacco onto the property. The defendant indicated that he would have some men remove a small tree that was an obstacle. They also discussed the best place to park the truck near an old abandoned farm house on the property where the tobacco was to be unloaded. The defendant indicated that he would get some men to clean out the house so that the tobacco could be put in it that night, and that Leno Locklear and some others would unload it from the truck that evening. The defendant was to pay Jones \$8,000 for the tobacco. Watson and Sidney Drakeford later returned to the farm in order that Drakeford would have correct directions. Drakeford left his car at the farm and accompanied Watson to the truck stop at St. Pauls. Roper drove the tractor-trailer of tobacco to the truck stop and was met there by Watson and Drakeford and was given \$100.00. Drakeford directed him to drive the truck toward Raeford, North Carolina, and once there to drive north on U. S. Highway 401. Roper was finally directed to the farm leased by the defendant Branch. Roper parked the truck near an abandoned house and gave the bills of lading to Drakeford.

Both Roper and the truck stop at St. Pauls were under SBI surveillance on 19 August 1976. The SBI had followed the truck using an airplane and a remote control light affixed to the top of the truck enabling it to be visible from the air. In addition a large number of SBI agents followed the truck using unmarked vehicles. When the agents arrived at the farm, the straps to the canvas securing the tobacco had been cut, but the truck had not been unloaded. The defendant Branch was subsequently arrested at the home of the parents of James Jones.

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The defendant offered evidence tending to show the following:

On 19 August 1976, defendant was the assistant principal of Scurlock Elementary School in Raeford, and also owned a small farm in Arabia where he farmed tobacco. The defendant lost his job because a load of tobacco had been found in the vicinity of a farm that he had rented, the SBI had arrested him and implicated him as being part of a conspiracy to steal a load of tobacco, and this was publicized in the newspapers. The defendant did not have any part in a conspiracy to steal the tobacco. The defendant knew James Jones, but did not know James Watson or Sidney Drakeford. On the night of 19 August 1976, the defendant was at a curing barn on the farm he leased, but had no knowledge that a tractor-trailer of tobacco had been driven onto the farm property. The defendant has had some business dealings with James Jones, relating to some repair work on a tractor.

The jury found defendant guilty on the felonious conspiracy count, and from a judgment entered on the verdict imposing a sentence of four to ten years, he appealed.

The facts necessary to an understanding of the speedy trial issue are contained in the following numbered paragraphs:

1. Defendant was arrested on 25 August 1976 upon a warrant charging him with felonious conspiracy to steal 22,000 pounds of tobacco and felonious larceny of the tobacco.

2. The preliminary hearing for the defendant was postponed twice by the State for reasons not appearing in the record, and on 23 September 1976, a preliminary hearing was held and defendant was bound over to Superior Court.

3. On 5 October 1976, Mr. Ben G. Floyd, Jr., the Clerk of Superior Court, sent a letter to defendant's counsel informing him that the case was calendared for arraignment and that a bill of indictment would not be returned by the Grand Jury until 11 October 1976. The defendant was served a notice to appear in court on 11 October 1976 for arraignment. On that date, defendant appeared in court with his counsel, but his case was not on the calendar.

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4. On 3 November 1976, defendant filed a motion for discovery seeking various information with regard to the State's case against him.

5. On 7 November 1976 and on 6 December 1976, defendant again appeared in court with counsel for arraignment but a bill of indictment had not yet been sent to the Grand Jury.

6. On 25 January 1977, defendant filed a written motion for a speedy trial, a copy of which was mailed to the district attorney.

7. On 1 July 1977, W. Allen Webster, who had represented Kenneth Jacobson, an alleged co-conspirator of the defendant, at the time of the probable cause hearing, became a member of the district attorney's staff.

8. On 10 October 1977, three true bills of indictment were returned by the Grand Jury charging the defendant with felonious conspiracy to steal 22,326 pounds of tobacco and a tractor-trailer truck, felonious larceny of the tobacco, and felonious larceny of the truck. From 23 September 1976 to 10 October 1977, there were 14 Sessions of Superior Court in Robeson County.

9. On 2 November 1977, defendant filed a motion for a bill of particulars and a motion to dismiss under G.S. § 15A-954 on the grounds that defendant had been denied his right to a speedy trial.

10. On 7 November 1977, a hearing was held before Judge Thomas H. Lee on defendant's various motions. Judge Lee denied the defendant's motion for a speedy trial in the following Order:

The Court finds and rules that a delay from August 25, 1976, until the present day is not such an unusual and undue delay so as to deprive the defendant of his Constitutional Right to a speedy trial under the Constitution of the United States and the Constitution of North Carolina. The Court further holds that the defendant herein has not carried the burden of establishing that the delay was due to the neglect or the willfulness of the prosecution. The Court holds, however, that the defendant has established that the delay has caused him great prejudice in his personal life and, therefore, the Court in its discretion, orders that the cases be tried during

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the next term of the Superior Court of Robeson County; that is the term—two week term beginning December the 12th, or be dismissed, unless otherwise continued by mutual agreement of the State and the defendant.

11. On 15 November 1977, defendant filed a motion for a special prosecutor on the grounds that W. Allen Webster, formerly counsel for one of defendant's alleged co-conspirators, was now on the district attorney's staff. On 18 November 1977, Judge Thomas H. Lee granted the defendant's motion.

12. On 15 July 1978, defendant's father suffered a stroke and became incapacitated to such an extent that he was unable to testify at trial.

13. On 31 July 1978, defendant's case came on for trial at a Special Term of the Superior Court of Robeson County. Prior to trial, defendant again made his motion to dismiss on the grounds that he had been denied his right to a speedy trial. Judge John R. Friday denied this motion in the following Order:

The Court is of the opinion that by the defendant having been on bond and having had an opportunity to adequately prepare his defense, I'm going to deny that motion to dismiss . . . [T]here was a stipulation by the State that the defendant's father was ill, but the defendant has testified that this serious illness has occurred within the last two weeks; that the defendant knew or had cause to know that this trial was docketed for the special term of Court and that no mention or no effort was made to preserve the father's testimony; that the Court allowed the defendant to testify that his father was critically ill before the Jury, and that was the reason for his absence. Therefore, the Court does not find that the defendant is prejudiced by the delay and will deny the motion.

14. Defendant was found guilty of felonious conspiracy and on 3 August 1978 a judgment was entered on the verdict imposing a prison sentence of four to ten years.

*Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.*

*James R. Nance, Jr., and John W. Campbell for defendant appellant.*



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HEDRICK, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss for failure of the State to grant him a speedy trial. The right of every person formally accused of a crime to a speedy and impartial trial is secured by the fundamental law of this State, *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965), and guaranteed by the Sixth Amendment to the federal constitution, made applicable to the states by the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978). In determining whether an accused has been denied his right to a speedy trial, the courts have weighed four factors: (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972); *State v. McKoy*, *supra*; *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976). Whether a speedy trial has been afforded depends on the circumstances of each particular case, and the burden is on the defendant who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. McKoy*, *supra*; *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

With regard to the length of the delay, the evidence in the present case discloses a delay of fourteen months from the time of defendant's arrest on 25 August 1976 to the time of his indictment on 10 October 1977. Eight days after defendant's motion to dismiss for lack of a speedy trial was denied, he filed a motion for a special prosecutor, and three days after this motion was filed it was granted. The record discloses that defendant's case was not called for trial until 31 July 1978, approximately nine months after his motion for a special prosecutor was granted. The length of the delay between defendant's arrest and trial, twenty three months, is unusual.

With regard to the second factor, the reason for the delay, the record contains little evidence of explanation. Ordinarily, the burden is on the defendant to show that the delay "was due to the wilful neglect of the prosecution and could have been avoided by a reasonable effort." *State v. McKoy*, 294 N.C. at 141-42, 240 S.E. 2d at 389. The courts of this State, however, have recognized

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an exception to this general rule where the defendant shows a long period of delay. Thus, in the present case, once the defendant showed a seventeen month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay. *See State v. Wright*, 290 N.C. at 51, 224 S.E. 2d at 628. In the present case, the State has failed to offer any explanation for the delay.

The record is also largely silent with regard to the third factor: waiver on the part of the defendant. The defendant made a motion for a speedy trial on 25 January 1977, some five months after his arrest and seven months prior to his indictment. The first hearing on defendant's motion for a speedy trial was on 7 November 1977, and resulted in its denial. Shortly thereafter defendant made a motion for a special prosecutor that was granted. There is no evidence that the defendant made any efforts to have his case called for trial during the nine months after his motion for a special prosecutor was granted. Nevertheless, we are of the opinion that the defendant did not at any time waive his right to a speedy trial.

The final counterbalancing factor is the fourth: prejudice to the defendant. At the first hearing on his motion to dismiss, the defendant presented evidence tending to show that he had lost his job as a result of the publicity surrounding his arrest. He did not present any evidence tending to show that he was prejudiced in his ability to prepare or present his defense. The record discloses that the defendant was free on a substantial bond during this period of time and was engaged in the business of farming. At a second hearing on his motion to dismiss, the only evidence presented of any prejudice was the unavailability of defendant's father to testify at trial due to a stroke suffered approximately two weeks earlier. The defendant testified at the second hearing that his father was with him on 19 August 1976, the night that the tractor-trailer was driven onto the farm the defendant leased. Presumably, defendant's father would have offered testimony to corroborate the testimony defendant gave at trial. There is nothing in the record, however, to indicate what testimony the witness would have given, or how the testimony would have related to his defense to the conspiracy charge. The burden is on an accused who asserts denial of a speedy trial to show that the delay has prejudiced him in his ability to defend

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himself, and prejudice will not be presumed merely upon a showing of a long period of delay. See *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). Balancing the above four factors, we think the defendant has failed to show that the prosecution's unexplained delay in bringing him to trial prejudiced him in his ability to present his defense so as to require dismissal of the charges against him.

[2] Defendant next contends that the trial court erred by allowing various witnesses to give hearsay evidence. Hearsay has been defined as testimony of an out-of-court statement offered to prove the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. McCormick on Evidence § 246, at 584 (2d ed. 1972). See also 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973). A careful examination of the numerous exceptions relied upon by the defendant reveals that none of the challenged testimony was excludable on the basis of hearsay since it either was not offered to prove the truth of the matters asserted therein, involved out-of-court statements made by the witness himself, or was offered for purposes of corroboration. No useful purpose would be served by further elaboration on these exceptions.

Defendant's final contention is that the trial court erred in allowing various statements of defendant's co-conspirators into evidence against him without the prosecution first offering evidence to show that he was also involved in the conspiracy. In *State v. Conrad*, 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969), the Court stated:

The general rule is that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) [they were made] while it was active, that is, after it was formed and before it ended. [Citations omitted.]

See also *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975).

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In the present case, the trial judge did not allow into evidence statements of co-conspirators against the defendant Branch until two persons had given testimony concerning the existence of the conspiracy, and the State had shown the involvement of the witness, whose statements tended to incriminate the defendant, in the conspiracy. It has been held that the testimony of a single co-conspirator is competent to establish the conspiracy, since it is seldom possible to show the existence of a conspiracy by direct proof. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Bindyke*, *supra*. Once the State has established a *prima facie* showing of a conspiracy, then the acts or declarations of co-conspirators made in the course of and in furtherance of the conspiracy are admissible to identify others participating in the conspiracy. Such was the situation in the present case.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and CARLTON concur.

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W. B. WOLFE AND RUTH WOLFE v. MR. AND MRS. CHARLES F. HEWES, T/A RUSTIC HILLS DEVELOPMENT CO., A PARTNERSHIP; AND HEWES BUILDING SUPPLY, INC.

No. 7827SC476

(Filed 1 May 1979)

**1. Partnership § 3— partner's lien as to partnership property—perfection upon dissolution**

Partners could not perfect their lien as to partnership property allegedly wrongfully applied until dissolution of the partnership. G.S. 59-69.

**2. Lis Pendens § 2— necessity for action affecting title to realty**

The trial court properly cancelled plaintiffs' notice of *lis pendens* where the complaint merely alleged a diversion of partnership assets without connecting the diversion with the property on which the notice was sought and thus failed to state a cause of action affecting the title to real property as required by G.S. 1-116(a)(1).

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**3. Laborers' and Materialmen's Liens § 3— partner's right to enforce lien—payment to partnership**

While a partner may enforce a lien for materials furnished by the partnership, there was no enforceable lien in this case where the record reveals that payment had been made to the partnership for the materials.

**4. Attorneys at Law § 4— testimony by former attorney—limitation to corroboration—harmless error**

The trial court erred in limiting the testimony of plaintiffs' former attorney to the purpose of corroboration, but such error was not prejudicial.

**5. Attorneys at Law § 4— erroneous exclusion of testimony by former attorney**

The trial court erred in excluding relevant testimony by plaintiffs' former attorney concerning an agreement with defendants' attorney on the ground that defendants' attorney was participating in the trial and could not testify without withdrawing as counsel, since counsel for defendants was aware of plaintiffs' intent to call their former attorney to the stand, and defendants' counsel should have withdrawn from the case if his testimony was desired.

**6. Partnership § 3— fraudulent use of partnership funds—sufficiency of evidence**

Plaintiffs' evidence was sufficient for the jury in an action based on defendants' alleged fraudulent use of partnership funds where it tended to show that a partnership existed between plaintiffs and defendants; partnership property was used in the construction of a house; defendants agreed to place the surplus proceeds from the sale of the house in an escrow account until the parties could reach an agreement regarding the partnership; and defendants instead placed the surplus proceeds in the bank account of a construction company in which plaintiffs had no interest.

APPEAL by plaintiffs from *Howell, Judge*. Judgment entered 15 February 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 1 March 1979.

Plaintiffs filed complaint alleging misuse of partnership assets by defendant Charles Hewes and a failure to account for partnership assets. Two weeks later, plaintiffs filed a purported notice of *lis pendens* on the property owned by defendants Mr. and Mrs. Charles F. Hewes (hereinafter referred to as defendants). Defendants filed answer admitting the existence of a partnership with plaintiffs in Rustic Hills Development Company but denying all other allegations. Defendants filed counterclaim alleging plaintiff W. B. Wolfe's failure to repay the partnership for expenditures in construction of his house, failure to pay a contractor's fee owing on the house in the amount of \$3,000.00, failure to pay a consultant's fee in the amount of \$5,000.00 for planning the Rustic Hills Subdivision project, and failure to pay

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\$25,000.00 owed to Hewes Construction Company for services performed for Rustic Hills Development Company. Defendants prayed for money judgment against plaintiff W. B. Wolfe and for an accounting of partnership properties and profits.

Plaintiffs filed a notice of lien on the following property:

“Full contents of Lot No. 38 of Section 2 of the Goodwill Acres Subdivision fully described by Deed recorded in the Gaston County Registry in Book 1166 at page 15 to which reference is hereby made for more complete description.’

‘Being the full contents of Lot No. 39 in Block two in the East Park Subdivision as per map in Plat Book 9 at page 31 and more fully described by Deed in Book 1200 at page 139 in the Gaston County Registry to which reference is hereby made.’”

They alleged that the above-described property was purchased by defendants with partnership funds. Plaintiffs also sought a lien on property owned by Woodrow F. Lay and wife, Loretta, alleging that partnership materials had been used in the construction of their dwelling. A subsequent lien was filed on property owned by defendants as tenants by the entirety seeking to have the property declared partnership property. Plaintiffs amended their complaint so as to allege defendants’ use of partnership funds to fraudulently acquire real estate, as tenants by entirety, fraudulent use of partnership funds, and fraudulent improvement with partnership funds of real estate owned by Mr. and Mrs. W. F. Eaker. Plaintiffs prayed for dissolution of the partnership.

The trial court ordered cancellation of the original notice of lien prior to a hearing of the case on its merits.

Plaintiffs’ evidence at trial tended to show the existence of a partnership in Hewes Building Supply between plaintiffs and defendants. At the conclusion of plaintiffs’ evidence, the trial court entered a directed verdict for defendants as to plaintiffs’ claim of fraud, found that an accounting had not been demanded, ordered a compulsory reference as to defendants’ counterclaim, and cancelled the remaining notices of *lis pendens*.

Plaintiffs appealed.

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*Basil L. Whitener, Hugh W. Johnston, and Anne M. Lamm, for plaintiff appellants.*

*Frank Patton Cooke, by Rob T. Wilder, for defendant appellees.*

ERWIN, Judge.

Plaintiffs assign as error the court's dismissal of their notices of liens and *lis pendens*. We affirm.

[1] It is well settled that each partner has the right to insist that partnership assets be applied in payment of partnership debts. *Casey v. Grantham*, 239 N.C. 121, 79 S.E. 2d 735 (1954). This right is sometimes loosely referred to as a partner's lien. Actually, the right is not, in fact, a lien as such, because it is equally well settled that a partner has no individual ownership in any specific assets of the firm. 1 J. Barrett & E. Seago, *Partners and Partnerships Law and Taxation* 193 (1956). The right, lien, quasi-lien or whatever else it may be called does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. *Casey v. Grantham, supra*; Lindley on Partnership, 10th Ed., p. 427. Such a lien based on fraud does not come into existence until actual dissolution occurs. See G.S. 59-69; 60 Am. Jur. 2d, Partnership, § 207, p. 119. Plaintiffs could not perfect their lien as to alleged partnership property pursuant to G.S. 7A-109 until the lien came into existence.

[2] Under G.S. 1-116(a)(1), notice of *lis pendens* can be filed against real property only in an action affecting its title. See G.S. 1-116(a)(1). To determine whether a complaint states a cause of action affecting title to real property, we must accept as true the factual averments of the complaint. *McGurk v. Moore*, 234 N.C. 248, 67 S.E. 2d 53 (1951). Plaintiffs' complaint fails to state a cause of action affecting the title to the real property covered by the notice. It merely alleges a diversion of partnership assets without connecting the diversion with the property on which the notice is sought. Cf. *McGurk v. Moore, supra*. As such, the complaint fails to state a cause of action affecting title to real property. See *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E. 2d 849 (1969). The amended complaint has the same defect. The trial court properly cancelled the notices of *lis pendens*.

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[3] Plaintiffs allege that they have a lien on the Lay's property, because the building materials were partnership property. A partner may enforce a mechanics lien for work done and furnished by the firm. 53 Am. Jur. 2d, Mechanics Lien, § 66, p. 577. However, the *prima facie* basis for such lien is *nonpayment*. Here the record clearly reveals that payment was made to the partnership. Thus, no lien existed which could be enforced. Moreover, if such lien had existed, plaintiffs' failure to file it within 120 days after the last furnishing of labor or materials at the site of the improvements would bar their claim. See G.S. 44A-12(b). The trial court properly dismissed plaintiffs' notice of *lis pendens* as to the Lay's real property.

Plaintiffs assign many evidentiary assignments of error. We have carefully examined them and find them all to be without merit except the ones treated below.

[4] The court's limitation of Mr. Gray's testimony solely for the purpose of corroborating the prior testimony was error.

A witness may testify as to anything he has apprehended by any of his five senses, when relevant to an issue. *State v. Fentress*, 230 N.C. 248, 52 S.E. 2d 795 (1949). Where a previous witness has testified directly to the same facts, the latter witness' testimony may be labeled "corroborative," but it is simply additional evidence of the fact in issue, and its admissibility is governed by general rules applicable to substantive evidence. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 49. Here, the testimony offered as substantive proof is not of a character so as to affect the verdict. Thus, the trial court's limitation of the evidence to corroborative purposes was not prejudicial error. *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965); 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 9.

[5] A more troublesome question is whether the trial court erred in excluding Mr. Gray's testimony regarding his agreement with Mr. Wilder to place money from the Gallagher Trails house in escrow.

The record reveals that plaintiffs and defendants agreed to place proceeds from the sale of the Gallagher Trails house and Rustic Hills house in escrow until the parties could reach an agreement regarding the partnership. It had been established



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that defendant Charles Hewes had failed to place the money in escrow as agreed. Mr. Gray's testimony was relevant, because it tended to prove or disprove a material fact in issue—the misuse of partnership funds. Unless excluded by some specific rule, his testimony was admissible. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 77.

The trial court excluded Mr. Gray's testimony stating:

“[I]’m not going to allow any testimony about any agreement between one attorney and another attorney when the other attorney is participating in the trial and cannot testify without withdrawing as counsel; and that being a matter not involving this lawsuit, but a matter involving other procedures relative to attorneys.”

The court was mistaken as to the relevancy of the testimony. Plaintiffs had amended their complaint to allege:

“4. That the defendants have fraudulently diverted partnership monies to their own use; that the defendants have fraudulently used partnership funds to acquire real estate which they have placed in their own names, as tenants by the entirety; that the defendants have fraudulently used partnership funds in improving real estate owned by them and by their parents, Mr. and Mrs. W. F. Eaker; that the defendants have fraudulently converted partnership monies to their own use and have seized control of all partnership assets and refuse to give the plaintiff a proper accounting thereof.”

Thus, the evidence offered was relevant to the allegations in the complaint. The court could properly have excluded the evidence if it would have been unduly prejudicial to defendants. However, the record reveals that Mr. Gray was originally co-counsel for plaintiffs in this action, that he withdrew as co-counsel, because he recognized the likelihood of the need of his testimony at trial, and counsel for defendants was aware of plaintiffs' intent to call Mr. Gray to the stand. Under these circumstances, defendants' counsel should have withdrawn from the case, and it was error to exclude Mr. Gray's testimony. However, not every error entitles the plaintiffs to a new trial. *Cf. Eaves v. Cox*, 203 N.C. 173, 165 S.E. 345 (1932) (exclusion of witness' testimony from jury's consideration prejudicial error). The trial court entered a directed

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verdict against plaintiffs on their claim of fraud. Only if the plaintiffs' evidence, when viewed as a whole, was sufficient to go to the jury would the error be prejudicial. See 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 9.

On defendants' motion for a directed verdict, the only question presented is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Cutts v. Casey*, 271 N.C. 165, 155 S.E. 2d 519 (1967); 11 Strong's N.C. Index 3d, Rules of Civil Procedure, § 50, p. 326. A directed verdict is proper only when as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff, *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971), and a plaintiff's evidence must be interpreted in the light of his allegations to the extent that the evidence is supported by the allegations. 12 Strong's N.C. Index 3d, Trial, § 21, p. 399.

[6] When viewed in the light most favorable to them, plaintiffs' evidence tends to show that a partnership existed between plaintiffs and defendants, that partnership property was used in the construction of the Gallagher Trails house, that defendant Charles Hewes agreed to place the surplus proceeds from the sale of the house in an escrow account, that instead defendant Hewes placed the surplus proceeds in the Hewes Construction Company's bank account, and that plaintiffs were not partners in Hewes Construction Company. As a partner in Hewes Building Supply, defendant Charles Hewes stood in a fiduciary relationship with plaintiffs. See *Casey v. Grantham*, *supra*. Where a fiduciary deals in an individual capacity with property under his control, fraud is presumed unless he proves that no fraud was practiced. 6 Strong's N.C. Index 3d, Fraud, § 12, pp. 336-37. Plaintiffs' evidence of fraud was sufficient to submit to the jury. Failure to so submit was prejudicial error. Accordingly, we hold that the court's compulsory reference of the Heweses' counterclaim and its order of accounting without first determining the validity of plaintiffs' claim of fraudulent conduct was error. Prior to determination of plaintiffs' claim of fraud, the partnership assets cannot be adequately ascertained.

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**State v. Jefferies and State v. Person**

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The orders cancelling the *lis pendens* are affirmed. The directed verdict entered by the trial court is reversed, and plaintiffs are awarded a new trial.

Judges VAUGHN and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. GRACIE JEFFERIES

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STATE OF NORTH CAROLINA v. CLINTES E. PERSON

No. 799SC46

(Filed 1 May 1979)

**1. Criminal Law § 92.1— two defendants—same crimes—consolidation proper**

Charges against two defendants were properly joined for trial under G.S. 15A-926(b) where each defendant was charged with thefts which apparently occurred in the same general area and during the same time span; the goods were all discovered in one defendant's vehicle in which the other defendant was also riding on the afternoon of the thefts; the defendants were seen together earlier in the afternoon of the same day at all three of the stores which were subsequently discovered to have been victims of shoplifting; and evidence admitted against one defendant was admissible against the other defendant and their defenses were not antagonistic.

**2. Searches and Seizures § 18— warrantless search of vehicle—consent given by owner—probable cause**

A warrantless search of one defendant's vehicle was constitutional where defendant, as the registered owner and person in control of the vehicle, consented to the search, and where the officer conducting the search had probable cause to believe that the vehicle contained stolen merchandise.

**3. Larceny § 9— felonious larceny—value of property not stated in verdict**

Where all of the evidence tended to show that merchandise stolen by defendants was valued at over \$200, the jury was not required by G.S. 15A-1237(a) to state in their verdict the value of the stolen property.

**4. Larceny § 7.8— merchandise taken from stores—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for felonious larceny where it tended to show that defendants were observed together in stores from which it was subsequently discovered that goods worth more than \$200 had been taken and the stolen merchandise was found later that same day in the car of one defendant, who was driving, and in which the second defendant was a passenger.

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**State v. Jefferies and State v. Person**

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APPEAL by defendants from *Hobgood, Judge*. Judgments entered 7 September 1978 in Superior Court, PERSON County. Heard in the Court of Appeals 5 April 1979.

Each defendant was charged in separate bills of indictment with felonious larceny of record albums from the Rose's store of Roxboro. Each defendant was also charged in separate warrants with misdemeanor larceny of 15 pairs of socks and two pairs of shoes from the Super Dollar store of Roxboro. Defendant Jefferies was additionally charged with the misdemeanor larceny of a radio from Western Auto store of Roxboro. Upon pleas of not guilty, the State offered evidence tending to show the following:

On 6 May 1978 the defendants were observed at the Super Dollar store in Roxboro by the manager, Sally Hall. The defendants were assisted at the shoe department and left shortly thereafter paying for a \$.57 paint brush. Defendant Person carried a nylon jacket in such a way as to suggest that something was under the jacket. Sally Hall followed the defendants out of the store and called the police from a shop near their car. It was subsequently determined that socks and shoes were missing from the store.

On the same day, the defendants were observed at the Western Auto store in Roxboro by Macy Evans, the owner of the store. A radio was subsequently determined to be missing.

Callie Watson, an employee of the Rose's store in charge of the verification procedure for all incoming record albums, saw the allegedly stolen albums first on 5 May 1978. He last saw them in the store on 6 May 1978 at approximately 10:30 a.m. The value of the albums was between \$430 and \$450.

On the afternoon of 6 May 1978, Sergeant Brann of the Roxboro Police Department conducted a search of defendant Person's vehicle. Defendant Person was the driver of the vehicle and defendant Jefferies was in the passenger seat. Steven Mann and Charles Blackwell were seated in the rear section of the vehicle. Sergeant Brann indicated to defendant Person that he was suspected of shoplifting and then asked the defendant Person if he could search the car. Defendant Person took the key from the ignition and opened the trunk. Inside the trunk, tools, thought to be burglary tools, and hypodermic syringes were discovered. In-

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side the car the following items were discovered: several pairs of pants, a bag containing a paint brush from Super Dollar store, three pairs of tennis shoes (one pair appearing to be new), 15 pairs of socks, hypodermic syringes, a carton opener with a razor blade in it, a carton of record albums bearing a sticker addressed to the Rose's store of Roxboro, and a radio. Also found was a receipt from Super Dollar store for a \$.59 paint brush and another receipt which was "an old receipt" that "had no bearing on the case." The car was subsequently taken to the police station and searched again, revealing more tools, "rolling paper" and a pipe.

Upon motion of the district attorney, and over defendants' objection, the cases against the defendants were consolidated for trial.

Defendants made a pretrial motion to suppress the evidence discovered as a result of the vehicular search. Their motion was overruled, the court finding that the search was with the consent of the owner of the car, and even if there were no consent, the search was lawful as based on probable cause.

Defendants offered evidence tending to show the following:

Charles Blackwell accompanied the defendants to Roxboro on 6 May 1978 from Durham. He testified that he stole the radio from Western Auto store, the socks and shoes from the Super Dollar store and the record albums from the Rose's store. He further testified that he was "not trying to take the rap" but "telling the truth of what happened."

The jury found the defendants guilty on all charges. From judgments imposing active sentences, defendants appealed.

*Attorney General Edmisten, by Special Deputy Attorney General Dennis P. Myers, for the State.*

*Ramsey, Hubbard & Galloway, by Mark Galloway, for defendant appellants.*

CARLTON, Judge.

[1] The defendants first assign as error the consolidation of the various charges against the defendants and the joinder of the defendants for trial. We find no error in the trial court's determination that such consolidation and joinder were proper.

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G.S. 15A-926(a) authorizes the joinder of offenses for trial "when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." G.S. 15A-926(b) authorizes joinder of defendants for trial as follows:

(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

(a) When each of the defendants is charged with accountability for each offense; or

(b) When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or
2. Were part of the same act or transaction; or
3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

The consolidation of the charges against the defendants was proper in this case as each defendant was charged with thefts which apparently occurred in the same general area and during the same time span. The goods were all discovered in defendant Person's vehicle in which defendant Jefferies was also riding on the afternoon of 6 May 1978. Defendant Jefferies was seen with defendant Person earlier in the afternoon of the same day at all three of the stores which were subsequently discovered to have been victims of shoplifting. The offenses were obviously "connected together" and part of a "single scheme or plan."

Evidence admitted against defendant Person was admissible against defendant Jefferies and their defenses were not antagonistic. Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. See *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed. 2d 573 (1977). The question of consolidation of charges is left to the discretion of the trial judge. See *State v.*

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**State v. Jefferies and State v. Person**

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*Greene*, 34 N.C. App. 149, 237 S.E. 2d 325 (1977), *aff'd*, 294 N.C. 418, 241 S.E. 2d 662 (1978). There has been no showing that the defendants were denied a fair trial as a result of the joinder. Therefore, the exercise of the court's discretion will not be disturbed on appeal. *State v. Smith, supra*.

Defendants were properly joined for trial under the provisions of G.S. 15A-926(b). Both defendants were charged with accountability for the two offenses of felonious larceny of the record albums and misdemeanor larceny of the socks and shoes. Furthermore, regardless of the fact that only defendant Jefferies was charged with misdemeanor larceny of the radio, the offenses charged were obviously part of "a common scheme or plan" and proof of one charge would be difficult to separate from proof of the others. For the reasons stated, we find that defendants were properly joined for trial and have shown no prejudice resulting therefrom.

[2] Defendants next assign as error the denial of their motion to suppress the introduction of evidence which resulted from the search of defendant Person's vehicle. Defendants contend that the vehicular search was illegal as an unreasonable search. We do not agree.

Either one of the two theories relied upon by the trial court would uphold the constitutionality of this vehicular search, *i.e.*, defendant Person, as the registered owner and person in control of the vehicle, consented to the search, and probable cause existed for Sergeant Brann's warrantless search. We find the search proper under both theories.

A warrantless search of a vehicle is justified where the officer has probable cause to believe that the search will reveal evidence pertaining to the crime. *See State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972). Sergeant Brann received information from his dispatcher concerning a vehicle believed to contain stolen merchandise. The license number of the vehicle was provided as was the name of the registered owner. The trial court, in this case, conducted a *voir dire* to determine the admissibility of evidence obtained from this search. The trial court found that Sergeant Brann had probable cause for the warrantless search of defendant Person's vehicle. The evidence from the record supports this finding of probable cause.

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State v. Jefferies and State v. Person

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Furthermore, the trial court found that the defendant Person consented to the search pursuant to G.S. 15A-221 and G.S. 15A-222. The testimony of Sergeant Brann supports the trial court's finding: "Then I asked if he would mind if I checked the car. He said that I would not find anything. Mr. Person got the key from the ignition and opened the trunk." Defendant Person was the registered owner of the vehicle and was also in apparent control of the vehicle at the time of the search. Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. See *State v. Faison*, 17 N.C. App. 200, 193 S.E. 2d 334 (1972).

We hold that the search of defendant Person's vehicle was conducted in accordance with constitutionally-recognized principles of both a search based on probable cause or a search conducted pursuant to consent by the owner of the vehicle. Evidence obtained as a result of this search was therefore admissible at the trial of the defendants.

[3] Defendants also assign as error the failure of the felonious larceny verdicts returned by the jury to establish the value of the record albums as exceeding \$200. We disagree.

The two relevant statutes are G.S. 14-72(a) and G.S. 15A-1237(a). G.S. 14-72(a) addresses misdemeanor larceny, but contains a *proviso* that "[i]n all cases of doubt the jury shall, in the verdict, fix the value of the property stolen." G.S. 15A-1237(a) provides in part that verdicts in criminal cases should be in writing, signed by the foreman and be included in the record.

G.S. 15A-1237(a) does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property as defendants contend. Furthermore, defendants concede that the trial judge in the case *sub judice* properly instructed the jury that they must believe the value of the property exceeded \$200 in order to return a verdict of guilty of felonious larceny.

G.S. 14-72(a) was interpreted in *State v. Brown*, 267 N.C. 189, 147 S.E. 2d 916 (1966). In that case, the indictment charged the larceny of property over \$200, the evidence adduced at trial amply supported the charge and there was no evidence to the contrary. Our Supreme Court held that under those circumstances it was not required that the jury find that the value of the property was in excess of \$200 in the verdict.



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**State v. Jefferies and State v. Person**

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In the instant case, both indictments returned against the defendants for larceny of the record albums placed the value at over \$200. The testimony of State's witness Watson indicated that the value of the albums was "between \$430 and \$450." No evidence was offered to the contrary by the defendants. We hold that the verdicts support the respective sentences imposed.

[4] Defendants' final assignment of error is that the trial court erred in failing to grant their motions for involuntary dismissal made at the close of State's evidence and again at the close of all the evidence. We treat defendants' motions for dismissal as motions for judgment of nonsuit. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977).

Defendants' motion, made at the close of the State's evidence, cannot be considered on this appeal as defendants subsequently introduced evidence thereby waiving their right to except on appeal to the denial of their motion. See *State v. Logan*, 25 N.C. App. 49, 212 S.E. 2d 236 (1975); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). Defendants' later exception to the denial of their motion made at the close of all the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971).

Viewing the evidence in the light most favorable to the State, we find that there is overwhelming evidence that the offenses charged have been committed and that defendants committed the offenses. Defendants' motion to nonsuit at the close of all the evidence was therefore properly overruled. See *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); 4 Strong, N.C. Index 3d, Criminal Law, § 106, p. 547.

We have reviewed defendants' remaining assignments of error and find that they are without merit. The defendants received a fair trial, free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

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Parrish v. Real Estate Licensing Board

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WILLIAM E. PARRISH v. NORTH CAROLINA REAL ESTATE LICENSING BOARD

No. 7810SC588

(Filed 1 May 1979)

**1. Brokers and Factors § 8— real estate broker—notice of statutory violations—insufficiency for suspension of license for violation of another statute**

Notice to a real estate broker that he was charged with violations of G.S. 93A-6(a)(1), making substantial and willful misrepresentations, and G.S. 93A-6(a)(10), improper, fraudulent or dishonest dealing, because of his failure to collect a \$1,000.00 earnest money deposit as required by a contract of sale was insufficient to support the suspension of his real estate broker's license for 90 days pursuant to G.S. 93A-6(a)(8) for being "unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public."

**2. Brokers and Factors § 8— real estate broker—failure to obtain earnest money—insufficiency to support conclusion he was "unworthy or incompetent"**

The finding that a real estate broker on a single occasion failed to obtain an earnest money deposit was insufficient to support the conclusion that he was "unworthy or incompetent" in violation of G.S. 93A-6(a)(8), especially where the sale of the property was assured from the time the property was offered for sale, and the seller suffered no loss as a result of the broker's failure to obtain the deposit.

APPEAL by plaintiff from *McLelland, Judge*. Order entered 10 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 26 March 1979.

This is a proceeding pursuant to G.S. 93A-6 before the North Carolina Real Estate Licensing Board (hereinafter referred to as Board), for the revocation of the real estate broker's license of the respondent.

The petitioner, Mabel M. Hartman, brought a complaint before the Board alleging that on 17 December 1976, the respondent made an offer to purchase petitioner's property in Knightdale for \$160,000.00 on behalf of J. C. Wheeler and Douglas Perry. Petitioner asked the respondent if he was also purchasing the property and he denied any involvement in the transaction other than as agent for the purchasers. Respondent received \$9,000.00 commission from the sale. Subsequently, the petitioner discovered that the respondent had purchased the property with Wheeler and Perry.

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Parrish v. Real Estate Licensing Board

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On 21 July 1977, the Board notified the respondent that a complaint had been filed and that the investigation tended to show that he had failed to disclose that he was purchasing the property and that he had failed to place \$1,000.00 in escrow as required by the contract of sale. The notice stated that the allegations, if true, would warrant the suspension or revocation of his license pursuant to G.S. 93A-6(a)(1), (4) and (10).

At hearing before the Board, the respondent admitted that he had failed to obtain the \$1,000.00 earnest money deposit, stating that it was an oversight. An order was entered in November 1977, finding that respondent failed to collect the \$1,000.00 earnest money deposit and concluded as a matter of law that Respondent had violated G.S. 93A-6(a)(8) as "[b]eing unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public," and suspended respondent's real estate license for 90 days.

The Board found that there was insufficient evidence of his failure to disclose his status as purchaser to support a finding of a violation of G.S. 93A-6(a)(1), (4) or (10).

Respondent appealed to the Superior Court from the order of the Board pursuant to G.S. 150A, Article 4. On 10 March 1978, the court entered an order which affirmed the decision of the Board.

From this order, respondent appeals.

*Attorney General Edmisten by Assistant Attorney General James E. Scarbrough for the State, appellee.*

*Smith, Debnam, Hibbert and Pahl by W. Thurston Debnam, Jr.; Lake and Nelson by I. Beverly Lake, Jr., for the plaintiff appellant.*

CLARK, Judge.

[1] The respondent first contends that the order of the Board was fatally defective and procedurally unlawful because it found respondent guilty of violating G.S. 93A-6(a)(8) when respondent was not notified that he was charged with violating that section of the statute.

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**Parrish v. Real Estate Licensing Board**

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The Board is an administrative agency subject to the requirements of Chapter 150A of the North Carolina General Statutes. G.S. 150A-23(b) provides that in contested cases:

“The parties shall be given a reasonable notice of the hearing, which notice shall include:

. . . .

(2) A reference to the particular sections of the statutes and rules involved; . . .”

The letter of 21 July 1977, which notified respondent of a hearing before the Board, set forth the following facts:

“(3) That sometime in December, 1976 you received a written offer to purchase the property wherein J. C. Wheeler and Douglas Y. Perry, as buyers, offered to pay a purchase price of \$160,000 and wherein it was represented that a \$1,000 was being tendered with the offer as an earnest money deposit.

(4) That you represented to the owners, Mr. and Mrs. Hartman, that you were neither a partner nor investor in the purchase.

(5) That the transaction was completed and closed on February 15, 1977 and the property was conveyed by the Hartmans.

(6) That you received a \$9,000 commission from the Hartmans.

(7) That you never received the \$1,000 earnest money deposit as represented in the sales contract; that you were a co-equal partner with J. C. Wheeler and Douglas Y. Perry in the purchase of said property; that you acted for yourself, J. C. Wheeler, and Douglas Y. Perry, as buyers; and that all of this was accomplished without the knowledge or consent of the Hartmans.”

The letter indicated that the stated facts, if found to be true would constitute violations of G.S. 93A-6(a)(1), (4) and (10). The letter, however, did not indicate that the respondent was also charged with a violation of G.S. 93A-6(a)(8) for failing to deposit \$1,000 in an escrow account.

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**Parrish v. Real Estate Licensing Board**

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G.S. 93A-6 which empowers the Board to revoke the license of a real estate broker or salesman is penal in nature. *Licensing Board v. Woodard*, 27 N.C. App. 398, 219 S.E. 2d 271, *cert. denied*, 288 N.C. 731, 220 S.E. 2d 621 (1975). In administrative proceedings, statutory procedures which are mandatory must be strictly followed, especially in proceedings that are penal in nature. 2 Am. Jur. 2d *Administrative Law* § 354 (1962). We must therefore strictly construe the notice requirements in G.S. 150A-23. In addition, in criminal proceedings, an "indictment must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense . . . ." 7 Strong's N.C. Index 3d *Indictment and Warrant* § 9.1. The same rationale is applicable in proceedings pursuant to G.S. 150A-23.

Respondent was notified that he was charged with violating G.S. 93A-6(a)(1), (4) and (10), which provide:

"(1) Making any substantial and willful misrepresentations,  
or

. . . .

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or

. . . .

(10) Any other conduct whether of the same or a different character from that hereinbefore specified which constitutes improper, fraudulent or dishonest dealing, . . ."

Section 4 is relevant only to the issue of whether the respondent had failed to inform the vendors of his status as purchaser of the property and provides no notice of charges relating to the respondent's failure to establish an escrow account. Sections (1) and (10) refer specifically to acts that are intentional or willful.

A defense to either of these statutory violations is that the respondent did not act intentionally but acted through oversight. There is no reference in either section to incompetence. Nor is there any statement in the notice which would indicate that the respondent's competency and ability as a real estate broker were in question. Therefore, the notice did not adequately apprise the

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Parrish v. Real Estate Licensing Board

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respondent of the charges against him so as to enable him to prepare his defense.

The Board contends that G.S. 93A-6(a)(8) is essentially a lesser included offense of the other violations, and, therefore, notice that respondent was charged with violations of G.S. 93A-6(a)(1) and (10) is sufficient to constitute notice of charges of incompetence. The test is whether the offense charged includes all the essential elements of the offense of which the defendant is convicted. *See* 7 Strong's N.C. Index 3d *Indictment and Warrant* § 18. G.S. 93A-6(a)(8) provides that a real estate broker's license may be revoked or suspended if he is "unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public . . ." This section requires findings on issues that are not included in the other sections. G.S. 93A-6(a)(1) and (10) do not raise any issues of respondent's worthiness or competency to act as a real estate agent or broker, or his ability to safeguard the interests of the public. Therefore, the appellee's contention that G.S. 93A-6(a)(8) is a lesser included offense of G.S. 93A-6(a)(1) and (10) is without merit.

[2] Further, assuming for the purposes of this discussion that the notice was sufficient, the facts do not support a finding that respondent violated G.S. 93A-6(a)(8) in that he was "unworthy or incompetent." The finding was based solely on respondent's admission that he had failed, through oversight, to obtain a \$1,000.00 earnest money deposit. There was no evidence that respondent had failed on any other occasion to obtain such deposit or that he was otherwise incapable of performing the duties of real estate broker. The evidence tends to show that the sale of the property was assured from the time it was offered for sale, and that complainant would suffer no loss as a result of respondent's failure to obtain the deposit. "Incompetency" is defined as, "Lack of ability, legal qualification, or fitness to discharge the required duty." *Black's Law Dictionary* 906 (4th ed. 1957). "Unworthy" is defined as, "Unbecoming, discreditable, not having suitable qualities or value." *Id.* at 1709. The finding that respondent on a single occasion failed to obtain an earnest money deposit is insufficient to support the conclusion that he was unworthy and incompetent in violation of G.S. 93A-6(a)(8).

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**Best v. Perry**

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The order appealed from is reversed and the cause remanded for vacation of the order of the North Carolina Real Estate Licensing Board.

Reversed and remanded.

Chief Judge MORRIS and Judge ARNOLD concur.

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PENNINA PEARL PERRY BEST v. WILLIAM EDWARD PERRY

No. 788SC637

(Filed 1 May 1979)

**Trusts § 16— alleged parol trust on land—no particular allegation of fraud—failure of complaint to state claim**

Where plaintiff and others executed and delivered a warranty deed conveying eight lots in fee simple to defendant but plaintiff contended that the conveyance was subject to a parol trust, the trial court properly found that plaintiff's complaint failed to state a claim upon which relief could be granted, since, in the absence of fraud or other ground for equitable relief, plaintiff could not impose a parol trust on the land for her benefit, and plaintiff's allegations did not state with any particularity any circumstance by which defendant fraudulently caused her to give him a warranty deed to the property in question.

APPEAL by plaintiff from *Allsbrook, Judge*. Judgment entered 9 May 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 30 March 1979.

The plaintiff instituted this action by filing a complaint against the defendant alleging that Anna Edwards Perry died intestate and was survived by four children including the plaintiff and the defendant. At the time of her death, Anna Edwards Perry was the owner of eight lots in Sunset Park Subdivision, Goldsboro, North Carolina. The plaintiff further alleged that shortly after the death of Anna Edwards Perry, "the heirs of Anna Edwards Perry agreed to convey their lands to William Perry as Trustee so that William Perry could borrow sufficient funds against said lands with which to purchase a steel vault in which to bury the said Anna Edwards Perry." Pursuant to their agreement, they executed and delivered a warranty deed to the

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defendant, a copy of which was made a part of the record on appeal. The plaintiff alleged that, at the time the warranty deed was executed, all parties understood that the property would be held in trust even though the deed was, on its face, a conveyance in fee simple. The defendant then obtained a loan of \$1,600 which was secured by a deed of trust to the eight lots.

The defendant later sold four of the lots, paid off the debt of \$1,600 and retained the balance of \$1,400. At no time did he distribute any portion of the proceeds to anyone else. Additionally, he remained in possession of the remaining four lots and refused to convey them to the plaintiff.

The plaintiff also alleged that she had performed valuable services for her mother prior to her mother's death. The plaintiff alleged that she had not been paid for performing those services for her mother, and that they were of a value of \$950.

The defendant answered and admitted that the heirs of Anna Edwards Perry had conveyed the eight lots in question to him. He denied that there was ever any trust agreement, however, and alleged that the conveyance to him was made in consideration of his promise to pay all of his mother's funeral expenses. The defendant additionally alleged that the four lots remaining in his possession had been owned by Anna Edwards Perry and her husband Charlie Perry as tenants by the entirety and passed upon her death to Charlie Perry as the survivor. For that reason, the defendant contended that the plaintiff had no interest in those lots. The defendant filed two affidavits in support of his allegations.

The defendant moved for judgment on the pleadings. After a hearing, the trial court found that the plaintiff's complaint failed to state a claim upon which relief could be granted. Upon that finding, the trial court granted the defendant's motion for judgment on the pleadings. The plaintiff appealed.

*Duke and Brown, by John E. Duke, for plaintiff appellant.*

*Merritt and Gaylor, by Cecil P. Merritt, for defendant appellee.*



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MITCHELL, Judge.

The plaintiff's sole contention on appeal is that the trial court erred in granting the defendant's motion for judgment on the pleadings. When matters not contained in the pleadings are presented to and not excluded by the trial court, a motion for judgment on the pleadings must be treated as a motion for summary judgment. G.S. 1A-1, Rule 12(c). The record before us indicates that affidavits were filed by the defendant with the trial court. The defendant's motion for judgment on the pleadings indicates that it is based "upon the pleadings and papers of record in the court file." The trial court's judgment indicates that it is based "Upon consideration of the pleadings, the arguments and other presentations by counsel." Additionally, the record before us does not at any point tend to indicate that the trial court excluded any matter or thing presented. As the record before us indicates that matters outside the pleadings were presented but does not indicate that such matters were excluded by the trial court, we must view the defendant's motion for judgment on the pleadings as though it had been a motion for summary judgment and determine whether judgment was correctly entered in accordance with the rules governing summary judgment.

The defendant's motion for summary judgment was properly granted in this case if the pleadings and affidavits presented to the trial court show that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The pleadings and affidavits in the present case reveal that the plaintiff and others executed and delivered a warranty deed conveying eight lots in fee simple to the defendant. The defendant does not deny such facts and they are not in dispute. However, the plaintiff alleges and the defendant denies that the conveyance was subject to a parol trust.

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 an 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

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N.C. 24, 209 S.E. 2d 795 (1974). Where, as here, the defendant presents a forecast of evidence tending to show 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.

Until the defending party has forecast evidence tending to establish 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 forecasts evidence which will be available to him at trial and which tends to establish 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 and which will tend 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 which will be available at trial to show that the defending party is not entitled to judgment as a matter of law, 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 facts by showing that no facts are in dispute. In the present case, however, the plaintiff alleges and the defendant denies that the conveyance was subject to a parol trust. Thus, an issue is presented with regard to a fact.

Even where, as here, an issue of fact arises, a party may show that it is not a genuine issue as to a material fact by showing that the party with the burden of proof in the action will not be able to present 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, the issue in the present case of whether the conveyance by the plaintiff and others to the defendant was subject to a parol trust is not a genuine issue as to a material fact if it can be shown that the plaintiff cannot present a forecast of substantial evidence which will be available to her at trial and which would allow that issue to be resolved in her favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

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It is well-established that "In the absence of fraud or other ground for equitable relief, a grantor may not impose a parol trust for his benefit on land which he conveys by deed purporting to vest title in the grantee. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548; *Schmidt v. Bryant*, 251 N.C. 838, 112 S.E. 2d 262; *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028." *Hodges v. Hodges*, 256 N.C. 536, 539, 124 S.E. 2d 524, 526 (1962). This result is necessitated not by the statute of frauds but by the parol evidence rule. *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909). The admission of parol evidence to establish the existence of a parol trust would contradict the terms of the plaintiff's warranty deed and directly violate the parol evidence rule. Therefore, in the absence of fraud or some other ground for equitable relief, the plaintiff in the present case will not be able to present evidence at trial to support the existence of a parol trust in her favor.

In her complaint, the plaintiff alleged "That the conduct of the defendant has been wilful, malicious, and in breach of faith, and in bad faith, and done with the intent to cheat, defraud, and deprive the plaintiff of her entitlement to lands and moneys from said lands which belonged to her deceased mother." Nevertheless, it is required that, "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." G.S. 1A-1, Rule 9(b). The plaintiff's allegations do not state with particularity any circumstance by which the defendant fraudulently caused the plaintiff to give him a warranty deed to the property in question. Therefore, the pleadings were insufficient to present a genuine issue as to whether the plaintiff's warranty deed was obtained by fraud.

The plaintiff additionally alleged that she had not recovered for valuable services she had rendered to her mother. The plaintiff has not alleged facts which would support a recovery of the value of those services from the defendant. As she has failed to allege any facts which, if true, would require the trial court to find that the defendant was personally indebted to her for the services she had rendered to her mother, the pleadings do not present a valid claim with regard to any such services.

As the pleadings and affidavits in the present case reveal that there is no genuine issue as to any material fact and that the

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defendant is entitled to judgment as a matter of law, the trial court properly allowed the defendant's motion for judgment in his favor. The judgment of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

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VAN HARRIS REALTY, INC. v. JAMES D. COFFEY AND WIFE, KAREN P. COFFEY

No. 7811DC648

(Filed 1 May 1979)

**Evidence § 32.2— written contract granting exclusive right to sell realty—parol evidence varying terms of contract**

Where a written contract gave plaintiff broker the exclusive right to sell certain real estate for defendants, the parol evidence rule rendered inadmissible evidence offered by defendants that the parties had agreed just before or simultaneously with the written contract that another broker also had the right to sell the property and that the broker who made the sale would receive the commission.

APPEAL by defendants from *Pridgen, Judge*. Judgment entered 27 February 1978 in District Court, LEE County. Heard in the Court of Appeals 3 April 1979.

Plaintiff filed this civil action alleging that defendants gave it a written exclusive right to sell certain real estate for defendants. Plaintiff further alleged that: It promptly undertook to sell the property and expended substantial time and money attempting to find a purchaser; prior to termination of their contract, defendants orally engaged Wayne Spivey, another real estate broker, to help sell their property; Wayne Spivey sold the property for defendants for \$59,000; defendants breached their contract with plaintiff and plaintiff has been damaged in the amount of \$2,950, being 5% of the purchase price as provided in the contract.

Defendants alleged as follows: That they signed a "non-exclusive" listing of their house with plaintiff; that Wayne Spivey also had the right to sell the house and that this was known to

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plaintiff at the time of the listing; that Wayne Spivey did sell the house for \$59,000 and therefore the plaintiff is not entitled to any commission; that they initially gave an "exclusive listing" to Wayne Spivey to sell the house but that plaintiff, through its president, pressured defendants to permit his company to list the residence for sale; that, at defendants' request, Wayne Spivey waived the exclusive sales agreement and both plaintiff and Wayne Spivey were, to the knowledge of each other, offering to sell the residence and each had the privilege of selling it; that the commission on the sale of the residence was to be paid to the seller of the real estate; that plaintiff at no time procured a ready, willing or able purchaser, nor did plaintiff perform or otherwise comply in good faith with the terms of the listing; that plaintiff is entitled to recover nothing of defendants.

At trial, plaintiffs introduced the written contract into evidence which was entitled, "EXCLUSIVE RIGHT TO SELL CONTRACT TO VAN HARRIS REALTY, INC." Plaintiff's president testified that he undertook to sell the property by advertising it and showing it to prospects. On cross-examination, the court ruled that the witness could not testify as to the conversation he and the male defendant had with respect to Spivey having the right to sell the property. In his answer, given for the record, plaintiff's president testified that the male defendant told him that Spivey was a good friend of his and had been attempting to sell the house for close to a year and had been unsuccessful. Further, that the male defendant would like for Spivey to be able to sell the house but that he explained to the male defendant that he was signing an exclusive right to sell to plaintiff and that plaintiff was the only company that could sell it. If Spivey wanted to continue to "show it" and if he were to have an offer on it, he could bring it to plaintiff and he would take it under advisement and would consider "co-brokering" the property with Spivey. This conversation took place before any signature was placed on the contract.

The male defendant then testified that he and his wife signed the contract with plaintiff but thereafter sold the house for \$59,500 and that they did not pay plaintiff any commission after the property was sold. The trial court then ruled that the witness could not testify as to any conversation between him and plaintiff's president which took place prior to the signing of the contract. In his answer, given for the record, the witness testified

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that he told plaintiff's president that he would sign the agreement if Spivey would have the right to sell the house also and that Spivey would get the commission if he sold the house and plaintiff would get the commission if it sold the house. The witness testified that plaintiff's president said "fine" and the papers were thereafter signed.

Wayne Spivey testified for the defendant that he sold the property and was not aware that plaintiff had any exclusive listing on the property. His understanding was that he received the commission if he sold the property and plaintiff received the commission if it sold the property.

The trial court entered findings of fact and conclusions of law in pertinent part as follows: That defendants had given plaintiff an exclusive right to sell the defendants' property and defendants were required to pay plaintiff the 5% commission if defendants' property was sold during the listing period irrespective of the party effectuating the sale; that the sale was in fact effected during the listing period and defendants are therefore liable to plaintiff for the full commission of 5% or \$2,975; that "defendants could not present evidence relating to conversations prior to or contemporaneous with the execution of plaintiff's Exhibit No. 1 [the contract] that tended to add to, vary, or contradict said exhibit, since to do so would contravene the Parol Evidence Rule."

Defendants appealed.

*J. D. Moretz, for plaintiff appellee.*

*Hoyle & Hoyle, by J. W. Hoyle, for defendant appellants.*

CARLTON, Judge.

Defendants' several assignments of error result in a single question presented by this appeal: Did the trial court properly apply the parol evidence rule to certain testimony proffered by the defendants?

Plaintiff introduced a written contract signed by defendants in which defendants gave plaintiff an exclusive right to sell certain real estate. Defendants thereafter attempted, through oral testimony, to prove an oral agreement between the parties entered into just before or simultaneously with the written con-

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tract which would establish a different understanding of the parties. The alleged oral agreement would establish that the true understanding between the parties was that another real estate broker had the right to sell the real estate for the defendants also and the broker who made the sale would receive the commission. The trial court properly excluded the testimony on the ground that it would "vary or contradict [the written agreement], and would contravene the Parol Evidence Rule."

The parol evidence rule, as frequently phrased, prohibits the admission of parol evidence to vary, add to, or contradict a written instrument. It is most often referred to as a rule of evidence but actually is one of substantive law. In substantive terms, the rule is stated as follows: "Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing." 2 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 251, p. 234.

There are numerous exceptions to the parol evidence rule. Stansbury, *supra*, § 252 *et seq.*; 6 Strong, N.C. Index 3d, Evidence, § 32, p. 88 *et seq.* Defendants argue that this action falls within one of those exceptions, to wit, that

parol evidence is admissible to show conditions precedent, which relate to the delivery or taking effect of the instrument, as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed. *Bailey v. Westmoreland*, 251 N.C. 843, 845, 112 S.E. 2d 517 (1960).

We do not believe defendants correctly perceive the exception stated in *Bailey*. There, in an action to recover a promissory note, the makers' evidence to the effect that they had signed and delivered the note upon the express condition that the same was not to become operative as a binding obligation unless the makers received a certain sum for the sale or collection of a particular note and that neither of these conditions occurred, was held admissible as not being violative of the parol evidence rule. This is sometimes referred to as the doctrine of "conditional delivery" and provides essentially that parol evidence may be introduced to

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show that the instrument was not to become legally effective until the happening of some condition precedent. *Stansbury, supra*, § 257.

Defendants cite various other cases in support of the conditional delivery doctrine. *Bailey* and other cases cited by defendants are, however, clearly distinguishable from the case *sub judice*. Those cases establish the proposition that parol evidence may be introduced to show a condition precedent which precludes the contract from becoming effective *until the condition happens*. Moreover, those conditions are not normally in contradiction with the written contract. Here, however, the proffered oral evidence would not have established a condition precedent which, until it happened, would have precluded the contract from becoming effective. Indeed, had the "happening" envisioned by the parol evidence in this case taken place, the contract would never have become effective. Moreover, the parol evidence in the case at bar is in direct contradiction to that in the written contract. The facts before us, therefore, clearly do not fit into the conditional delivery doctrine enunciated by *Bailey* and other cases.

We have examined the other exceptions to the parol evidence rule and find that none of them here apply. We concede that the decisions in this and other jurisdictions have not been wholly consistent in applying the parol evidence rule. However, the factual situation here presented involves parol evidence which directly contradicts the provisions of the written instrument. We believe the parol evidence rule evolved to lend stability to written contracts and prevent their upheaval in situations precisely like this.

For the reasons stated, we hold that the trial court properly excluded the proffered parol evidence and the decision of the lower court is therefore

Affirmed.

Judges PARKER and HEDRICK concur.



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**McAulliffe v. Wilson**

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THOMAS W. MCAULLIFFE v. MARJORIE ANN WILSON

No. 7826SC634

(Filed 1 May 1979)

**1. Banks and Banking § 4— joint account—ownership of funds—intent of parties**

It is well established in this jurisdiction that persons may contract among themselves for the creation of a joint interest in property (including monies in a bank account) with right of survivorship, and, nothing else appearing, money in the bank to the joint credit of two persons is presumed to belong one-half to each person; however, where a controversy arises as to ownership, the intent of the parties will be controlling, and evidence may be received to prove such intent.

**2. Banks and Banking § 4— joint account—wrongful withdrawal—intent in setting up account**

In an action to recover funds withdrawn by defendant from a joint savings account set up in both parties' names by defendant during the time that the parties were cohabiting, evidence was sufficient to support the trial court's conclusion that plaintiff set up the account solely for his convenience and at defendant's suggestion, and that defendant wrongfully took \$30,000 from the account, even though defendant's testimony raised an inference that plaintiff acknowledged his obligation to defendant and was promising to care for her by opening the joint account.

APPEAL by defendant from *Davis, Judge*. Judgment entered 30 March 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1979.

Plaintiff brought this action to recover \$30,000 in funds withdrawn by defendant from a joint savings account set up in both their names by plaintiff. Plaintiff alleged that defendant wrongfully converted the funds to her own use when she was not entitled to any of them, plaintiff having been the initial and only depositor to the account. Defendant denied that she had wrongfully converted the funds and asserted that she was entitled to them, both by virtue of the formation of the joint account and in *quantum meruit* for certain services rendered to plaintiff.

The evidence tended to show that defendant was the owner and operator of a dress shop in Charlotte, North Carolina, called the "Yum-Yum Tree." Plaintiff first met defendant at the "Yum-Yum Tree" in January of 1975, when a salesman from his automobile business was discussing trading cars with defendant. The relationship developed and by March of 1975 plaintiff and

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**McAulliffe v. Wilson**

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defendant began cohabiting on a regular and settled basis at plaintiff's home in Monroe, North Carolina. There is some evidence to indicate that from time to time plaintiff and defendant represented themselves as being man and wife, although their relationship was never accorded any such status in fact.

Plaintiff was the part-owner of an automobile dealership, the management of which interest appears to have been problematic for him. Defendant's "Yum-Yum Tree" was apparently fairly successful. Defendant testified that plaintiff sought her advice and counsel with reference to his financial matters. The record indicates that plaintiff procured several loans in not insubstantial amounts from defendant during the course of their involvement. Plaintiff denied that defendant gave him any financial advice. Plaintiff was without a driver's license at this time, owing to several convictions for driving under the influence of intoxicating beverages and thus often needed the services of a chauffeur. These services were provided by defendant as requested, including several extended trips out-of-state. Defendant, although continuing on a diminished basis her management of the "Yum-Yum Tree," freely bestowed her feminine favors and domestic services upon plaintiff, expending monies for plaintiff's as well as their mutual benefits.

In 1976, plaintiff sold his interest in the automobile dealership, and received net proceeds from the sale totalling \$115,000. Plaintiff deposited this sum on 16 September 1976, into a savings account set up as a joint account with right of survivorship. "T. W. McAulliffe" and "Mrs. Marjorie W. McAulliffe" were signatories for this joint account. The agreement creating the joint savings account signed by the parties provided as follows:

Date: 9/16/76

Account No. 3880022-8

(b) Membership of joint holders with right of survivorship of share account.

(1) McAulliffe, (Surname); Mr. T. (First Name); W. (Middle Name)

(2) McAulliffe, Mrs. Marjorie, W.

(3)

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**McAulliffe v. Wilson**

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The undersigned hereby applied for a membership and for a Opt. share account in the

NORTH CAROLINA SAVINGS AND LOAN ASSOCIATION and for the issuance of evidence of membership in the approved form in the joint names of the undersigned as joint tenants with the right of survivorship and not as tenants in common. Specimens of the signatures of the undersigned are shown below and the Association is hereby authorized to act without further inquiry in accordance with writings bearing any such signature; it being understood and agreed that any one of the undersigned who shall first act shall have power to act in all matters related to the membership and any share accounts in said Association held by the undersigned. The repurchase or redemption value of any such share account or other rights relating thereto may be paid or delivered in whole or in part to any one of the undersigned shall be a valid and sufficient release and discharge of said Association. And we do certify that we have each contracted and agreed with the other that the funds which may thereafter be invested in said account and not previously withdrawn, shall upon the death of either of us be the absolute property of the survivor. Membership in this Association is subject to the provisions of the Constitution and by-laws of this Association, which are hereby made a part of the application.

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(1) Signature	(2) Signature	(3) Signature
Rolling Hills Drive, Box 42-A Monroe, N. C. 28110		
(Address)		

Late in September of 1976, defendant began to have some apprehension as to her future and as to whether plaintiff would continue to care for her as she alleges he had promised. Therefore, defendant took the passbook to the joint account and withdrew \$30,000 from it and deposited it to her own use and account. This action on her part inaugurated a season of fractiousness between the parties culminating in the instant action. At trial, plaintiff was awarded a judgment of \$30,000 and \$1,000 attorney's fees, less certain set-offs for valuable services performed by defendant and monies due and owing to her. From this judgment, awarding plaintiff \$17,289.00 and \$1,000 attorney's fees, defendant appeals, assigning error.

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*Burns & Giordana, by William F. Burns, Jr., for the plaintiff.  
Don Davis, for the defendant.*

MARTIN (Robert M.), Judge.

The trial court, in its conclusions of law, stated that defendant "wrongfully took the sum of Thirty Thousand Dollars (\$30,000.00) from the plaintiff and that the plaintiff is entitled to be reimbursed for same and to recover interest thereon." We find this was correct. It was found by the trial court, and was not contested by plaintiff, that defendant performed a number of valuable services for plaintiff for which she was entitled to compensation. The value of these services was fixed by the trial court at \$12,711. We find this to be correct also, and affirm this portion of the trial court's order.

[1] It is well established in this jurisdiction that persons may contract among themselves for the creation of a joint interest in property (including monies in a bank account) with right of survivorship. *See Wilson County v. Wooten*, 251 N.C. 667, 111 S.E. 2d 875 (1959). It is also the rule in this jurisdiction that, nothing else appearing, money in the bank to the joint credit of two persons is presumed to belong one-half to each person. *See Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575 (1959). However, where a controversy arises as to ownership, the intent of the parties will be controlling, and evidence may be received to prove such intent. *See generally* 10 Am. Jur. 2d *Banks* § 374 (1963). In the instant case, there was evidence, uncontroverted, that a check made out to plaintiff was the sole deposit made to the joint account. The check represented proceeds from the sale of plaintiff's interest in the automobile dealership.

[2] The evidence received was sharply conflicting as to the intent of plaintiff in setting up the joint account. He testified that it was solely for his convenience and was done at defendant's suggestion. Defendant's testimony, on the other hand, raises an inference that plaintiff acknowledged his obligation to defendant and was promising to care for her by opening the joint account. When there are competing inferences arising from testimony of witnesses in a case, it is for the trier of fact to decide between them. The findings of fact by a trial court in a non-jury trial have the force and effect of a verdict by a jury and are conclusive

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**Coley v. Bank**

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on appeal if supported by competent evidence, even though the evidence might sustain findings to the contrary. *Henderson County v. Osteen*, 38 N.C. App. 199, 247 S.E. 2d 636 (1978). The wisdom of this rule is especially apparent in situations such as the one presented by the instant case where the cold record reveals testimony from each party that precisely contradicts that of the other, and the evidence of either party, if believed, would support a finding for that party. The trial court, having had the fullest opportunity to hear the testimony and observe the demeanor of the parties, to weigh any competent evidence either party cared to place before the court and arrive at appropriate conclusions as to the intent of the parties and the value of any services performed, should be accorded deference unless his findings and conclusions are manifestly unsupported by the record. The record before us supports the trial judge's findings and conclusions and the judgment based thereon will not be disturbed.

The award of attorney's fees to plaintiff presents another question, however. Plaintiff cites no authority to justify the award and candidly concedes that there is none. We find that the allowance of attorney's fees was erroneous, and accordingly reverse that portion of the trial court's order making the award to plaintiff.

The judgment of the trial court is accordingly affirmed in part and reversed in part.

Judges MITCHELL and WEBB concur.

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LARRY W. COLEY AND JUDY B. COLEY, HIS WIFE v. NORTH CAROLINA NATIONAL BANK; TOMMY J. WILLIAMS; CURTIS R. EUDY AND ELIZABETH W. EUDY, HIS WIFE

No. 7819SC672

(Filed 1 May 1979)

**1. Fraud § 9; Rules of Civil Procedure § 9—alleging acts constituting fraud with particularity**

An action against defendant bank for fraud was properly dismissed for failure of plaintiffs to state with particularity the circumstances constituting the alleged fraud where plaintiffs' complaint alleged that defendant bank,

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**Coley v. Bank**

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which made a home loan to plaintiffs, misrepresented that a material condition of the contract of sale of the home had been performed by the sellers and that plaintiffs reasonably relied on this misrepresentation to their detriment, but the complaint failed to allege specifically the individuals who made the misrepresentations and the time and place they were made. G.S. 1A-1, Rule 9(b).

**2. Rules of Civil Procedure § 12— motion to dismiss not converted into one for summary judgment**

Defendant's Rule 12(b)(6) motion to dismiss was not converted into one for summary judgment by the trial court's consideration of the contract which was the subject of the action and specifically referred to in the complaint.

APPEAL by plaintiffs from *Lupton, Judge*. Order entered 6 March 1978 in Superior Court, CABARRUS County. Heard in the Court of Appeals on 5 April 1979.

This is a civil action instituted on 8 December 1977 wherein plaintiffs have alleged that they were fraudulently induced by the defendants to purchase a new home. The specific allegations relevant to this appeal concern one of the defendants, North Carolina National Bank ("Bank"). In this regard, the complaint contained the following:

7. In February of 1977, the plaintiffs were living in a home in Rowan County, North Carolina, which was mortgaged to defendants, Liberty Financial Planning, Inc., and Concord-Kannapolis Savings & Loan Association, and were in the market for a home in the vicinity of Concord, North Carolina. The plaintiffs looked at a newly constructed home being advertised and offered for sale by the defendant, Tommy J. Williams, for the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife. The plaintiffs liked the appearance of the new home and explained to the defendant, Tommy J. Williams, that they could not purchase the new home and still remain responsible for the mortgage obligations on their old home. The defendant, Tommy J. Williams, proposed that the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife assume the obligations on the plaintiffs' old home and that the old home be traded in to the Eudys on the purchase of the new home on Burrage Road in Concord, North Carolina . . . [The parties] agreed and contracted on or about the 12th day of February, 1977, that the plaintiffs would purchase the new home from the [Eudys] on Burrage

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**Coley v. Bank**

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Road in Concord, North Carolina, and would trade in their home in Rowan County to the [Eudys] who would assume the mortgage indebtednesses on that home . . .

8. The defendant, Tommy J. Williams, suggested that the financing of this new home be obtained through the defendant, North Carolina National Bank. The defendant, North Carolina National Bank, was aware at all times that a condition of the plaintiffs' purchase of the new house from the Eudys and a condition of the plaintiffs' loan and repayment of the loan from the defendant, North Carolina National Bank, was that the two (2) mortgage indebtednesses on the home the plaintiffs were trading in would be assumed by the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife . . . It was a material condition of the contract between the parties that the [Eudys] would relieve the plaintiffs of their obligations to the mortgage holders on their home in Rowan County.

9. In order to induce the plaintiffs to purchase the house from the Eudys and to deed their Rowan County property to the Eudys and execute a promissory note to the defendant, North Carolina National Bank, and pay other loan fees to North Carolina National Bank, and in order for the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife, and defendant, Tommy J. Williams, to receive the sale price and other consideration for the new home from the money advanced by North Carolina National Bank in a loan to the plaintiffs, the defendants all (excepting Liberty Financial Planning, Inc., and Concord-Kannapolis Savings & Loan Association) materially misrepresented to the plaintiffs that the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife, had in fact performed a material condition of the contract. The misrepresentation was that the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife, had assumed the mortgage indebtednesses on the plaintiffs' home they traded in and had fixed the leaks in the basement and each of the defendants had full knowledge of the falsity of their misrepresentations or culpable ignorance of the truth of the misrepresentations and all had a fraudulent intent to deceive the plaintiffs and did in fact deceive the plaintiffs into believing . . . that the mortgage indebtednesses had been assumed

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by the Eudys when in fact they had not. . . . The misrepresentations of the defendants induced the plaintiffs to sign a deed for their Rowan County property to the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife, while in truth and in fact the defendants, Curtis R. Eudy and Elizabeth W. Eudy, his wife, never have nor at any time did they intend to assume the obligations owing on the mortgage indebtednesses or fix the leaks in the basement.

10. . . . The plaintiffs have lost sleep and suffered intense mental distress, anxiety and embarrassment all because of the fraudulent misrepresentations of the defendants that their obligations to Concord-Kannapolis Savings & Loan Association and Libery Financial Planning, Inc., had been assumed by the [Eudys].

11. The plaintiffs reasonably relied on the misrepresentations of the defendants and the plaintiffs never would have deeded their Rowan County home or purchased the new home but for the fraud of the defendants which induced them to do so. . . .

On 23 January 1978, the Bank, pursuant to G.S. § 1A-1, Rules 12(b)(6) and 9(b), filed a motion to dismiss "for failure of the Plaintiffs to state . . . with particularity the circumstances constituting the alleged fraud." On 6 March 1978, after a hearing, the trial judge entered an Order granting the Bank's motion to dismiss. Plaintiffs appealed.

*Wesley B. Grant for plaintiff appellants.*

*Berry, Bledsoe, Hogewood & Edwards, by Ashley L. Hogewood, Jr., and Jackie D. Drum, for defendant appellee North Carolina National Bank.*

HEDRICK, Judge.

[1] Plaintiff first contends that the court erred in granting the Bank's Rule 12(b)(6) motion to dismiss. Plaintiff argues that the complaint contains sufficiently detailed allegations of fact which, if proven, would establish fraud.

The essential elements of active fraud are well-established: There must be a misrepresentation of material



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fact, made with knowledge of its falsity and with intent to deceive, which the other party reasonably relies on to his deception and detriment. Equally well-established is the requirement that the plaintiff allege all material facts and circumstances constituting the fraud with particularity in the complaint. Mere generalities and conclusory allegations of fraud will not suffice. [Citations omitted.]

*Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E. 2d 833, 834-35 (1976). Under G.S. § 1A-1, Rule 9(b), however, "[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally." The pleader, however, must state with particularity the time, place and content of the false misrepresentation. 2A Moore's Federal Practice § 9.03, at 1924-28 (2d ed. 1978). Furthermore, the plaintiff must identify the particular individuals who dealt with him when he alleges that he was defrauded by a group or association of persons. *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757, 774-75 (D. Colo. 1964).

We think plaintiffs have failed to allege the circumstances constituting fraud with sufficient particularity, and that the trial judge properly granted defendant's Rule 12(b)(6) motion. At most, plaintiffs' complaint alleges that the Bank misrepresented that a material condition of the contract had been performed and that plaintiffs reasonably relied on this misrepresentation to their detriment. The fatal deficiency in plaintiffs' allegations is that the complaint contains no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations to the plaintiffs. The defendant North Carolina National Bank is a corporation; *ipso facto*, any fraudulent misrepresentations attributable to it would necessarily have been made by natural persons acting as its agents. It is not sufficient to conclusorily allege that a corporation made fraudulent misrepresentations; the pleader in such a situation must allege specifically the individuals who made the misrepresentations of material fact, the time the alleged misstatements were made, and the place or occasion at which they were made. It would be manifestly unfair to require a corporation to attempt to defend an action for fraud without being informed as to which of its officers, agents, or employees purportedly made the misrepresentations, as well as to all of the facts and circumstances surrounding the

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transaction. Because no such facts are alleged in the plaintiffs' complaint, it was properly dismissed for failure to state a claim upon which relief may be granted.

[2] Plaintiffs next contend that the court erred by considering materials outside the pleadings in ruling on the motion to dismiss without giving them a reasonable time in which to present additional materials in support of their position. The outside material objected to was the written contract obligating the Eudys to assume the mortgage on the plaintiffs' Rowan County house, which contract was referred to in the complaint.

Rule 12(b) provides in pertinent part:

If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

We do not think that defendant's Rule 12(b)(6) motion to dismiss was converted into one for summary judgment by the trial court's referring to the contract which was the subject of the action and specifically referred to in the complaint. The obvious purpose of the above quoted provision contained in Rule 12(b) is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings. In the present case these factors are conspicuously absent. Certainly the plaintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint. Furthermore, by considering the contract, the trial judge did not expand the hearing to include any new or different matters. No prejudice could have resulted to the plaintiffs from the trial judge's actions in any event, as the complaint was

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dismissed for failure to state with particularity the circumstances of the alleged fraud. This assignment of error has no merit.

For the reasons stated above, the Order dismissing defendant North Carolina National Bank is affirmed.

Affirmed.

Judges PARKER and CARLTON concur.

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VERNON LYNCH, EMPLOYEE v. M. B. KAHN CONSTRUCTION COMPANY,  
EMPLOYER, SELF-INSURED

No. 7710IC952

(Filed 1 May 1979)

**Master and Servant § 85.3— workmen's compensation—review and amendment of award—commission's discretionary powers**

Giving the language of G.S. 97-85 the liberal construction to which it is entitled, the Court holds that the powers which are granted therein to the full Industrial Commission to "review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award," are plenary powers to be exercised in the sound discretion of the Commission; specifically, whether "good ground be shown therefor" in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion.

ON writ of certiorari to review order of the North Carolina Industrial Commission entered 11 August 1977. Heard in the Court of Appeals 24 August 1978.

This is a proceeding under the Workmen's Compensation Act to recover benefits for injury by accident which occurred on 1 March 1973 when plaintiff slipped and fell while working as a carpenter for the defendant on a construction project in Rocky Mount, N.C. Hearings were held before Deputy Commissioners on 21 May 1976, 22 September 1976, and 17 March 1977 at which plaintiff presented evidence to show that while working on the job on 1 March 1973 he slipped and fell, striking his right hip on a 4 x 4 piece of timber. At first he did not think he had been hurt

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by the fall, and he did not report it to his foreman until 5 March 1973. Later, he suffered pain for which he was treated some two weeks after the accident by Dr. Armstrong in Nashville, who gave him pills and a shot in his right hip. Plaintiff continued to work for defendant until 8 May 1973, when he was admitted to Nash General Hospital under the care of Dr. Cleaver, who placed his right leg in traction. He did not get relief from this treatment, and on 22 May 1973 he went to Duke University Medical Center, where Dr. Guy L. Odom operated on him to remove a ruptured disc. Dr. Odom testified that he continued to treat plaintiff and that in his opinion plaintiff reached maximum improvement by 13 December 1973 with a 20 per cent permanent partial disability.

The deputy hearing commissioner sustained objections by defendant's counsel to two questions asked of Dr. Odom as to whether the witness had an opinion satisfactory to himself "as to what caused" the condition of which plaintiff complained. Dr. Odom then went on to testify that plaintiff's condition "could easily have been caused by other factors other than a fall or a blow or something like that. You can just wake up in the morning and there it is without any precipitating incident, injury, or other difficulty."

Defendant presented evidence to show that plaintiff continued to work for about eleven weeks after 1 March 1973 and that plaintiff did not report his injury to defendant in writing until February, 1974.

On 20 April 1977 Deputy Commissioner Delbridge filed his opinion and award finding that plaintiff sustained an injury by accident arising out of and in the course of his employment on 1 March 1973 by reason of which he was entitled to compensation for temporary total disability from 8 May 1973 to 13 December 1973 and for 20 percent permanent partial disability of the back for a period of sixty weeks. On appeal by the employer, the Full Commission on its own motion on 11 August 1977 ordered "that this case be remanded and placed on the Durham Docket to take additional medical testimony concerning the causal connection only," and directed that "[u]pon completion of this testimony, the case shall be referred back to the Full Commission for an Opinion and Award."

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From the order of the Full Commission defendant gave notice of appeal to the Court of Appeals and subsequently filed with this Court its petition for writ of certiorari to review the Commission's order.

*Banzet & Banzet and Lewis Alston Thompson for plaintiff.*

*Hedrick, Parham, Helms, Kellam & Feerick by J. A. Gardner III for defendant.*

PARKER, Judge.

No appeal lies from an interlocutory order of the North Carolina Industrial Commission. *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 245 S.E. 2d 892 (1978). Only from a final order or decision of the Industrial Commission is there an appeal of right to this Court. G.S. 7A-29; G.S. 97-86. No final order or decision of the Commission has yet been entered in this case, and defendant's attempted appeal from the Commission's interlocutory order is dismissed. Nevertheless, in order that we may pass upon the question which defendant seeks to present concerning the extent of the Full Commission's power to receive further evidence in a compensation case after an award has been entered by a single commissioner or a deputy commissioner, we grant defendant's petition for writ of certiorari.

Insofar as pertinent to the question here presented, G.S. 97-85 provides:

If application is made to the Commission within 15 days from the date when notice of the award [made by a commissioner or deputy commissioner pursuant to G.S. 97-84] shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . .

Defendant contends that the Commission in the present case exceeded the power granted it by G.S. 97-85 to "receive further evidence" in that here no "good ground" has been shown therefor. More particularly, defendant contends that plaintiff failed, after three hearings, to present any competent medical evidence to establish a causal connection between the accident which occurred on 1 March 1973, when he fell and struck his right hip, and

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his ruptured intervertebral disc, which Dr. Odom removed and which caused plaintiff's disability. From this, defendant argues that the plaintiff, who had the burden of proof, simply failed to present sufficient evidence to establish a compensable claim, and defendant contends that the "good ground" which G.S. 97-85 requires to be shown before the Commission may "receive further evidence" means something more than the mere failure of a claimant to make out his case after he has had a fair opportunity to do so. For these reasons, defendant contends that the Commission exceeded its powers in remanding the case for further testimony and that it should have simply reversed the deputy commissioner's award as being unsupported by competent evidence. We do not agree.

It is axiomatic that the Workmen's Compensation Act should be liberally construed to achieve its purpose of providing compensation to employees injured by accident arising out of and in the course of their employment and that its benefits should not be denied by a technical or narrow construction of its language. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968). Consistent with this approach, we have held that procedurally "[t]he strict rules applicable to ordinary civil actions are not appropriate in proceedings under the Act." *Conklin v. Freight Lines*, 27 N.C. App. 260, 261, 218 S.E. 2d 484, 485 (1975). In that case we affirmed an order of the Industrial Commission which, after making an award of partial benefits, retained jurisdiction in order to give the claimant a second chance to prove his case for additional benefits. We have also held that the Commission, upon appeal to it from an opinion and award of the hearing commissioner, had the discretionary authority to receive further evidence regardless of whether it was newly discovered evidence. *Lewallen v. Upholstery Co.*, 27 N.C. App. 652, 219 S.E. 2d 798 (1975); *Harris v. Construction Co.*, 10 N.C. App. 413, 179 S.E. 2d 148 (1971).

We now hold that, giving the language of G.S. 97-85 the liberal construction to which it is entitled, the powers which are granted therein to the full Commission to "review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award," are plenary powers to be exercised in the sound discretion of the Commission. Specific-

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ly, we hold that whether "good ground be shown therefore" in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion. Clearly, no manifest abuse of the Commission's discretion has been shown in the present case.

The Commission's order in this case is

Affirmed.

Judges CLARK and ERWIN concur.

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GEORGE ROBERT BELL, PETITIONER v. EDWARD L. POWELL, COMMISSIONER OF  
MOTOR VEHICLES OF NORTH CAROLINA AND THE DEPARTMENT OF MOTOR  
VEHICLES, RESPONDENT

No. 786SC712

(Filed 1 May 1979)

**Automobiles § 2.4— willful refusal to take breathalyzer test**

Petitioner willfully refused to submit to a breathalyzer test where he submitted to the test initially but failed to give a sufficient breath sample to get an accurate reading; petitioner was given two additional opportunities to complete the test but refused to give another breath sample; the breathalyzer operator, after having waited more than thirty minutes after he advised petitioner of his rights, disassembled the breathalyzer machine in petitioner's presence; and petitioner then requested to submit to the test after the machine was disassembled.

APPEAL by petitioner from *Rouse, Judge*. Judgment entered 8 May 1977 in Superior Court, HERTFORD County. Heard in the Court of Appeals 25 April 1979.

Petitioner was arrested on 6 September 1976 for operating a motor vehicle on Highway 461 in Hertford County, while under the influence of intoxicating liquor. Later respondent received an order of revocation of his driver's license for failure to take the breathalyzer test; he requested and was granted an administrative review by a hearing officer of the Division of Motor Vehicles; this hearing officer entered an order affirming the action of the Division of Motor Vehicles in ordering the petitioner's driver's license revoked for six months. Petitioner sought a

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review by the Superior Court; after hearing the evidence, Judge Rouse affirmed the revocation order complained of by petitioner and dissolved all restraining or stay orders that had been entered in the case. Petitioner appealed.

*Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill and Deputy Attorney General William W. Melvin, for the State.*

*Carter W. Jones and Ralph G. Willey III, for petitioner appellant.*

ERWIN, Judge.

Petitioner was placed under arrest by Highway Patrolman Price and charged with the offense of operating his motor vehicle on a public highway while under the influence of intoxicating liquor. Petitioner was requested to take a breathalyzer test. At the time the test was administered, the operator deemed the breath sample given by petitioner was insufficient; petitioner was advised that the small amount of air was just enough to turn the green light on the breathalyzer and was not enough to get an accurate reading. Petitioner refused to give another sample so that he could be properly tested.

The question for our determination on the record is: Did the petitioner willfully refuse to submit to a breathalyzer test? We answer, "Yes," and affirm the trial court.

G.S. 20-16.2(c) provides:

"(c) The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). If the person arrested willfully refuses to submit to the chemical test designated by the arresting officer, none shall be given. However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for a period of six months."



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Petitioner contends that he could not have willfully refused to take the test since the petitioner blew into the instrument as required by Trooper Highsmith, and after the test was completed and the breathalyzer sample was declared insufficient for analysis, the trooper again failed to explain to petitioner what was required of him and what was wrong with the sample actually submitted by him.

Patrolman Price testified:

"[W]hen the breathalyzer test was offered to him, he gave a very small amount of air. It was just enough to turn the green light on, and Trooper Highsmith requested him or advised him that his was not a sufficient sample to get an accurate reading. He wouldn't do anymore and wouldn't blow anymore and so Trooper Highsmith told him it would be a refusal if he didn't give a sufficient sample, and he took the machine down. He was putting the machine back up and had taken the chemicals out, and he said, (the petitioner), 'Well, let me take it again.' Trooper Highsmith had already taken the machine down, and he said, 'No, I have already taken it down, and you had a chance to take it on two or three occasions when I asked you to take it and you wouldn't do it.'"

Patrolman Highsmith testified:

"At that time I told him it was not a sufficient amount to run the test and he said, 'That is all you are going to get. I beat the machine before and I will beat it this time.' I said, 'Mr. Bell, you will have to blow deep lung air into the machine.' He then said, 'I will not blow anymore.' I said, 'If you don't blow I will have to call it a refusal.' This I did. I had the machine ready and had checked the list for administering the test. I ran the check list but not in its entirety. I made sure it was running properly. It was a new sample in the chamber and I sterilized the chamber and checked it all. I requested that he submit two or three times to the test after it operated correctly. After I advised him it would be considered a refusal I disassembled the machine.

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[I] am instructed as a breathalyzer operator to determine what is a sufficient sample by long deep breaths to obtain the

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breath that is deep in the lungs. . . . Without deep air you cannot run an accurate test. In breathalyzer training I was instructed that air in the chamber would make the green light come on. I asked him to blow again until I was sure there was enough deep lung sample of air."

Respondent testified: "Mr. Highsmith read me my rights and I called my brother-in-law, Robert Jenkins, who is an attorney. I asked him to come down and he got there after I had already left. He was not present when the test was given."

The trial court found the following facts:

"That the petitioner submitted to the test initially but failed to provide an adequate sample of breath for analysis.

That the petitioner was given two additional opportunities to satisfactorily complete the breathalyzer test and, on each occasion, refused to so cooperate.

That Trooper Highsmith, having offered the breathalyzer test to the petitioner on three occasions and having waited an excess of 30 minutes after advising the petitioner of his rights, disassembled the instrument in the presence of the petitioner and marked the petitioner as having refused the test. That the petitioner requested an opportunity to submit to the test after Trooper Highsmith had disassembled the instrument in his presence.

From the foregoing facts, the Court concludes that the petitioner willfully refused to take a chemical test of breath in violation of law and the order of the respondent complained of is justified in fact and in law."

Our Supreme Court stated the following in *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 235, 182 S.E. 2d 553, 559, *reh. denied*, 279 N.C. 397, 183 S.E. 2d 241 (1971):

"[A] license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked. However, once issued, a license is of substantial value to the holder and may be revoked or suspended only in the manner

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and for the causes specified by statute. *Harrell v. Scheidt, Com'r of Motor Vehicles, supra; Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 84 S.E. 2d 259; *In re Revocation of License of Wright, supra.*"

We hold that the full import of G.S. 20-16.2(c) requires an operator of a motor vehicle, who has been charged with the offense of driving under the influence of intoxicating liquor, to take a breathalyzer test, which means the person to be tested must follow the instructions of the breathalyzer operator. A failure to follow such instruction, as the petitioner did in this event, provided an adequate basis for the trial court to conclude that petitioner willfully refused to take a chemical test of breath in violation of law.

The purpose of administering the breathalyzer test is to produce an accurate result. This is important for the operator of the motor vehicle as well as the State. To administer this test without producing the required result, would render the Act of the General Assembly useless. This, we are not willing to do. Where the findings and conclusions of the trial court are supported by competent evidence, as here, they are conclusive on appeal and must be upheld. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974), and *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971).

Judgment affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

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JUANITA P. BARDEN v. METROPOLITAN LIFE INSURANCE COMPANY,  
AND MARY DUNCAN MAULTSBY BARDEN

No. 7810SC647

(Filed 1 May 1979)

**Insurance § 29.1— life insurance—right to change beneficiary contracted away**

The insured could and did contract away his right to designate the beneficiary of a life insurance policy issued to himself when he signed a separation agreement with his first wife which included a provision that he would transfer all incidents of ownership on the policy, including the right to change

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the beneficiary, to the first wife, and insured's attempt thereafter to change the beneficiary by filing a form with the insurance company was of no force and effect.

APPEAL by defendant Mary Duncan Maulsby Barden from *McLelland, Judge*. Judgment entered 19 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals on 3 April 1979.

This is a civil action wherein plaintiff seeks to recover the proceeds of a group life insurance policy issued to her former husband, Heywood L. Barden. Defendant Mary Duncan Maulsby Barden answered, denying the material allegations of the complaint, and further alleged that she is entitled to the proceeds of the policy in question by virtue of the provisions of 5 U.S.C. § 8705(a). Defendant Metropolitan Life answered admitting that the insured filed a designation of beneficiary dated 23 September 1968 naming the plaintiff as beneficiary and also filed a designation form on 14 November 1975 naming the defendant, Mary Barden, beneficiary. Metropolitan Life further moved for Order of interpleader and alleged that it was prepared to pay the insurance proceeds and accrued interest into the Court. On 16 September 1977, the trial judge granted the defendant Metropolitan Life's interpleader motion, and ordered that it be dismissed from the lawsuit upon paying the moneys in question to the Clerk of Court.

The facts of this case are not controverted. Heywood L. Barden was the insured under a Federal Employee's Group Life Insurance policy issued by Metropolitan Life Insurance Company. On 23 September 1968, the insured filed with Metropolitan Life a form designating the plaintiff, Juanita P. Barden, as the beneficiary under the policy. On 1 August 1970, the insured entered into a separation agreement with the plaintiff. One of the provisions of the separation agreement is as follows:

10. The party of the first part [Heywood L. Barden] covenants and agrees that he will continue in effect and in force and pay the premiums on the life insurance policies which he now has including the policies with Metropolitan Life and the Veterans Administration. The party of the first part agrees that he will transfer to the party of the second

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part [Juanita Barden] all the incidents of ownership on said policies, such as the right to designate the beneficiary of the said policies. The party of the first part further covenants and agrees that he will continue to designate the party of the second part as beneficiary of the Group Life Insurance Policy provided by the U.S. Government as part of his employment and retirement benefits.

On 2 June 1975, Heywood L. Barden was divorced from the plaintiff. The insured was subsequently married to the defendant, Mary Barden. On 14 November 1975, he filed with Metropolitan Life a second form designating Mary Barden as the beneficiary under the policy in question. On 24 January 1977, Heywood Barden died.

Both parties moved for summary judgment. On 19 May 1978, the trial court entered a summary judgment in the amount of \$18,688.71, the amount of the insurance proceeds and accrued interest, in favor of the plaintiff. Defendant appealed.

*Boyce, Mitchell, Burns & Smith, by Eugene Boyce and Robert Smith, for plaintiff appellee.*

*Lester G. Carter, Jr., and Williford, Person & Canady, by N. H. Person, for defendant appellant.*

HEDRICK, Judge.

Since there exists no genuine issue as to any material fact, the one question presented by this appeal is whether the plaintiff was entitled to a summary judgment as a matter of law. Defendant argues that she is entitled to the insurance proceeds as a matter of law by virtue of 5 U.S.C. § 8705(a), which, in pertinent part, provides:

The amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order or precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office . . . For this purpose, a

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designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.

We think that this statute does not entitle the defendant to the insurance proceeds. The cited statute establishes a priority scheme for payment and provides that "a designation, change, or cancellation of beneficiary" to be effective as such, must be made "in a signed and witnessed writing received before death in the employing office." This portion of the statute provides the method by which a beneficiary may be properly designated; it does not establish the right to designate a beneficiary, which right is contained in the insurance policy. More importantly, compliance with the procedure set out in 5 U.S.C. § 8705(a) does not as a matter of law automatically entitle the person so designated to the proceeds.

In the present case, the insured contracted away his right to designate the beneficiary to the insurance proceeds when he entered into the separation agreement with his first wife. Thus, the insured, after 1 August 1970, no longer had the right to designate the beneficiary on the policy, and his "signed and witnessed writing" purporting to designate the defendant as beneficiary of the group policy was a nullity.

The defendant argues that the provision in the 1 August 1970 separation agreement stating that the insured "agrees that he will continue to designate the party of the second part [Juanita Barden] as beneficiary of the Group Life Insurance Policy" is "a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed," and thus by the terms of 5 U.S.C. § 8705(a), it "has no force or effect." Defendant cites *Williams v. Williams*, 255 N.C. 315, 121 S.E. 2d 536 (1961), in support of her argument. The provision in question in the separation agreement was not "a designation, change, or cancellation of beneficiary," but rather was a promise by the insured that he would not change the existing valid designation. The actual designation of beneficiary occurred on 23 September 1968 when the insured filed the proper form listing the plaintiff as beneficiary.

*Williams v. Williams*, *supra*, involved a National Service Life Insurance policy issued by the United States Government and

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serviced by the Veteran's Administration. The applicable statute in force at that time, 38 U.S.C. § 749, provided that "the insured shall at all times have the right to change the beneficiary or beneficiaries of a United States Government Life insurance policy." The insured entered into a separation agreement containing a provision that he would not change the beneficiary on the policy, but he later filed a form naming his second wife as beneficiary. After the proceeds had been paid to the second wife by the Veteran's Administration, plaintiff, the insured's first wife, did not pursue her statutory remedy to institute suit under 38 U.S.C. § 784, but rather sought to have the State courts impose a constructive trust on the proceeds in the hands of the second wife for her benefit. The trial court ruled that there could not be an irrevocable beneficiary and thus the statute, and not the separation agreement, controlled the disposition of the proceeds. It further refused to impose a constructive trust. On appeal, the North Carolina Supreme Court affirmed, holding that because the plaintiff failed to pursue her exclusive statutory remedy, the decision of the Veteran's Administration as to payment of the proceeds was final. Furthermore, a constructive trust was not available because of 38 U.S.C. § 3101(a), which provided: "Payments of benefits due or to become due under any law administered by the Veteran's Administration shall not be assignable . . . and such payments made to . . . a beneficiary . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever . . ."

In the present case, the life insurance policy was issued by a private insurer rather than the federal government, and the right to name the beneficiary was established by the contract between the insured and the company, rather than by federal statute. Counsel has pointed to no statute, and we have found none, that makes the right to designate the beneficiary a non-assignable right with regard to the policy in the present case. We note, furthermore, that a constructive trust on the proceeds from a policy like the one in the present case has been upheld by the courts of at least one jurisdiction. *Roberts v. Roberts*, 560 S.W. 2d 438 (Tex. Civ. App. 1977). We are, therefore, of the opinion that the insured in the present case could, and did, contract away his right to designate the beneficiary, and thus his attempt thereafter to change the beneficiary was of no force and effect.

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**Wilcox v. Pioneer Homes**

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For the reasons stated above, the summary judgment for plaintiff is affirmed.

Affirmed.

Judges PARKER and CARLTON concur.

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BRYAN R. WILCOX AND WIFE, LINDA P. WILCOX v. PIONEER HOMES, INC.

No. 7812DC667

(Filed 1 May 1979)

**Deeds § 24— covenant against encumbrances—existing violation of city ordinance side lot requirement**

An existing violation of the minimum side lot requirement of a city ordinance constitutes an encumbrance within the meaning of the covenant against encumbrances in a warranty deed.

APPEAL by plaintiffs from *Guy, Judge*. Judgment entered 25 April 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 4 April 1979.

In October 1976, plaintiffs brought this action to recover damages for breach of warranty against encumbrances contained in a warranty deed from defendant to plaintiffs.

The record tends to show that on 17 November 1974, the parties entered into a contract whereby the defendant agreed to construct a house on Lot I, Clifton Forge Subdivision in Hope Mills, and to convey the house and lot to plaintiffs for \$52,000. Defendant agreed to convey a good and marketable title, free of all encumbrances. On 1 May 1975, defendant conveyed the house and lot to plaintiffs by warranty deed. In 1976, plaintiffs entered into a contract to sell the property and prior to closing the sale, the purchasers caused a survey of the property to be made. The survey revealed that the lot was narrower than the defendant had represented. The house was located 3.5 feet from the side line of the lot, in violation of a Hope Mills City ordinance which provided for a minimum side lot requirement of 15 feet. The house was also in violation of a restrictive covenant applicable to lots in the Clifton Forge Subdivision which provided that no structure



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shall be located less than 7 feet from the side lines of the lot. The plaintiffs thereafter purchased a triangular strip of property adjacent to the lot for \$1,500 in order to bring the house and lot into compliance with the ordinance and covenants, and deeded the strip of land to the purchasers of the house and lot.

Plaintiffs then brought this action to recover \$1,500, alleging in the complaint that the defendant had breached the covenant against encumbrances contained in the warranty deed to plaintiffs. Both parties moved for summary judgment. On 25 April 1978, the court found that there was no genuine issue of material fact and entered summary judgment in favor of defendant. The court concluded as a matter of law that:

"1. A restriction upon the use which may be made of land, or upon its transfer, which is imposed by a statute or ordinance enacted pursuant to the police power, such as a zoning ordinance or an ordinance regulating the size of lots, fixing building lines or otherwise regulating a subdivision of an area into lots is not an encumbrance upon the land within the meaning of a covenant against encumbrances or a contract or option to convey the land free from encumbrances.

2. The existence of the ordinance and the failure of the defendant to comply with its provisions did not constitute an encumbrance such as to prevent it (defendants) from giving a deed that is both marketable and free from encumbrances."

*McGeachy, Altman & Ciccone, by J. Gary Ciccone for plaintiff appellants.*

*Coolidge, Anderson and Clarke, by H. Terry Hutchens for defendant appellee.*

CLARK, Judge.

The plaintiffs assign as error the court's granting of summary judgment in favor of defendant. Plaintiffs contend that a violation of a municipal ordinance regulating the use of real property at the time of sale constitutes an encumbrance on the land and a breach of the warranty against encumbrances.

An encumbrance, within the meaning of such a covenant, has been defined as "any burden or charge on the land and includes

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**Wilcox v. Pioneer Homes**

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any right existing in another whereby the use of the land by the owner is restricted." *Gerdes v. Shew*, 4 N.C. App. 144, 148, 166 S.E. 2d 519, 522 (1969). The general view is that the existence of a public restriction on the use of real property does not constitute an encumbrance within the meaning of the covenant against encumbrances. Annot., 39 A.L.R. 3d 362 (1971). This view was adopted in North Carolina in *Fritts v. Gerukos*, 273 N.C. 116, 159 S.E. 2d 536 (1968). In *Fritts*, the plaintiffs purchased an option on a tract of land containing 49 lots. The defendant agreed to deliver a deed with full covenants and warranty against encumbrances. At the time the parties entered into the option contract, an ordinance of the City of Gastonia prohibited the transfer or sale of land by reference to a subdivision plat without obtaining the city's approval of the plat. After exercising the option, plaintiffs advertised an auction sale of the 49 lots. The City of Gastonia enjoined the sale for failure of plaintiffs to obtain approval of the plat. Plaintiffs then brought suit for breach of warranty against encumbrances contending that the existence of the ordinance constituted an encumbrance. The North Carolina Supreme Court rejected plaintiffs' contention on the grounds that:

"A restriction upon the use which may be made of land, or upon its transfer, which is imposed by a statute or ordinance enacted pursuant to the police power, such as a zoning ordinance or an ordinance regulating the size of lots, fixing building lines or otherwise regulating the subdivision of an area into lots, is not an encumbrance upon the land within the meaning of a covenant against encumbrances . . . being distinguishable in this respect from restrictions imposed by a covenant in a deed. (Citations omitted.) Thus, the *existence* of the Subdivision Standard Control Ordinance . . . at the time the option agreement was executed did not cause the title of the defendant to be subject to an encumbrance . . . ." (Emphasis added.) *Id.* at 119, 159 S.E. 2d at 539.

In the case *sub judice*, however, plaintiffs do not contend that the *existence* of the municipal ordinance constituted an encumbrance on the property, but contend that a violation of the ordinance, existing at the time of the conveyance to plaintiffs, constituted an encumbrance. There are no North Carolina cases which consider whether an existing violation of public restrictions on the use of real property constitutes an encumbrance. There is

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a split of authority among the jurisdictions which have considered this question. Annot., 39 A.L.R. 3d 362 § 2 (1971). The majority of the jurisdictions have held that, although the existence of a public restriction on the use of real property is not an encumbrance rendering the title to the real property unmarketable, an existing violation of such an ordinance is an encumbrance within the meaning of a warranty against encumbrances. *Lohmeyer v. Bower*, 170 Kan. 442, 227 P. 2d 102 (1951), (minimum side lot violation); *Oatis v. Delcuze*, 226 La. 751, 77 So. 2d 28 (1954), (non-conforming building); *Moyer v. De Vincentis Construction Co.*, 107 Pa. Super. 588, 164 A. 111 (1933), (violation of set-back requirement). See *Hartman v. Rizzuto*, 123 Cal. App. 2d 186, 266 P. 2d 539 (1954), (violation of rear-yard requirement); *Miller v. Milwaukee, Odd Fellows Temple, Inc.*, 206 Wis. 547, 240 N.W. 193 (1932); *Genske v. Jensen*, 188 Wis. 17, 205 N.W. 548 (1925). Annot., 39 A.L.R. 3d 362 §§ 5-6 (1971).

We hold that the existing violation of the minimum side lot requirement as set forth in the ordinance of the City of Hope Mills, constitutes an encumbrance within the meaning of the covenant against encumbrances contained in the plaintiffs' warranty deed.

The summary judgment for defendant was improvidently entered. The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge ARNOLD concur.

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JOSEPHINE H. GARLAND v. BOBBY MCKINLEY SHULL AND MYRTLE  
BAKER SHULL

No. 7825SC656

(Filed 1 May 1979)

**Damages § 13.5— doctor's opinion—possible future pain—evidence prejudicial**

In an action to recover for injuries sustained by plaintiff in an automobile accident, the trial court erred in permitting a doctor to state an opinion with regard to possible pain and suffering which plaintiff might suffer in the future.

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**Garland v. Shull**

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APPEAL by defendant from *Walker (Ralph A.), Judge*. Judgment entered 5 April 1978 in Superior Court, BURKE County. Heard in the Court of Appeals 4 April 1979.

The plaintiff, Josephine H. Garland, was injured on 12 March 1976 when an automobile owned by one defendant and driven by the other collided with a vehicle in which the plaintiff was a passenger. The plaintiff initiated this action by the filing of a complaint on 3 August 1977 alleging that her injuries were caused by the defendants. The defendants answered denying the plaintiff's allegations. Prior to trial the defendants stipulated their negligence and their liability for the plaintiff's injuries. The case proceeded to trial on the issue of damages.

The plaintiff's husband testified at trial that he was driving the automobile in which the plaintiff was riding at the time of the collision which gave rise to this action. He indicated that upon the collision of the two automobiles, the plaintiff's knees hit the glove compartment and her head hit the dashboard. After the collision, the plaintiff was taken by ambulance to a hospital where she remained for approximately two hours.

The plaintiff testified that she was asleep at the time of the accident and could not recall anything that happened during the accident because she was knocked unconscious. After she was taken to the hospital, x rays were made of her head and one of her knees. A large knot about the size of a goose egg developed on her upper left forehead. Her eyes were sore and subsequently became blackened. She was short of breath and experienced pain in breathing. Her knees were swollen and painful. She further testified that she developed headaches which were of a continuing nature.

On cross-examination, the plaintiff testified that she did not know what the doctor had advised her regarding her x rays, that she did not know whether the doctor dismissed her as not having any problems at all, and that she did not know whether the doctor had advised her to return to see him. In addition, the plaintiff indicated that she returned to the hospital one week after the accident and was examined by Dr. Brooch, a pediatrician. One week after seeing Dr. Brooch, the plaintiff was examined by Dr. Kenneth A. Powell, her family physician. Dr. Powell examined the plaintiff again more than one month later. Dr. Powell informed

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**Garland v. Shull**

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the plaintiff that he could find nothing physically wrong with her. On 26 October 1976, the plaintiff was given a brain scan and x rays were taken. The results of both were normal. The plaintiff further testified that she had not been to any doctor who had told her that he found anything physically wrong with her. However, the plaintiff indicated that she had been taking medicine continuously for pain for approximately a year before the trial.

Dr. Powell then testified that he had seen the plaintiff during the latter part of March, 1976. An examination of the plaintiff at that time revealed that she had bruises on her left forehead and that the area over her knees was tender. Additionally, the plaintiff complained of headaches. Dr. Powell "prescribed Midrin, a headache type medicine for her." He next examined the plaintiff on 1 May 1976. His examination revealed no brain damage or localized signs, but the plaintiff's knees and head were still painful.

Dr. Powell again saw the plaintiff on 16 June 1976, at which time she still complained of headaches. He again saw her on 18 October 1976, and she complained of continuing headaches. Due to the persistency and severity of the plaintiff's headaches, Dr. Powell ordered x rays of her skull and a brain scan. The results of those tests were normal.

During his testimony, Dr. Powell was asked a hypothetical question. That question was:

Q. I want to ask you a hypothetical question or two, Doctor. If the jury should find as facts from the evidence that is presented in this case, and should find that by the greater weight of the evidence, that on March 12, 1976 while riding as a passenger in a motor vehicle that was involved in a collision with another motor vehicle; that her head and body were thrown about the interior of that vehicle with her head hitting the dashboard; and that she received a large injury to the left forehead; and a knot, or a swelling come up of approximately the size of a goose egg; that other injuries received were to the knees and to the chest; and that in addition to the blow, or the knot on the head that she received injuries about her eyes that resulted in them becoming blackened and sore around the frontal area just below the eyes; that she was rendered unconscious, taken by Emergen-

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cy Medical Service Ambulance to the Glenn R. Frye Hospital where she was examined; and if the jury should further find that she thereafter was treated by you, as a medical doctor, commencing on March 13, 1976; and that over this period of time that she has had persistent headaches commencing in the left frontal parietal area of her head, going back across her head and down into the left side of the neck and into the left shoulder; and if the jury should further find from the evidence and its greater weight that she has had prescribed for her medications to assist her with this pain; and if the jury should further find from the evidence and its greater weight that the headaches continue from the time of the accident on March 12, 1976 up through the date of this trial on April 5, 1978, do you have an opinion satisfactory to yourself, as a medical doctor, whether or not the persistent headaches are permanent in nature?

There was an objection to the question, and a voir dire examination was conducted. The trial court overruled the objection, and Dr. Powell testified that he did have an opinion. It was his opinion that "The headaches may persist for years at least. An indefinite period of time." Dr. Powell was later allowed to read into evidence, over the objection of the defendants, a medical report prepared by him for the plaintiff's attorney.

At the close of all of the evidence, the following issue was submitted to the jury: "What amount, if any, is the Plaintiff entitled to recover for her injuries and damages from the Defendant?" The verdict of the jury was that the plaintiff was entitled to recover \$11,000. From the entry of judgment in accordance with that verdict, the defendants appealed.

*Byrd, Byrd, Ervin & Blanton, P.A., by Joe K. Byrd and Robert B. Byrd, for plaintiff appellee.*

*Mitchell, Teele & Blackwell, by W. Harold Mitchell, for defendants appellants.*

MITCHELL, Judge.

The defendants assign as error the admission of Dr. Powell's testimony concerning his opinion of the future duration of the plaintiff's headaches. After Dr. Powell was asked the hypothetical

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question, the defendant objected. The trial court then conducted a voir dire examination of the witness. During the voir dire examination, Dr. Powell testified that it was his opinion "That these headaches have resulted from the accident, and that although they may not last the rest of her life, they are—they may last for years, the exact length of time I do not know." At the conclusion of the voir dire hearing, the trial court ruled that Dr. Powell could give his opinion. When the jury returned, Dr. Powell was allowed, over objection, to answer the hypothetical question. He then indicated that in his opinion "The headaches may persist for years at least. An indefinite period of time."

"[A] physician testifying as an expert to the consequences of a personal injury should be confined to certain consequences or probable consequences, and should not be permitted to testify as to possible consequences." *Fisher v. Rogers*, 251 N.C. 610, 614, 112 S.E. 2d 76, 79 (1960). See generally, Annot., 75 A.L.R. 3d 9 (1977). Testimony tending to indicate that an event may occur is an indication that the occurrence of the event is possible, but it is not an indication that the occurrence of the event is certain or probable. Therefore, the trial court should not have permitted Dr. Powell to testify regarding pain which in his opinion the plaintiff may suffer in the future. That testimony was likely to have caused the jury to award compensation for future pain and suffering when, in fact, it was not competent evidence of such future injuries. Therefore, the admission of Dr. Powell's opinion with regard to possible pain and suffering by the plaintiff was prejudicial error which will require a new trial.

The defendant has brought forth and argued additional assignments of error. We need not discuss them, however, as they are not likely to recur during a subsequent trial of this action.

For the reasons previously set forth, there must be a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

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**State v. Moore**

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## STATE OF NORTH CAROLINA v. GLENN WOODSON MOORE

No. 783SC1090

(Filed 1 May 1979)

**1. Criminal Law § 92— motion at trial to require joinder of other cases**

Defendant's motion to require the State to join other cases pending against him should have been made at defendant's arraignment and came too late when made after the present case was called for trial. G.S. 15A-952(c).

**2. Criminal Law § 128.2— delay during trial—failure to declare mistrial**

The trial court did not err in failing to declare a mistrial because the jury was out of the courtroom on the second day of the trial until 11:00 a.m. where the court explained to the jury that it had been working on other matters and that the delay had nothing to do with defendant.

**3. Criminal Law § 88.4— cross-examination of defendant—question not in bad faith**

In this prosecution for possession and sale of cocaine, the record failed to show that the district attorney's question to defendant as to whether he was trying to dispose of cocaine for the sum of \$24,000 to \$28,000 was not based on information and asked in bad faith.

**4. Criminal Law § 121— instructions on entrapment**

In this prosecution for possession with intent to sell and sale of cocaine, the trial court did not err in failing to instruct the jury to examine the activities of the undercover agent who bought the cocaine from defendant "to see whether or not her activities created a substantial risk that the offense of sale of cocaine and possession with intent to sell cocaine would be committed by someone other than an individual who was prepared to commit it, or someone who does not have a predisposition to commit the specific acts charged," the court having properly charged that the jury should acquit defendant if it found that the intent to commit the crime did not originate in defendant's mind but that defendant was induced by the State's agent to sell the drug, which he was not otherwise willing to do, through persuasion or trickery.

**5. Criminal Law § 33.3— defendant's statement that he had "been trapped"—exclusion not prejudicial**

In this prosecution for possession and sale of cocaine, the exclusion of testimony by defendant that, nearly three weeks after the sale of cocaine to an undercover agent, he told his sister that he had "been trapped" was not prejudicial to defendant since the testimony bore only slight relevance to the issues being tried.

**6. Criminal Law § 138.7— sentence for sale of cocaine—consideration of other sales**

In imposing a sentence upon defendant for possession of cocaine for sale and sale of cocaine to an undercover agent, the trial court could properly consider defendant's testimony that he had made two other sales of cocaine to the agent.



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**State v. Moore**

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APPEAL by defendant from *Rouse, Judge*. Judgment entered 14 July 1978 in Superior Court, PITT County. Heard in the Court of Appeals 1 March 1979.

Defendant was placed on trial on one count of felonious possession of cocaine and another count of the felonious sale of cocaine.

The principal witness for the State was a female agent of the State Bureau of Investigation who, on 11 April 1978, was working as an undercover agent in an investigation of the illegal traffic of drugs in the Greenville area. The agent was then using the name "Shawn." At about 8:10 p.m. on that day, the agent known as Shawn went to defendant's apartment in the company of a male informant. She asked defendant if he had cocaine. He stated that he had one gram left. Defendant took a plastic bag containing a white powder substance from a bucket inside a planter in the living room. The agent paid defendant \$80.00 and left. Other officers observed the agent enter the apartment about 8:10 p.m. She came out about 8:15 p.m. and gave one of them the plastic bag. A chemical analysis disclosed that it contained cocaine.

Defendant offered evidence tending to show that Shawn came to his apartment on the afternoon of 11 April 1978 in the company of a male. Defendant testified that Shawn was in the apartment for about one-half hour and smoked marijuana with him and some of his friends. She was dressed and acted in a manner that was very attractive to defendant. She inquired if he could get cocaine for her and told him, "You don't realize how much I'd appreciate it." Defendant testified that he thought she was insinuating sex and that because of her manner and dress he would have done most anything for her. He thought that she would come back later and they would go to bed. He, nevertheless, charged her a price for the cocaine that included a profit for himself. In addition to marijuana, he said he used cocaine and MDA. His roommates, Jeff Jones and Steve Bateman, sold cocaine. Defendant admitted that he had also sold cocaine on three occasions. He testified that he "was dealing in cocaine" with Larry Wallace. He first met the agent known as Shawn about two months prior to 11 April but had never been out with her, kissed or fondled her. He had sold her cocaine on one occasion before the sale on the 11th and later made another sale to her.

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Defendant was found guilty of the possession of cocaine for the purpose of sale and the sale of cocaine. Judgment imposing a prison sentence was entered.

*Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.*

*James, Hite, Cavendish & Blount, by Marvin Blount, Jr., and Dallas Clark, Jr., for defendant appellant.*

VAUGHN, Judge.

[1] Defendant's first assignment of error is to the failure of the court to require the State to join other cases that were pending against the defendant. In defendant's brief he argues that those cases involved other sales of drugs to the same agent. The State responds by arguing that defendant has not been prejudiced. Neither side directs the court's attention to the real issue. The motion was orally made after the present case was called for trial. It came too late.' The motion should have been made at defendant's arraignment. G.S. 15A-952(c). Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pre-trial stage of the proceedings.

[2] On the second day of the trial the jury was out of the courtroom until 11:00 a.m. When they were called in to resume the trial of this case the judge explained that the court had been working on other matters and that the delay had nothing to do with defendant. Defendant's arguments that the judge should have declared a mistrial because of the delay and that the judge abused his discretion are without merit.

[3] The record discloses the following:

"I sold cocaine three times, and I have used it four times. This was in a two and a half to three-month period. Before that I had not seen any cocaine. No, my roommates weren't cocaine dealers, I'm not aware of what they do all the time but it was rumored that they were cocaine dealers. Yes, I lived with them. Yes, I know Larry Wallace and I were dealing in cocaine with him. No, I was not trying to dispose

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of several pounds of cocaine. No, I was not trying to sell cocaine for the sum of \$24,000.00 to \$28,000.00.

MR. BLOUNT: I'm going to object to this . . . ."

Defendant then objected and moved for a mistrial. On appeal, he argues that "the question" was asked in bad faith and that, at the very least, the court should have conducted a *voir dire* to determine if there was a factual basis for "the question." We note, first of all, that neither "the question" nor any objection thereto appears in the record before us. Secondly, if defendant desired a *voir dire*, he should have requested it. Moreover, the record fails to show that any questions that may have been asked were not based on information and asked in good faith. When a record is silent on a particular point, the action of the trial judge is presumed to be correct. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

[4] Defendant contends that the judge erred because he did not instruct the jury to examine the activities of the agent "to see whether or not her activities created a substantial risk that the offense of sale of cocaine and possession with intent to sell cocaine would be committed by someone other than an individual who has prepared to commit it, or someone who does not have a predisposition to commit the specific acts charged." We conclude that the judge correctly instructed the jury on the law as it applied to the evidence. The jury was instructed, among other things, to acquit defendant if they found that the intent to commit the crime did not originate in defendant's mind but that defendant was induced by the State's agent to sell the drug, which he was not otherwise willing to do, through persuasion or trickery. The exceptions to the charge fail to disclose error.

[5] The offense occurred on 11 April 1978, and defendant was arrested on 3 May 1978. Defendant attempted to testify that right after he was arrested, he telephoned his sister and told her, "I have been trapped." The State argues that the evidence was properly excluded because it was "self-serving." If testimony is otherwise admissible, it is not to be excluded merely because it is "self-serving." It is hardly likely that any defendant would strive to get any evidence in unless it served his interest. We hold, however, that there was no prejudicial error in the exclusion of the testimony. He testified that he had sold the agent cocaine on an

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 McKissick v. Jewelers, Inc.
 

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earlier occasion, and there is no indication that he was persuaded to do so by a promise of sexual favors. If the agent broke what he considered to be her implied promise, the breach occurred on the night of the sale and defendant thereafter sold her more cocaine. When all of the evidence is considered, the fact that defendant, nearly three weeks after the sale, told his sister that he had been trapped, bears such slight relevance to the issues being tried that the exclusion of that testimony is inconsequential.

[6] Defendant's final assignment of error is that the judge, in sentencing defendant, considered defendant's testimony that he had made two other sales of cocaine to the agent. We note at the outset that the record reflects that defendant put on evidence on the question of sentencing but that evidence is not a part of the record. We have only some of the judge's comments. Nevertheless, it would have been entirely proper for the judge to take into account defendant's admissions relating to his other transactions in the illegal drug trade. We note also that defendant could have received a prison sentence of twenty years. The judge ordered a sentence of only three years.

Defendant received a fair trial, and judgment imposing a sentence within lawful limits was entered. There is no reason to disturb the verdict or judgment.

No error.

Judges ERWIN and MARTIN (Harry C.) concur.

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EVELYN W. MCKISSICK v. R. CONNELLY JEWELERS, INC.

No. 7814DC669

(Filed 1 May 1979)

**Bailment § 3.3— rings stolen from jeweler—duty to safeguard—no showing of breach of duty**

In an action to recover damages for failure of defendant to return two rings which plaintiff had delivered to it for alteration and repairs where defendant alleged that the rings were stolen during a break-in at its jewelry store, the trial court properly determined that defendant's possession of plaintiff's rings was that of a bailee under a bailment for the mutual benefit of the

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**McKissick v. Jewelers, Inc.**

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bailor and the bailee; the bailee was not an insurer and was liable only for such loss as proximately resulted from his failure to exercise ordinary care for the safekeeping of the rings; defendant was not required to carry insurance on plaintiff's property or to inform plaintiff of the lack thereof; and plaintiff failed to carry her burden of showing that defendant failed to exercise due care in safeguarding her property.

APPEAL by plaintiff from *Pearson, Judge*. Judgment entered 20 February 1978 in District Court, DURHAM County. Heard in the Court of Appeals 5 April 1979.

This is a civil action to recover damages for failure of defendant jewelry company to return two rings which plaintiff delivered to it for alteration and repairs. Defendant admitted receiving the rings, but defended on the grounds that they were stolen in a burglary of defendant's store by persons unknown without fault on its part. The case was tried by the court without a jury.

Plaintiff presented evidence to show, among other things, that for many years she was a customer of the defendant company, which operates a leading jewelry store in Durham, N.C. In October 1975 she delivered the two rings, valued at \$4,000.00, to defendant to be made smaller and repaired. When she requested return of the rings, defendant informed her that they had been taken after a break-in at defendant's store by some person or persons unknown to defendant.

Defendant's evidence showed that on the night of 26 October 1975 some person or persons unknown broke into defendant's store, broke open the vault, and stole its contents, including plaintiff's rings and a large amount of defendant's property. Entry to the building had been gained by prying open a locked metal door between defendant's store and an adjoining vacant building, and entry into the vault had been effected by knocking off the dial to the combination lock and ripping open the door with a crowbar or other instrument. The vault was a walk-in vault, built into the building, and was approximately eight feet tall and five feet wide, with steel and concrete walls and a floor six to eight inches thick. It was manufactured by Diebold Safe Company and was Underwriters Lab approved to withstand extreme heat for four hours. The vault had formerly been used by Security Savings and Loan Association, a previous occupant of the building. It had never been broken into prior to 26 October 1975.

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**McKissick v. Jewelers, Inc.**

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At the conclusion of the evidence, the court entered judgment making the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Prior to October 26, 1975, plaintiff delivered to defendant the items of jewelry described in the complaint, for alteration or repair to be performed by defendant for a consideration, at plaintiff's request.

2. Defendant was at the time in question in the jewelry sale and repair business, and received said items of jewelry from plaintiff and caused them to be placed for safekeeping in a vault which it kept and regularly used for the safekeeping of valuable items belonging to itself and to its customers.

3. On or about October 26, 1975, while defendant's business was closed, the premises of defendant were broken and entered by persons unknown, entry to the said vault was forced by metal tools, and many items of jewelry belonging to defendant and to its customers, including the plaintiffs' aforesaid items of jewelry, were stolen therefrom and the plaintiff's said items have not been recovered or located, and defendant cannot return plaintiff's said items to plaintiff.

4. There was no contract between the parties requiring defendant to purchase insurance against loss by theft of plaintiff's items, and there was no such insurance, and defendant has not recovered anything by way of indemnification or insurance or otherwise for the loss of plaintiff's items.

5. Defendant used due care under the circumstances to safeguard plaintiff's said items, and the loss thereof occurred as the result of a forced entry and burglary by persons unknown, and without fault on the part of defendant.

Upon the foregoing Findings of Fact, the Court draws the following

**CONCLUSIONS OF LAW**

1. The relationship between plaintiff and defendant with respect to plaintiff's items of jewelry was that of a bailment for mutual benefit of the parties.

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2. Plaintiff was not damaged as a result of any negligence of defendant.

3. Plaintiff is not entitled to recover anything from defendant.

On these findings and conclusions, the court adjudged that plaintiff recover nothing of the defendant. From this judgment, plaintiff appeals.

*Major S. High for plaintiff appellant.*

*Roger S. Upchurch for defendant appellee.*

PARKER, Judge.

Plaintiff contends that the trial judge erred, first, in failing to find that the defendant had a duty either to carry insurance to protect plaintiff's property or to inform plaintiff there was no such insurance, and, second, in failing to find defendant negligent in caring for plaintiff's property. We find no error in either respect.

Defendant's possession of plaintiff's rings was that of a bailee under a bailment for the mutual benefit of the bailor and the bailee; "and in such case the duty of the bailee is to exercise due care and his liability depends upon the presence or absence of ordinary negligence." *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 184, 81 S.E. 2d 416, 418 (1954); *accord, Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560 (1935); *Morgan v. Bank*, 190 N.C. 209, 129 S.E. 585 (1925). Unless made so by statute or by express contract, the bailee is not an insurer and is liable only for such loss or damage to the property as proximately results from his failure to exercise ordinary care for its safe keeping. *Insurance Co. v. Motors, Inc.*, *supra*; *Beck v. Wilkins*, 179 N.C. 231, 102 S.E. 313 (1920). A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show or it is admitted that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition. *Wellington-Sears Co. v. Finishing Works*, 231 N.C. 96, 56 S.E. 2d 24 (1949). But even when there is such a *prima facie* case of negligence, the ultimate burden of proof of establishing actionable

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negligence on the part of the defendant is on plaintiff, and this burden remains on the plaintiff throughout the trial. *Electric Corp. v. Aero Co.*, 263 N.C. 437, 139 S.E. 2d 682 (1965).

Applying these well established principles to the present case, defendant was not an insurer of plaintiff's property. On competent evidence the trial court found that there was no contract between the parties requiring defendant to purchase insurance. Not being required either by law or by contract to insure plaintiff's property, defendant was under no duty to inform plaintiff that there was no such insurance. The burden was on the plaintiff to show that defendant failed to exercise due care in safeguarding her property. She has failed to carry that burden with the finder of the facts, who on competent evidence has found that defendant used due care and that plaintiff's loss occurred as result of a burglary and without fault on the part of the defendant.

The judgment appealed from is

Affirmed.

Judges HEDRICK and CARLTON concur.

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JAMES F. COOK v. HILDA M. COOK

No. 7710DC961

(Filed 1 May 1979)

**Divorce and Alimony § 13.3— denial of alimony—award of possession of residence—legal separation—divorce based on separation for one year**

A judgment which denied defendant wife alimony because she was not a dependent spouse and an order which awarded defendant possession of the residence for her use and the use and benefit of the minor children of the parties legalized the separation of the parties even though the court also found that plaintiff had wrongfully abandoned defendant, and plaintiff was entitled to maintain an action for an absolute divorce under G.S. 50-6 where the parties lived separate and apart for more than one year after their separation thus became legalized.

APPEAL by defendant from *Bullock, Judge*. Judgment entered 15 August 1977 in District Court, WAKE County. Heard in the Court of Appeals 29 August 1978.



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Plaintiff husband instituted the present action on 7 April 1977 seeking an absolute divorce from defendant under G.S. 50-6 on the ground of one year's continuous separation, which plaintiff alleged commenced on 17 December 1975. Defendant answered and pled in bar a judgment entered by the District Court in Wake County on 17 December 1975 in a prior divorce action between the parties. The record in the prior action, No. 75CVD4659, was introduced in evidence and shows the following:

Plaintiff and defendant were married to each other in 1957 and had three children. In September 1975 plaintiff filed action No. 75CVD4659 in the District Court in Wake County seeking a divorce based on one year's separation, which in that case plaintiff alleged commenced on 10 August 1974. Defendant answered and pled as a defense that plaintiff had wrongfully abandoned her, and she counterclaimed for alimony without divorce, for custody of and support for the minor children, and for possession of the residence owned by the parties as tenants by the entirety. By judgment filed 17 December 1975 the court found that plaintiff had wrongfully abandoned defendant and accordingly denied him a divorce, but found that defendant was not a dependent spouse and accordingly denied her alimony. By a separate order, also filed 17 December 1975, the court awarded custody of the minor children to the defendant, ordered plaintiff to make payments for child support, and granted defendant possession of the residence for benefit of the minor children during their minority. There was no appeal from the judgment or order in case No. 75CVD4659.

The present action was heard by the court without a jury. On 15 August 1977 the court entered judgment finding the facts as to the prior action and the judgment and order entered therein. The court also found that plaintiff and defendant had not lived together since 17 December 1975 and that plaintiff intended to live separate and apart from that date. The court concluded that entry of the judgment in case No. 75CVD4659 denying defendant's claim for permanent alimony and entry of the order granting possession of the residence to defendant for the benefit of the minor children constituted a legal separation between the parties. The court further concluded that a prior finding of abandonment made in the previous action was not a defense in this action.

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On these findings and conclusions, the court entered judgment on 15 August 1977 granting plaintiff an absolute divorce. From this judgment, defendant appeals.

*Jack P. Gulley for plaintiff appellee.*

*Jordan, Morris and Hoke, by John R. Jordan, Jr. and Joseph E. Wall, for defendant appellant.*

PARKER, Judge.

Defendant wife contends that the trial court erred in granting her husband an absolute divorce despite her plea in bar of wrongful abandonment, which abandonment had been established by the judgment entered in the prior action between the parties. We do not agree with defendant's contention and accordingly affirm the judgment appealed from.

Initially, we note that after entry of the judgment appealed from and while this appeal was pending, our General Assembly enacted Chapter 1190 of the 1977 Session Laws, which became effective 16 June 1978. Section 1 of that Act amended G.S. 50-6, the statute under which the present action was brought, by rewriting the third sentence therein to read as follows:

A plea of *res judicata* or of recrimination, with respect to any provision of G.S. 50-5 or of G.S. 50-7, shall not be a bar to either party's obtaining a divorce under this section.

Abandonment is the first ground set forth in G.S. 50-7 as a provision for obtaining relief under that section. Therefore, if the amendment to G.S. 50-6 which was effected by Section 1 of Chapter 1190 of the 1977 Session Laws is applicable to the present case, it is obvious that defendant's plea in bar of *res judicata* and of recrimination would not be effective to bar plaintiff from obtaining an absolute divorce in this action. By Section 3 of Chapter 1190 of the 1977 Session Laws that Act became effective upon its ratification on 16 June 1978, and there is no provision that the Act shall not affect pending litigation. We find it unnecessary, however, to decide whether Chapter 1190 of the 1977 Session Laws applies in the present case, since, for the reasons hereinafter set forth, we hold that the entry of the decree of absolute divorce in this case was in any event proper under G.S. 50-6 even prior to the amendment effected by Chapter 1190.

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In *Rouse v. Rouse*, 258 N.C. 520, 128 S.E. 2d 865 (1963), our Supreme Court held that a decree which awarded the wife alimony without divorce in an action brought under G.S. 50-16 legalized the separation even though the decree was based on the wrongful act of the husband in abandoning the wife, with the result that the husband became entitled to an absolute divorce under G.S. 50-6 after the parties had lived separate and apart for two years (now one year) following entry of the decree which had awarded his wife alimony without divorce. In the case now before us, the issue of alimony was determined by the judgment entered 17 December 1975 in the prior action between the parties. That judgment determined that defendant was not a dependent spouse and for that reason was not entitled to alimony. If a separation is legalized by an award of alimony without divorce, as our Supreme Court held in *Rouse v. Rouse*, *supra*, we see no sound reason why it should not also be legalized by a decree denying alimony based upon a finding of no dependency. In each case the court has considered and determined the respective rights and obligations of the separated parties insofar as support is concerned. In neither case is the court able to mend the broken marriage or to force the parties to live together if either persists in continuing to live apart. It would be logically inconsistent to hold that a legal separation is created by the granting of alimony without divorce but not by its denial based upon a finding of no dependency. Certainly a financially independent spouse should have even less reason to oppose an absolute divorce than a dependent spouse who may have a legitimate concern that the divorcing spouse's ability to continue making alimony payments might become adversely affected by a subsequent marriage.

In the case now before us, the court in the prior action, in addition to determining the issue as to alimony, further recognized the status of the parties as living separate and apart when it awarded possession of the residence to the defendant wife for her use and for the use and benefit of the minor children. This also had the effect of legalizing the separation of the parties. *Earles v. Earles*, 29 N.C. App. 348, 224 S.E. 2d 284 (1976); *Johnson v. Johnson*, 12 N.C. App. 505, 183 S.E. 2d 805 (1971).

We hold, therefore, that the separation of the parties became legalized on 17 December 1975 by the entry of the judgment which denied defendant alimony and by entry of the order which

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awarded her possession of the house. The parties having lived separate and apart for more than one year after their separation thus became legalized, plaintiff was entitled to maintain this action for an absolute divorce under G.S. 50-6. We further hold that the adjudication made in the prior action that plaintiff had originally wrongfully abandoned the defendant is not effective as a bar in the present action. *See, Gray v. Gray*, 16 N.C. App. 730, 193 S.E. 2d 492 (1972).

The judgment granting plaintiff an absolute divorce is

Affirmed.

Judges CLARK and ERWIN concur.

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STATE OF NORTH CAROLINA v. CLYDE C. FORREST

No. 7929SC19

(Filed 1 May 1979)

**Criminal Law §§ 75.7, 76— inadmissible confession—effect on subsequent confession—failure to make findings**

Where defendant was arrested for breaking and entering and larceny, the arresting officer recognized a television set in defendant's residence as one of the stolen items and told defendant that he would recommend that defendant be allowed to sign his own appearance bond if he could obtain more of the stolen property, and defendant "said he could take us to where more of the property was," this statement by defendant amounted to a confession and was inadmissible because defendant had not been given the *Miranda* warnings. Furthermore, the trial judge's determination that a subsequent written confession made by defendant after he had been given the *Miranda* warnings was admissible in evidence was not supported by the court's findings where the court made no findings that defendant's second confession was not the product of the prior invalid confession and that any influences rendering the prior confession involuntary did not also render the second confession inadmissible.

APPEAL by defendant from *Seay, Judge*. Judgment entered 16 November 1978 in Superior Court, HENDERSON County. Heard in the Court of Appeals on 3 April 1979.

Defendant was charged in a proper indictment with felonious breaking and entry and felonious larceny. Upon entering a plea of

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not guilty, the defendant was advised by the assistant district attorney that the State intended to offer into evidence an alleged confession made by him. Defendant then filed a written motion to suppress and requested a *voir dire* hearing prior to trial on the motion. The evidence adduced at the hearing tended to show the following:

Randy Case, a Deputy Sheriff for Henderson County went to the defendant's residence on 20 June 1978 with an arrest warrant for the defendant for a breaking and entering and larceny that occurred at David Unwin's residence in Zirconia on 10 May 1978. When the defendant opened the door, Deputy Case observed a television and a throw rug matching the descriptions of items taken from the Unwin residence, and placed the defendant under arrest. No Miranda warnings were given to the defendant at this time. Deputy Case next proceeded to examine the television and rug more closely and determined them to be the items taken from Unwin's residence. Defendant was led to a police vehicle in which he was to be taken to Hendersonville. Bill Thomas, another officer with the Sheriff's department was also present. While in the police vehicle, Deputy Case told the defendant that if they could obtain more of the stolen property, he would make a recommendation that the defendant sign his own appearance bond. Defendant agreed to take the two deputies to where more of the property was located. After first going to the magistrate's office and signing his own bond, defendant took the officers to more of the stolen property. Thereafter he accompanied the deputies to the Sheriff's department where he was advised of his constitutional rights. Defendant signed a waiver of rights form in the presence of Deputy Case and Officer Thomas. After signing the form, defendant made a confession which Deputy Case reduced to writing.

At the conclusion of the *voir dire* hearing, the trial judge made findings and conclusions which, except where quoted, are summarized below:

On 19 June 1978, Deputy Sheriff Randy Case went to the defendant's residence and arrested the defendant pursuant to an arrest warrant. The deputy observed a television set and a throw rug that were the subject of the arrest. "Officer Case told the defendant that if he would assist in the recovery of the additional

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property taken from the Unwin residence, he would recommend that he be allowed to sign his own appearance bond." Defendant was then taken to the Magistrate's Office. "[W]hen the defendant left the Magistrate's Office, he was asked to go into the Sheriff's Office, but was not, at that time, in custody, the defendant having been released on bond." While in the Sheriff's Office, defendant was advised of his Miranda rights and signed a waiver form. The court concluded "that the defendant was properly advised of his constitutional rights" in the Sheriff's Office; "that the defendant did, thereupon, freely, understandingly and voluntarily make a statement to the officers;" and "that no threats or promises were made to him to induce him to answer any of the questions."

Upon the judge's ruling on his motion to suppress, defendant entered a plea of guilty to the offenses charged in the indictment, and received a sentence of two to four years on the breaking and entering charge, and a sentence of two to four years on the larceny charge, to run at the conclusion of the first sentence. Defendant appealed.

*Attorney General Edmisten, by Assistant Attorney General Amos C. Dawson III, for the State.*

*Stepp, Groce, Pinales & Cosgrove, by Timothy R. Cosgrove, for defendant appellant.*

HEDRICK, Judge.

Appellate review is permitted by G.S. § 15A-979(b). The sole question presented by this appeal is whether the trial court erred in denying defendant's motion to suppress. The defendant contends that the written confession given by him in the Sheriff's office was the product of a prior involuntary confession, and thus the trial court erred in determining that his second confession was "freely, understandingly and voluntarily" made. The rule in North Carolina is as follows:

[When] a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence. The burden is upon the State to overcome this presumption by clear and convincing evidence. [Citations omitted.]

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*State v. Silver*, 286 N.C. 709, 718, 213 S.E. 2d 247, 253 (1975). See also *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). This rule "arises out of a concern that where the first confession is procured through promises or threats rendering it involuntary as a matter of law, these influences may continue to operate on the free will of the defendant in subsequent confessions." *State v. Siler*, 292 N.C. at 551, 234 S.E. 2d at 739; *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193 (1954).

The evidence adduced at *voir dire* clearly discloses that the defendant made inculpatory statements at the time of his arrest in response to the officers' questioning, and that such statements amounted to a confession. "Any extra judicial statement of an accused is a confession if it admits defendant's guilt of an essential part of the offense charged." *State v. Williford*, 275 N.C. 575, 582, 169 S.E. 2d 851, 857 (1969); *State v. Hamer, supra*. In the present case, defendant was arrested for breaking and entering and larceny, the arresting officer recognized a television as being one of the stolen items, accused the defendant specifically of stealing the television and then told him that if he and Officer Thomas could obtain more of the stolen property, he would make a recommendation that defendant sign his own appearance bond. According to Deputy Case's testimony, the defendant "said he could take us to where more of the property was." This statement by the defendant amounted to a confession since it, in effect, disclosed that the defendant had taken part in the offenses charged. See *State v. Fletcher*, 279 N.C. 85, 89, 181 S.E. 2d 405, 409 (1971). Furthermore, the evidence adduced on *voir dire* clearly shows that the defendant's first confession was inadmissible because the defendant was not informed of his rights under the *Miranda* decision. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed. 2d 694, 726 (1966); *State v. Siler, supra*; *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976).

Thus, the question for our determination is whether the trial judge's finding and conclusion that the defendant's second confession was "freely, understandingly and voluntarily" made is supported by the evidence adduced on *voir dire*. In this regard, the State had the burden of showing by clear and convincing evidence that the defendant's second confession was not the product of the prior invalid confession and that any influences rendering the

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prior confession involuntary did not also render the subsequent confession inadmissible. There is no evidence in this record as to what effect the defendant's first confession had on his second, or that the circumstances rendering the first inculpatory statements of the defendant inadmissible had abated so that his subsequent confession was in fact voluntarily made. The trial judge's Order contains no findings whatsoever with regard to the effect of defendant's first confession. Thus the trial judge's finding and conclusion that the defendant's second confession was "freely, understandingly and voluntarily" made is not supported by the evidence adduced on *voir dire*, or the findings of fact, and therefore the Order denying the defendant's motion to suppress is reversed. The defendant's plea of guilty is stricken; the judgment entered is vacated; and the cause is remanded to the superior court for further proceedings.

Reversed and remanded.

Judges PARKER and CARLTON concur.

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STATE OF NORTH CAROLINA v. WALTER ANDREW MORRIS

No. 7826SC1174

(Filed 1 May 1979)

**1. Criminal Law § 157— notice of appeal—necessary part of record**

Notice of Appeal is required to be a part of the record in order to give the Court of Appeals jurisdiction to hear and decide a case.

**2. Searches and Seizures § 2— inspection of package by freight agent—no constitutional protection**

An agent of a carrier who opened and inspected a package consigned to his employer's care acted as a private citizen, since he was not supervised or requested to perform the inspection by an agent of the government, and the trial court therefore properly overruled defendant's motion to suppress evidence found during the inspection.

**3. Searches and Seizures § 2— inspection of package by freight agent—warrantless investigation by officers**

Defendant's contention that his motion to suppress contraband should have been granted because officers failed to obtain a search warrant before inspecting the contraband was without merit since the contraband was contained



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in a package sent from another state to N.C. by an airfreight carrier; a freight agent opened the package and notified law enforcement officers; it then became the duty of the officers to further investigate the package; and subsequent law enforcement activity did not constitute any new or different search.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 29 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1979.

Defendant was charged in a bill of indictment, proper in form, with a second violation of possession of a controlled substance with intent to sell and deliver methamphetamine, which is included in Schedule II of the N.C. Controlled Substances Act. Defendant moved to suppress certain evidence, which motion was denied by Judge Barbee. Thereafter, defendant pleaded guilty to the offense charged and was given an active sentence of ten years in custody of the North Carolina Department of Correction.

On the motion to suppress, Robert C. Houser testified for the State that: he was a supervisor of Emery Air Freight in Charlotte; on 25 May 1978, he received a phone call from Mr. Olinger, a supervisor at Emery Air Freight in San Francisco, requesting that he open a suspicious package; he opened the package, observed heat-sealed packages of a white substance; he called the FBI, and they told him to call the Charlotte Police Department.

Officer Dale B. Furr of the Charlotte Police Department testified for the State that: on 25 May 1978, he was with the Special Investigation, Section Vice, Narcotics Division of the Charlotte Police Department; Sergeant Travis answered a complaint at the Emery Air Freight at Douglas Airport and advised him that an agent of Emery Air Freight had a package that the agent suspected contained a controlled substance; Officer Blakeney and Sergeant Black accompanied him to Emery Air Freight; upon their arrival, the package was already open; he pulled out one of the heat sealed plastic bags and tested it; the valtox test result showed positive for amphetamine; he took the package to the police department for further testing; he returned to Emery Air Freight with the package and began surveillance; on 29 May 1978, he arrested defendant after defendant picked up the package.

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Defendant's cross-examination of Officer Furr revealed that: Mr. Ollinger, the Emery Air Freight Agent in San Francisco, contacted a Drug Enforcement Administration agent for the federal government in San Francisco, who contacted the DEA Agency in Greensboro; the DEA in Greensboro advised Emery Freight to contact the Charlotte Police Department.

The trial court denied defendant's motion to suppress the evidence seized.

Defendant appealed pursuant to G.S. 15A-979(b).

*Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.*

*John G. Plumides, for defendant appellant.*

ERWIN, Judge.

[1] In the preparation of this record on appeal, defense counsel did not make the Notice of Appeal a part of the record. The State failed to raise an issue with reference to the lack of a Notice of Appeal in the record in its brief. Our Clerk of Court was able to have copy of the Notice forwarded to him. Notice of Appeal is required in order to give this Court jurisdiction to hear and decide a case. See Rule 4 of the Rules of Appellate Procedure; G.S. 7A-26; G.S. 15A-1448; *Cf. Mason v. Commissioners of Moore*, 229 N.C. 626, 51 S.E. 2d 6 (1948); *Corporation Com. v. R. R.*, 185 N.C. 435, 117 S.E. 563 (1923). Our Clerk acted at our request to prevent further expenditure of this Court's time and other expenses by the State.

[2] Defendant contends the trial court erred in overruling his motion to suppress certain evidence. We find no error.

Searches by airfreight carriers conducted pursuant to tariff regulations in which governmental agents have not otherwise been involved have been held "nongovernmental" for purposes of the Fourth Amendment. *United States v. Gumerlock*, 590 F. 2d 794 (9th Cir. 1979); *United States v. Issod*, 508 F. 2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916, 43 L.Ed. 2d 783, 95 S.Ct. 1578 (1975); *United States v. Edwards*, 443 F. Supp. 192 (D. Mass. 1977). Where an agent of a carrier of his own volition opens and inspects a package consigned to his employer's care, he acts as a

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private citizen unless he was supervised or requested to perform the inspection by an agent of the government. *United States v. Crabtree*, 545 F. 2d 884 (4th Cir. 1976); *United States v. Edwards, supra*; *United States v. Pryba*, 502 F. 2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127, 42 L.Ed. 2d 828, 95 S.Ct. 815 (1975). The testimony at trial clearly indicated the absence of a request to open the package on the part of a governmental agent, and the trial court so found. The court's findings of fact are conclusive. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); 4 Strong's N.C. Index 3d, Criminal Law, § 175, p. 895. We find no error.

[3] Defendant further contends that his motion to suppress should have been granted, because the officers failed to obtain a search warrant before inspecting the contraband. This argument is without merit.

If the freight agent could lawfully open the package, he could also, upon discovering the contraband, lawfully notify law enforcement officers of the discovery and show it to them. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. denied*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971); *United States v. Issod, supra*; *Cf. United States v. Sellers*, 511 F. 2d 1199 (4th Cir. 1975). Then it would become the duty of the officers to further investigate the package. *United States v. Ford*, 525 F. 2d 1308 (10th Cir. 1975). The subsequent law enforcement activity did not constitute any "new or different search." *United States v. Ford, supra*; *United States v. Pryba, supra*; *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971). Although the officers could have seized the contraband since it was in plain view, *Coolidge v. New Hampshire, supra*; *Harris v. United States*, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *United States v. Tripp*, 468 F. 2d 569 (9th Cir. 1972), *cert. denied*, 410 U.S. 910, 35 L.Ed. 2d 272, 93 S.Ct. 965 (1973); *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968), they were entitled to allow delivery before arresting defendant. *United States v. Issod, supra*. We find no error.

Defendant's other assignments of error are not argued in the brief and are deemed abandoned. *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *vacated on other grounds*, 428 U.S. 904, 49 L.Ed. 2d 1212, 96 S.Ct. 3212 (1976).

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**Armstrong v. Armstrong**

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The judgment entered by the trial court is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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CHARLES H. ARMSTRONG, JR. v. ANTOINETTE B. ARMSTRONG

No. 7821DC681

(Filed 1 May 1979)

**Divorce and Alimony § 28— Florida divorce orally granted—subsequent written order—effective date of divorce**

Where a Florida court orally granted defendant's first husband a divorce from defendant on 25 September 1964, plaintiff and defendant were married on 1 January 1965, a final decree of divorce was filed by the Florida court in written form on 1 September 1965, and an order was entered *nunc pro tunc* in the Florida action on 6 May 1977 making the effective date of the final decree 25 September 1964, the Florida judgment of final divorce was effective as of 25 September 1964 and was entitled to full faith and credit from that date, and plaintiff's marriage to defendant on 1 January 1965 was therefore valid.

APPEAL by defendant from *Alexander (Abner), Judge*. Judgment entered 3 April 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 23 April 1979.

On 25 September 1964, defendant in the instant action was party defendant in a divorce proceeding in the Florida courts, in which she was divorced from her husband, the court orally granting complete and final divorce to the parties. On 1 January 1965, plaintiff and defendant were married in Winston-Salem, North Carolina. On 1 September 1965, a final decree of divorce was filed in written form by the trial court in the Florida action. This order was subsequently amended 6 May 1977 by entry of an order *nunc pro tunc* making the effective date of the final decree 25 September 1964. As of that date, all jurisdictional and statutory prerequisites had been met for the granting of a final decree of divorce in the Florida courts. On 31 October 1977, plaintiff and defendant entered into a separation agreement, signed by them both, purporting to delineate the rights and interests of the parties. The present action was begun by plaintiff 30 December 1977

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to have the marriage declared null and void pursuant to N.C. Gen. Stats. §§ 50-4 and 51-3. On 6 February 1978, plaintiff moved for summary judgment, asserting that, on the uncontested facts of record, his marriage to defendant was void *ab initio* in that a final decree of divorce had not been granted to defendant at the time he married her and that the order *nunc pro tunc* entered in the Florida action was ineffective to validate the marriage.

The trial court granted plaintiff's motion for summary judgment and defendant appeals.

*Pettyjohn & Molitoris, by Theodore M. Molitoris, for the plaintiff.*

*Wright and Parrish, by Carl F. Parrish, for the defendant.*

MARTIN (Robert M.), Judge.

The sole question before us is as to the validity of plaintiff's marriage to defendant.

The facts being uncontroverted and the only question before the trial court being the conclusion in law that would necessarily flow from those facts, this matter was an appropriate one for summary judgment. However, the trial court erred in entering summary judgment for plaintiff and we reverse that order, remanding the cause for entry of summary judgment in favor of defendant on this issue.

Both parties concede that the sequence of dates enumerated in the facts above (*i.e.*, first hearing on defendant's divorce action in the Florida courts 25 September 1964, marriage of plaintiff and defendant 1 January 1965, entry of written final order in defendant's Florida divorce proceeding 1 September 1965, and entry of order *nunc pro tunc* in the Florida action 6 May 1977) is of central importance to the resolution of the question. However, the parties differ diametrically as to the proper interpretation to be given in law to the series of events. The trial court agreed with plaintiff and found that his marriage to defendant was bigamous and therefore void from its inception. We find this was error.

Counsel have included in the record of the instant action a transcript of the defendant's divorce proceeding which took place in the Florida courts in 1964. That transcript contains sworn

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testimony by the parties thereto and from other witnesses. It further includes an oral rendition of judgment by the trial court. This transcript reveals that defendant had met the statutory and jurisdictional prerequisites for the granting of a final decree of divorce in Florida, and that the trial court stated in open court and of record "[t]he Plaintiff is granted a complete divorce from the Defendant . . ." "Defendant" in that action was the same person who is now defendant in the case *sub judice*.

No explanation appears in that record to account for the elapse of almost one year between the oral rendition of judgment and the filing of a written final judgment in the matter. There can be no question, however, that defendant was eligible for and was awarded a divorce as of 25 September 1964. Indeed, as no collateral attack, proper or otherwise, is made upon the regularity or validity of the Florida proceedings we could not entertain any such question. The contention that the written reduction of the trial court's oral rendition of judgment containing an effective date other than 25 September 1964 was error is buttressed by the Florida court's subsequent action in entering on its own motion an order *nunc pro tunc* substituting 25 September 1964 for the effective date of the 1965 final decree.

Our study of the appropriate Florida authorities indicates that, while a judgment must be ultimately reduced to written form for purposes of appellate review, oral rendition will not otherwise affect a judgment's validity or authority as the judgment of the court. *Becker v. King*, Fla. App., 307 So. 2d 855 (1975). Where, as was apparently the case here, the final written rendition of judgment contains clerical errors or inconsistencies with the prior oral or other rendition of judgment by the court, an entry of an order or judgment *nunc pro tunc* is the appropriate means by which to correct such errors. The order *nunc pro tunc* will be given retrospective effect, in a manner similar to the legal fiction of relation back, where that order does not make any substantive change in the judgment being amended or does not of itself constitute a ruling not previously made. See *De Baum v. Michael*, Fla. App., 333 So. 2d 106 (1976); 31 West's Fla. Stats. Ann. Rules of Civil Procedure 1.540(a). We conclude that the *judgment* of the Florida tribunal was rendered orally 25 September 1964, that the written reduction of that rendition of judgment contained, for whatever reason, an erroneous effective date, and

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that the Amended Final Decree filed 6 May 1977 in that proceeding properly corrected that error. Accordingly, the Florida judgment of final divorce was effective as of 25 September 1964, and from that date was entitled to full faith and credit in our North Carolina courts. Defendant's marriage to plaintiff 1 January 1965 was therefore valid, and judgment should have been entered below to that effect.

The order of the trial court allowing summary judgment in favor of plaintiff declaring his marriage to defendant bigamous and void *ab initio* is reversed. The cause is remanded for entry of summary judgment declaring that marriage to be valid, and for further proceedings not otherwise inconsistent with this opinion.

Reversed and remanded.

Judges CLARK and ARNOLD concur.

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STATE OF NORTH CAROLINA v. ROBERT BARNETT

No. 7927SC13

(Filed 1 May 1979)

**1. Burglary and Unlawful Breakings § 4— usual practice of locking doors—relevance of evidence—no prejudice**

In view of the uncontradicted evidence in a felonious breaking or entering case that defendant entered the victim's dwelling without permission, the admission of evidence as to the "usual practice" of the victim with regard to locking his home at night, even if not relevant, was certainly not prejudicial to defendant.

**2. Criminal Law §§ 73.2, 85— defendant's nickname—no hearsay—no improper character evidence**

In a prosecution for felonious breaking or entering, testimony by a victim that he knew defendant by the nickname, Spook, was not inadmissible because it was hearsay or because it tended to impeach defendant's character when his character was not at issue, since the name a person is called is a fact, not hearsay, and since the testimony was relevant to show the witness's acquaintance and familiarity with defendant and was therefore not inadmissible even if it did incidentally reflect upon character.

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APPEAL by defendant from *Gaines, Judge*. Judgment entered 14 September 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 24 April 1979.

Defendant was tried on his plea of not guilty to the charge contained in a bill of indictment, proper in form, that he feloniously broke and entered the dwelling of James Clyde Stewart with the intent to commit the felony of larceny therein. The State presented evidence to show that at approximately 6:30 a.m. on 25 May 1978 James Stewart was awakened by a noise in his bedroom. His pants were lying on a table beside his bed, and he heard the change in them rattle. On turning on the light he saw the defendant, with whom he was already acquainted, standing in his room. A fight ensued, in the course of which Stewart forced defendant out of his house. Both James Stewart and his brother, Clyde Stewart, the only occupants of the house, testified that defendant had not been given permission to come into their home. There was evidence that the back screen door had been cut and that a piece of plywood approximately two feet wide and four feet high, which had been nailed to the rear door over the place where the window was broken out, had been pushed off.

The defendant did not introduce evidence. The jury found him guilty of felonious breaking or entering. From judgment on the verdict sentencing defendant to prison for a term of not less than three nor more than five years, defendant appealed.

*Attorney General Edmisten by Associate Attorney T. Michael Todd for the State.*

*Richard B. Schultz, Assistant Public Defender, for defendant appellant.*

PARKER, Judge.

[1] Defendant first assigns error to the court's overruling his objection to the district attorney's question directed to the State's witness, James Stewart, as to whether it was Stewart's "usual practice to go about locking the house" before going to bed. Defendant contends this was error because the witness had just previously testified that he had no recollection concerning locking his house before going to bed on the night of 24 May 1978. Defendant argues that in view of this testimony, whatever Stewart's



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“usual practice” may have been, it could not have been relevant in this case. We find no prejudicial error. Although evidence concerning the witness’s usual practice with respect to locking his home may not have been relevant in this case, its admission could hardly have been prejudicial. Defendant was charged with a violation of G.S. 14-54(a) which provides that “[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony.” (Emphasis added.) To convict of violating the statute, it is sufficient if the State’s evidence shows either a breaking or an entering; it need not show both. *State v. Jones*, 272 N.C. 108, 157 S.E. 2d 610 (1967); *State v. Lassiter*, 15 N.C. App. 265, 189 S.E. 2d 798 cert. denied 281 N.C. 761, 191 S.E. 2d 358 (1972); *State v. Pittman*, 14 N.C. App. 588, 188 S.E. 2d 694 (1972). In view of the uncontradicted evidence that defendant entered the Stewart dwelling without permission, the admission of evidence as to the “usual practice” of James Stewart with regard to locking his home at night, even if not relevant, was certainly not prejudicial to the defendant. Defendant’s first assignment of error is overruled.

[2] Defendant’s second assignment of error is directed to the court’s action in overruling his objection to an answer given by the same witness, James Stewart, on direct examination. After the witness testified he had known the defendant for “probably several years,” the district attorney asked,

Q. And what did you know his name to be?

to which the witness replied:

A. All they call them (sic) was “Spook.” That’s all I knowed for a long time.

At that point defense counsel interposed an objection, which was overruled. Exception to this ruling is the basis of defendant’s second assignment of error. He contends that the witness’s answer was objectionable both because it was hearsay and because it tended to impeach defendant’s character when his character was not at issue. We find no error.

At the outset we note that defendant made no motion to strike the witness’s answer. Where, as here, inadmissibility is not indicated by the question but only becomes apparent by some feature of the answer, “the objection should be made as soon as

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the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." 1 Stansbury's N.C. Evidence (Brandis Revision) § 27, p. 70. Although defendant here failed to make his objection in the proper form, for purposes of this appeal we will treat it as having been a motion to strike. So treated, we find no error in the court's ruling. The testimony to which defendant objected was not hearsay. The name a person is called is a fact, and in this case the witness was testifying to such a fact within his own knowledge.

Nor was the testimony inadmissible on the grounds that it showed defendant's bad character when his character was not at issue. If it be granted that the nickname "Spook" may, under certain circumstances, be not altogether complimentary, nevertheless the testimony was admissible since it was relevant to show the witness's acquaintance and familiarity with the defendant. Where evidence is relevant for some purpose other than proving character, it is not inadmissible because it incidentally reflects upon character. *State v. Penley*, 6 N.C. App. 455, 170 S.E. 2d 632 (1969); 1 Stansbury's N.C. Evidence (Brandis Revision) §§ 79, 80, 91, 104.

We have carefully examined all of defendant's remaining assignments of error which have been brought forward in defendant's brief and find no error. There was ample evidence to require submission of the case to the jury; such discrepancies as existed in the State's evidence were for the jury to resolve; and the defendant's motion to dismiss was properly denied. Defendant's motion to set the verdict aside was addressed to the discretion of the trial court, *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975), and no abuse of discretion has been shown.

No error.

Judges MITCHELL and MARTIN (Harry C.), concur.

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**State v. Sealey**

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STATE OF NORTH CAROLINA v. OLIN DELANO SEALEY

No. 7826SC1168

(Filed 1 May 1979)

**1. Indictment and Warrant § 17.3; Narcotics § 4.1— indictment charging sale of narcotics to named person—proof of sale to another—fatal variance**

There was a fatal variance between indictment and proof where the indictment alleged that defendant sold the controlled substance dilaudid to a named person and the evidence tended to show only a sale to a different person.

**2. Criminal Law §§ 42.6, 88; Narcotics § 3.1— chain of custody of narcotics—no right to voir dire**

Defendant's right to effective cross-examination of an SBI chemist concerning the chain of custody of dilaudid pills did not include a right to a practice-run examination of the witness out of the jury's presence.

**3. Criminal Law § 117— instruction to scrutinize testimony—written request required**

An instruction to scrutinize the testimony of a witness on the grounds of interest or bias relates to a subordinate feature of a criminal case, and the trial court is not required to give such an instruction absent a special request made in writing before the charge to the jury is begun. G.S. 1-181.

**4. Criminal Law § 42.6— chain of custody**

A showing that a package was put into the U.S. mail and that it was received by a chemist at the SBI laboratory in Raleigh was sufficient to establish the chain of custody without evidence as to who picked the package up at the post office in Raleigh and delivered it to the chemist and what precautions were taken to safeguard the package in its transit from the Raleigh post office to the SBI laboratory.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 23 September 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 March 1979.

Defendant was tried upon his plea of not guilty to the charges in a two-count indictment charging him, in the first count, with the felonious sale of dilaudid, a controlled substance, to N. C. Mills, and, in the second count, with felonious possession of dilaudid with intent to sell. The State presented evidence to show that one Timothy Lee Atkins arranged to sell 100 dilaudid pills to N. C. Mills, an undercover agent of the State Bureau of Investigation. Atkins and Mills drove from Gastonia to Charlotte where Atkins telephoned the defendant who told Atkins to meet him at

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a certain grocery store. Atkins and Mills drove to the indicated store and were met by the defendant who drove up in his own car. Atkins, in possession of \$1500 given him by Mills, got into the defendant's car and was driven by the defendant to an apartment about a block away. The defendant entered the apartment and returned with 100 dilaudid pills for which Atkins paid the defendant \$1300. Atkins then delivered the pills to Mills, keeping a profit of \$200 for himself.

The defendant did not present evidence. The jury found the defendant guilty as charged on both counts. On defendant's conviction of the charge contained in the second count, judgment was entered sentencing defendant to prison for the term of ten years. On defendant's conviction of the charge contained in the first count, judgment was entered sentencing defendant to prison for the term of ten years, this sentence to run at the expiration of the sentence imposed on the second count. From these judgments, defendant appeals.

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

*G. Miller Jordan for the defendant appellant.*

PARKER, Judge.

By a motion to supplement the defendant's brief, which we have treated as a memorandum of additional authorities under Rule of Appellate Procedure 28(g), the defendant argues that there was a fatal variance between the count of the indictment charging sale of dilaudid and the proof of that count. We agree and vacate the judgment on the sale count.

[1] The count in question charged the defendant with selling dilaudid to N. C. Mills. The evidence showed, however, that the defendant made the sale to Atkins. "[W]here the bill of indictment alleges a sale to one person and the proof tends to show only a sale to a different person, the variance is fatal." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E. 2d 532, 534 (1974). The judgment on the sale count must be vacated. The State is at liberty to obtain another bill of indictment charging defendant with the sale to Atkins. *State v. Ingram, supra*.

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[2] In the first assignment of error presented in his brief, the defendant contends that the trial court erred in refusing to allow defendant to conduct a voir dire inquiry into the chain of custody of the dilaudid pills in the midst of the testimony of SBI chemist McSwain. The defendant argues that the trial court's ruling in this regard constituted an impairment to his right of effective cross-examination. This contention is without merit. The defendant was not entitled to a voir dire hearing in this instance. The defendant's right to effective cross-examination here did not include a right to a practice-run examination of the State's witness out of the jury's hearing.

[3] In the second assignment of error presented in his brief, defendant contends that the trial court erred in denying defendant's oral request, made at the conclusion of the charge of the court, that it instruct the jury "concerning the testimony of the codefendant," Atkins, who was also charged with the sale to Mills as well as with other drug-related crimes. We find no error. An instruction to scrutinize the testimony of a witness on the grounds of interest or bias relates to a subordinate feature of a criminal case, and the trial court is not required to charge as to such matters in the absence of request for special instructions aptly made. *State v. Roux*, 266 N.C. 555, 146 S.E. 2d 654 (1966); *State v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909 (1943); 4 Strong's N.C. Index 3d Criminal Law § 113.3. p. 586-87. A request for a special instruction is aptly made if in writing and submitted to the trial court before the charge to the jury is begun. G.S. 1-181. In this case the defendant made his request orally at the close of the trial court's charge.

[4] The defendant's final contention is that the court erred in allowing the State to introduce the dilaudid pills into evidence because, so he argues, there had been a break in the chain of custody of the envelope containing the pills. The evidence shows that SBI employee Coleman took the 100 pills from Agent Mills and packaged them for mailing in State's Exhibit 1A, a tan manilla envelope, after having placed the pills inside State's Exhibit 1B, a smaller envelope which he placed in State's Exhibit 1A. Coleman testified that he took State's Exhibit 1A to the Post Office, paid postage on it, and put it in the mail. The postmark on State's Exhibit 1A shows that the package was mailed on 9 November 1976. SBI Chemist McSwain testified that he received

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the package by first class mail and in a sealed condition at the SBI laboratory in Raleigh on the afternoon of 12 November 1976. The defendant contends erroneously that a link is missing in the chain of custody between Coleman's mailing of the package and its receipt by McSwain at the SBI laboratory in Raleigh because the evidence does not show who picked the package up at the post office in Raleigh and delivered it to McSwain and what precautions were taken to safeguard the package in its transit from the Raleigh post office to the SBI laboratory. A showing that a package was put into the United States mail and that it was received in a sealed condition by the chemist at the SBI laboratory in Raleigh is sufficient to establish the chain of custody. There was no error in admitting the pills into evidence.

The result is:

The judgment entered upon defendant's conviction of the charge contained in the first count in the indictment, which charged him with felonious sale of dilaudid to N. C. Mills, is vacated.

In the judgment entered upon defendant's conviction of the charge contained in the second count in the indictment, which charged him with felonious possession of dilaudid with intent to sell, we find

No error.

Judges HEDRICK and CARLTON concur.

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STATE OF NORTH CAROLINA v. WILLIAM TIMOTHY LAIL, JR.

No. 7827SC1167

(Filed 1 May 1979)

**1. Searches and Seizures § 11—warrantless search of vehicle—probable cause**

Officers had probable cause to believe that a search of defendant's vehicle would reveal a pistol which had been taken during a break-in and a warrantless search of the vehicle was not unreasonable where a person told an officer that he took part in the break-in; that he gave the pistol he stole to defendant who put it in his trousers; a pat-down of defendant revealed no

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weapon; and in response to the officer's question as to whether he had a vehicle, defendant pointed out his van which was fifteen or twenty feet from defendant.

**2. Criminal Law § 89.2— witness not impeached—corroborative testimony admissible**

The trial court did not err in admitting corroborative testimony though the witness had not been impeached.

APPEAL by defendant from *Gaines, Judge*. Judgment entered 9 August 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 28 March 1979.

Defendant was indicted for feloniously receiving stolen goods, a .38 caliber Colt pistol and holster. The State presented evidence that on 6 April 1978 the residence of Jack Black was broken into, and some old money, a Seiko watch, and a .38 caliber Colt pistol were stolen. At trial Black identified State's Exhibit No. 1 as his pistol.

David Guy Jones testified that on 6 April he and defendant's son, Troy, broke into two houses, and from the second house he took some old money, a Seiko watch, and a .38 caliber pistol. He put the money and watch in his pocket and the gun in his pants. He then went to a gas station, where he sold the gun to defendant. Over objection, Jones testified that he and Troy told defendant that the gun was stolen before he bought it from them. State's Exhibit No. 1 appeared to be the same gun and holster that he sold to defendant.

Officer Sprott of the Gastonia Police took Jones into custody at the gas station and advised him of his rights. Jones then told Sprott "that he was in fact one of the persons involved in the break-in. . . . I asked Mr. Jones if he could tell me where [the] pistol was. He stated that it was given to [defendant] while they were at the station before I arrived." Defendant was standing nearby. Sprott patted him down and found no gun on him, so he asked defendant if he had a vehicle and defendant pointed out a red van fifteen to twenty feet away. Sprott asked Officer Self to search the vehicle for the weapon. Sprott identified State's Exhibit No. 1 as the weapon later given to him by Officer Self. Having received the weapon, Sprott placed defendant under arrest.

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Officer Self of the Gastonia Police testified that he searched the red van defendant indicated as his vehicle and found a pistol in a holster under the driver's seat. He gave this pistol to Officer Sprott. The trial court found facts and concluded that there was probable cause for the search, that a warrantless search was justified due to the mobility of the vehicle and the information Sprott had obtained from Jones, and that the pistol was admissible into evidence.

Defendant presented no evidence. He was found guilty of feloniously receiving stolen goods and sentenced to five to seven years. Defendant appeals.

*Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.*

*Robert H. Forbes for defendant appellant.*

ARNOLD, Judge.

Defendant's argument that hearsay testimony was admitted is without merit. None of the testimony which defendant challenges under this assignment of error falls within the definition of hearsay, that is, an assertion of a person other than the witness which is offered to prove the truth of the matter asserted. 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973). Two of the challenged statements are testimony as to what the witness told the defendant, the third is not an assertion, and the fourth is not offered to prove the truth of the matter asserted but merely to prove that a statement was made.

[1] Defendant contends that the court improperly admitted into evidence testimony about the search of defendant's vehicle which revealed the pistol. He would have us find that the warrantless search was unreasonable. However, our Supreme Court has indicated that "[i]n recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible if there is probable cause to make the search." *State v. Ratliff*, 281 N.C. 397, 403, 189 S.E. 2d 179, 182 (1972) (emphasis in original). And there is ample evidentiary support here for the trial court's conclusion that probable cause existed. Jones told Officer Sprott that he took part in the break-in, and that he gave the pistol he stole to defendant, who put it in his trousers. A pat-



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down of defendant revealed no weapon, but in response to Sprott's question defendant pointed out his vehicle "fifteen to twenty feet from where he was at that point." These facts are sufficient to give the officers probable cause to believe that their search of the vehicle would reveal "the instrumentality of a crime or evidence pertaining to a crime." *Id.* at 403, 189 S.E. 2d at 183, quoting *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 20 L.Ed. 2d 538, 88 S.Ct. 1472 (1968).

Nor does the fact that a number of officers were on the scene and, as defendant argues, "one or more of the officers could . . . have remained with the defendant's vehicle while one or more of the officers left the scene to secure a search warrant" affect this result. "If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before presenting the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant." *State v. Ratliff, supra* at 403, 189 S.E. 2d at 183.

[2] David Jones was allowed to testify about the statement he gave Officer Sprott after he was taken into custody, and the jury was instructed that the statement was offered only as corroboration of Jones' other testimony. Defendant argues that it was improper to admit corroborative testimony, since the witness had not been impeached. However, in North Carolina the scope of impeachment as a prerequisite to corroboration is extremely broad, see 1 Stansbury's N.C. Evidence § 50 (Brandis rev. 1973), and recent cases ignore the requirement of impeachment altogether. *E.g. State v. Fields*, 10 N.C. App. 105, 177 S.E. 2d 724 (1970).

Moreover, we find no prejudice to defendant from the admission of the challenged testimony. Only one of the witness's answers referred to defendant ("I told him that I sold [the pistol] to [defendant]"), and this evidence had already been admitted. Asked "[A]nd did you tell him anything about what if anything you all told [defendant] about where the gun came from?" Jones answered only, "I don't believe so—not at the time." We find no prejudicial error in the admission of the corroboration.

We have considered defendant's other assignments of error, and we find that they are without merit.

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No error.

Chief Judge MORRIS and Judge CLARK concur.

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STATE OF NORTH CAROLINA v. STUART K. EUTSLER AND LAWRENCE S. MARCHIONDA

No. 794SC66

(Filed 1 May 1979)

**Searches and Seizures § 23—warrant to search house—sufficiency of affidavit to show probable cause**

An affidavit contained a sufficient recital of facts and underlying circumstances to constitute probable cause for issuance of a search warrant where the affidavit specifically described the residence to be searched, specified the reason for the search was to find marijuana and evidence of manufacturing marijuana, and stated that officers believed such evidence might be found because patches of marijuana were growing across the road from the described premises; a path led from the patches to the house; footprints went from the patches to the house; there were no other residences any nearer to the patches than one-quarter mile; the price tag on a box of plant food found in one patch indicated that it was purchased at the Marine Corps Exchange; and a check with the local deputy revealed that military personnel lived in the premises in question and that they were the only military personnel in the area.

APPEAL by State from *Stevens, Judge*. Order entered 11 December 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 6 April 1979.

Defendants were charged with felonious manufacture of marijuana and felonious possession of marijuana with intent to manufacture. Defendant Marchionda was also charged with felonious possession of marijuana. Before trial, the defendants timely filed a motion to suppress the fruits of the search leading to their arrest on grounds that the affidavit portion of the search warrant was insufficient to establish probable cause. A hearing on this motion to suppress was held before Judge Stevens at the 4 December 1978 session of Onslow County Superior Court. After hearing this evidence, the trial court allowed the motion to suppress and issued a formal order suppressing the fruits of the search on 11 December 1978. From this order the State appealed.

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

*Bailey, Raynor & Erwin, by Edward G. Bailey, for the defendants.*

MARTIN (Robert M.), Judge.

The sole question for our resolution is whether the search warrant in this case was issued upon a sufficient showing to constitute probable cause to search the described premises. The State contends that probable cause was shown in the affidavit upon which the warrant was issued and the court therefore erred in allowing the defendants' motion to suppress the evidence obtained pursuant to that search warrant.

Within the meaning of N.C. Gen. Stats. §§ 15A-243 through 245 (dealing with search warrants and their issuance), probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). Probable cause "does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant." *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

The affidavit in question specifically described the residence to be searched as an old wood frame house, the first house on the left as one turns off State paved road 1307 onto dirt road 1311. The reasons specified in the application for a search warrant for searching the premises were to find marijuana and to find evidence of manufacturing marijuana. The grounds upon which the officers believed such evidence might be found in the described household were given as follows:

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Across the road from this residence is Seven marijuana patches, growing, having some (illegible) marijuana plants over six foot high. From these marijuana patches a path leads directly to the above described residence. An empty box of "Miracle-GRO" Plant food was found this date X by one of the marijuana patches. The price tag on the box indicated it was purchased from the Marine Corps Exchange. A check with the local deputy revealed that military subjects lived at this residence and that they were the only military in the immediate area. The marijuana patches starts about forty yards in front of this residence. There is not another residence besides this one for a quarter mile in any direction. Also there are footprints from the patches that go directly to this residence.

We hold the affidavit contains a sufficient recital of facts and underlying circumstances to constitute probable cause for issuance of the search warrant. See *State v. Wrenn*, 12 N.C. App. 146, 18 S.E. 2d 600 (1971), *appeal dismissed* 279 N.C. 620, 184 S.E. 2d 113, *cert. denied* 405 U.S. 1064.

Reversed.

Judges MITCHELL and WEBB concur.

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UNIGARD CAROLINA INSURANCE COMPANY v. F. MARION DICKENS, INDIVIDUALLY AND AS PRESIDENT OF DICKENS & HUX AWNINGS, INC., AND DICKENS & HUX AWNINGS, INC.

No. 786DC644

(Filed 1 May 1979)

**Appeal and Error § 6.2— partial new trial on damages issue—no immediate appeal**

There is no immediate right of appeal from an order granting a partial new trial on the issue of damages. The contrary decision in *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E. 2d 491 is overruled.

APPEAL by defendants from *Williford*, Judge. Judgment entered 8 February 1978 in District Court, HALIFAX County. Heard in the Court of Appeals 3 April 1979.

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Plaintiff insurance company brought this subrogation action to recover \$940.52 for fire damage to their insureds' home allegedly caused by defendants' negligence. Plaintiff issued a homeowners insurance policy providing coverage for loss by fire on the residence of Julian G. Hofmann and wife. While this policy was in effect, the Hofmanns contracted with defendants to replace three storm doors at the Hofmann residence. In replacing one of the doors on 17 April 1974, defendant Dickens used an acetylene blow torch to cut out old hinges on the metal door frame. Plaintiff alleged and defendants denied that in using the torch defendant Dickens negligently set fire to the Hofmanns' house, damaging it in the amount of \$940.52, which loss plaintiff paid in accordance with the terms of its policy, thereby becoming subrogated to any right of action which the Hofmanns had against the defendants by reason of the fire.

The case was tried before a jury which answered issues as follows:

1. Is the Plaintiff subrogated to the rights of Julian G. Hofmann and his wife, Margaret M. Hofmann, which arose out of the incident which occurred on or about April 17, 1974, as alleged in the Complaint?

Answer: Yes.

2. If so, were the Hofmanns damaged by the negligence of the Defendants?

Answer: Yes.

3. If so, in what amount were the Hofmanns damaged?

Answer: \$200.00

The court accepted the verdict on the first two issues but set aside the verdict on the third issue and granted plaintiff's motion for a new trial limited to the issue of damages. From this order, defendants appeal.

*Allsbrook, Benton, Knott, Cranford & Whitaker by Thomas I. Benton for plaintiff appellee.*

*Clark & Godwin by Charlie D. Clark, Jr. for defendants appellants.*

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PARKER, Judge.

By this appeal the defendants attempt to obtain immediate appellate review of an interlocutory order of the trial court which accepted the jury's verdict fixing liability and directed there be a new trial solely on the issue of damages. We find the appeal premature and order it dismissed.

In *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), the opinion in which was filed on 5 February 1979, our Supreme Court held that an order of the trial court granting plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment, was an interlocutory order not subject to immediate appeal. The defendants in the present case, after entry of the order from which they now attempt to appeal, were in precisely the same position as the defendant in *Industries, Inc. v. Insurance Co.*, *supra* after entry of the order from which appeal was attempted in that case, albeit they had followed a different route to get there. In each case defendants were confronted with an order which fixed liability and retained the cause for determination solely on the issue of damages. In holding the order in *Industries, Inc.* not immediately appealable inasmuch as it was an interlocutory order which did not deprive defendant of any substantial right, our Supreme Court observed that "[e]ven if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages." 296 N.C. at 491, 251 S.E. 2d at 447. The same can be said of the defendants in the present case. The defendants here, as the defendant in *Industries, Inc.*, can preserve the right to have appellate review of all trial court proceedings by duly entered exceptions on appeal from the final judgment. All reasons advanced by our Supreme Court in *Industries, Inc.* against permitting fragmentary, premature, and unnecessary appeals, apply with equal force in the present case.

The decision of this court in *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E. 2d 491 (1978), insofar as it recognized the right of immediate appeal from an order granting a partial new trial on the issue of damages only, is overruled. The decision in that case was rendered prior to the decision of our Supreme Court in *Industries, Inc. v. Insurance Co.*, *supra*, which we find controlling.

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We now hold that the language in G.S. 1-277(a) which provides that "[a]n appeal may be taken from every judicial order or determination, of a judge of a superior or district court . . . which . . . grants or refuses a new trial," does not apply to an order which grants only a partial new trial.

For the reasons stated, this appeal is

Dismissed.

Judges HEDRICK and CARLTON concur.

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**STATE OF NORTH CAROLINA v. RONALD ROBERTS**

No. 793SC21

(Filed 1 May 1979)

**1. Criminal Law § 181.3— denial of post-conviction relief—certiorari proper method of review**

The proper method for defendant to seek appellate review of the trial court's order denying his petition for post-conviction relief was by writ of certiorari, since the time for appeal from defendant's trial had expired when he sought post-conviction relief, and there was no appeal pending at the time his petition for post-conviction relief was filed. G.S. 15A-1422(c)(3).

**2. Criminal Law § 181— post-conviction hearing ordered**

Order of the trial court denying defendant's petition for post-conviction relief is vacated and an evidentiary hearing is ordered where defendant raised substantial questions of violation of constitutional rights which could not be determined from the record.

APPEAL by defendant from *Reid, Judge*. Order entered 10 August 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 3 April 1979.

*Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.*

*A. B. Cooper, Jr., by Neil B. Whitford, for the defendant.*

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CARLTON, Judge.

[1] Defendant seeks to appeal the ruling of the superior court denying his petition for post-conviction relief filed on 17 July 1978.

G.S. 15A-1422 provides in pertinent part as follows:

....

(c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

....

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

The record discloses that defendant pled guilty to armed robbery on 8 June 1976 and was sentenced to 28 to 30 years in the Department of Correction on that same date. The "time for appeal" from his trial had therefore expired when he sought post-conviction relief. The record discloses no appeal pending at the time his petition was filed on 17 July 1978. Pursuant to G.S. 15A-1422(c)(3), defendant's proper method for seeking appellate review of Judge Reid's order was by writ of certiorari. No appeal lies from the trial court's order in this case.

The attempted appeal is dismissed. The record docketed here is considered as a petition for the issuance of a writ of certiorari. See *State v. Green*, 2 N.C. App. 391, 163 S.E. 2d 14 (1968).

[2] It appears that the defendant has raised substantial questions of violation of constitutional rights which cannot be determined from the record and that an evidentiary hearing pursuant to G.S. 15A-1420(c) is necessary to determine these questions. It is therefore ordered that the order of Judge Reid dated 10 August 1978 be, and the same hereby is, vacated and this cause is remanded to the Superior Court, Carteret County for an evidentiary hearing, findings of fact and determination with respect to all allegations of denial of constitutional rights contained in the petition.

Vacated and remanded.

Judges PARKER and HEDRICK concur.



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**State v. Jones**

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STATE OF NORTH CAROLINA v. RICHARD B. JONES

No. 7923SC62

(Filed 1 May 1979)

**Assault and Battery § 14.6— assault on officer—discharging duty of office—sufficiency of evidence**

In this prosecution for assaulting an officer in violation of G.S. 14-33(b)(4), the evidence was sufficient to show that the officer, the chief jailer of a county jail, was discharging a duty of his office at the time of the alleged assault where it tended to show that defendant was a prisoner under the supervision and control of the officer; there was a disturbance in defendant's cell; the officer discovered that defendant was kicking on the cell door with his shoes; the officer entered the cell and removed defendant's shoes; and defendant assaulted the officer as the officer left defendant's cell.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 17 October 1978 in Superior Court, ASHE County. Heard in the Court of Appeals 5 April 1979.

Defendant was convicted of assaulting an officer, a violation of N.C.G.S. 14-33(b)(4), and appeals from a judgment of imprisonment. We find no error in the trial.

The warrant charges defendant with assaulting Jim Johnson, custodial officer of the Ashe County jail, on 20 August 1978, while the officer was discharging a duty of his office in checking on the condition of defendant after he had been locked up on a charge of public drunkenness.

The evidence showed that defendant was arrested on a charge of public drunkenness and placed in the custody of Jim Johnson, Chief Jailer with the Ashe County Sheriff's Department. After defendant was placed in the cell, noise from it became so loud the officers could not hear or transmit over the radio or telephone. Twice Officer Johnson went back to check on defendant and found him kicking on the steel door with his shoes. He tried to get the defendant to be quiet but each time the noise continued.

Finally, officer Johnson with officer Parsons went into defendant's cell and asked him for his shoes. Defendant refused and the officers removed his shoes. As Johnson turned his back on defendant to leave the cell, defendant grabbed him and they

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fell to the floor. Johnson got away from defendant and the officers left the cell. Officer Johnson was not injured, nor his uniform damaged, but it was soiled in the encounter.

Defendant's evidence was essentially the same, except he denied grabbing, hitting, or assaulting the officer in any way.

*Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.*

*William F. Lopp for defendant appellant.*

MARTIN (Harry C.), Judge.

Defendant argues the court erred in overruling his motion for nonsuit at the close of the State's evidence, contending the evidence failed to show officer Johnson was discharging a duty of his office at the time of the alleged assault. Defendant cites *State v. Smith*, 262 N.C. 472, 137 S.E. 2d 819 (1964), and *State v. Mink*, 18 N.C. App. 346, 196 S.E. 2d 552 (1973). In each of these cases, the challenge was to the validity of the warrant rather than the sufficiency of the evidence. The warrants totally failed to allege the duty the officer was discharging at the time in question and, therefore, were insufficient. Here, the warrant does allege that officer Johnson, as the Chief Jailer, was checking on the condition of defendant who was in custody for public drunkenness. Defendant Jones did not move to quash the warrant or move in arrest of judgment.

The sheriff has the care and custody of the jail in his county and shall appoint the keeper thereof. N.C. Gen. Stat. 162-22. The office of sheriff is constitutional, N.C. Const. art. VII, § 2, while the right of the sheriff to appoint deputies is a common law right, and the deputy is coeval in point of antiquity with the sheriff. *Lanier v. Greenville*, 174 N.C. 311, 93 S.E. 850 (1917). The position of jailer is one of common law origin and has existed from time immemorial. *Gowens v. Alamance County*, 216 N.C. 107, 3 S.E. 2d 339 (1939). The duties of the jailer are those prescribed by statute and those recognized at common law. The Chief Jailer of Ashe County is a public officer. He has charge of the jail premises and the prisoners. As Chief Jailer, Johnson had the duty to investigate or "check" on the prisoners in his charge, and any disturbance on the premises. "Check" is defined as "an examina-

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tion, etc. to determine if something is as it should be." Webster's New World Dictionary, Second College Edition 1974, at 242. The defendant was a prisoner under the supervision and control of officer Johnson; there was a disturbance involving prisoner Jones; the jailer had a duty of his office to investigate or "check" on this condition; he did so, and the assault occurred during this process.

There was sufficient evidence to overcome the motion for nonsuit.

In defendant's trial we find

No error.

Judges VAUGHN and ERWIN concur.

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## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 MAY 1979

CANTY v. DARSIE No. 7814SC163	Durham (75CVS1868)	No Error
COX v. TIRE CO. No. 7816SC126	Robeson (75CVS253)	Affirmed
CRATER v. WARD CO. No. 7821SC663	Forsyth (76CVS3580)	Affirmed
DECKER v. DECKER No. 7822DC583	Davidson (77CVD152)	Reversed and New Trial
HATCHER v. HATCHER No. 7826DC661	Mecklenburg (78CVD356)	Reversed and Remanded
HOLLAND v. HOLLAND No. 7815DC635	Alamance (77CVD1047)	Affirmed
IN RE ROGERS No. 789DC1166	Granville (78SP175)	Dismissed
INSURANCE CO. v. CALL No. 7823SC336	Wilkes (76CVS741)	Reversed and Remanded
KELLER v. OWEN No. 7822SC668	Davidson (76CVS939)	No Error

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STATE v. AMIS No. 7919SC44	Cabarrus (78CR5801)	No Error
STATE v. BROADNAX No. 7917SC30	Rockingham (77CRS12488)	No Error
STATE v. ELLERBE No. 7820SC1121	Richmond (77CRS5318)	No Error
STATE v. ELLIOTT No. 791SC28	Perquimans (78CRS1079) (78CRS1080)	No Error
STATE v. JONES No. 787SC1140	Edgecombe (78CRS375) (78CRS376)	No Error
STATE v. NELSON No. 7912SC76	Cumberland (77CRS52770)	No Error
STATE v. PLESS No. 7926SC93	Mecklenburg (78CR6864) (78CR6865) (78CR6867)	Dismissed
STATE v. WOODALL No. 784SC763	Onslow (78CR308) (78CR309) (78CR310) (78CR311)	No Error

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**Snelling & Snelling v. Watson**

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SNELLING & SNELLING, INC. v. JOY W. WATSON, INDIVIDUALLY, SNELLING & SNELLING OF HIGH POINT, INC., PARTIME TESTED TEMPORARIES, INC., JOBS ONE OF WINSTON-SALEM INC., SNELLING & SNELLING OF THOMASVILLE, INC. AND ERIC BOYD SCHEIPERS

No. 7818SC496

(Filed 15 May 1979)

**Actions § 2; Corporations §§ 2, 26— foreign corporation—franchise agreements—interstate commerce—no certificate of authority—right to bring action in this State**

Plaintiff foreign corporation, a national franchisor of employment agencies, was transacting business in interstate commerce within the meaning of G.S. 55-131(b)(8) and was not required to obtain a certificate of authority from the Secretary of State as a prerequisite to bringing suit in this State where its activities in this State consisted of (1) soliciting franchise agreements and promoting sales of its business forms; (2) training and instructing its franchisees and inspecting the premises, books and records of its franchisees; and (3) controlling the business methods of its franchisees to protect its service mark and to ensure an accurate accounting of profits by its franchisees, since plaintiff's activities were incidental to its interstate franchise contracts and were, therefore, interstate in nature.

APPEAL by plaintiff from *Crissman, Judge*. Judgment entered 3 April 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 March 1979.

Plaintiff is a nationwide franchisor of employment agencies and is incorporated in the Commonwealth of Pennsylvania with its principal place of business in Sarasota, Florida. Between 1964 and 1974, plaintiff entered into licensing agreements with each of the four corporate defendants. The defendant, Joy W. Watson, executed the contracts on behalf of the corporate licensees.

On 9 August 1977, plaintiff brought this action for breach of the four franchising agreements. Plaintiff sought to recover money damages, injunctive relief under the non-competition provisions in the licensing agreements, damages for infringement of service marks, treble damages and injunctive relief for trademark violations, and an accounting by the four licensees.

On 16 September 1977, defendants moved to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b) on the grounds that plaintiff is a foreign corporation transacting business within North Carolina but has failed to obtain a Certificate of Authority from

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the Secretary of State, and is therefore prohibited by G.S. 55-154(a), from maintaining an action in this State.

In support of defendants' motion to dismiss, the defendants presented the affidavit of Joy W. Watson. The affidavit tended to show that since 1964, the plaintiff has sent various employees into this State for periodic inspections of the premises of each licensee. The plaintiff's employees inspected the licensee's files, reports, business forms, cards and financial records. Plaintiff's employees also made periodic visits to the premises of the licensees in this State to solicit the purchase of business forms, advertising and promotional materials. In addition, the plaintiff sent its employees to instruct the licensees in the procedures and systems they were to use. Other visits were made to negotiate and enter into licensing agreements and to attend meetings and conferences. Defendant licensees paid over \$10,000 a year to the plaintiff in license fees.

Plaintiff presented the affidavit of John J. McBrearty, Vice President of Snelling and Snelling, Inc., which tended to show that the plaintiff maintained no offices in North Carolina and that no officers or employees of the plaintiff corporation reside in this State. The corporation takes no part in the daily operations of the local franchisees. Plaintiff does employ sixteen Directors of Franchise Relations to provide advice and services to its franchisees. Plaintiff has a total of fifteen franchisees in North Carolina.

On 3 April 1978, a Judgment was entered dismissing the complaint on the stated grounds that the provisions of G.S. 55-154(a) prohibited plaintiff from maintaining this action because it had failed to obtain a Certificate of Authority from the Secretary of State of North Carolina. From this judgment, plaintiff appeals.

*Smith, Moore, Smith, Schell & Hunter by Michael R. Abel and Suzanne Reynolds; McNairy, Clifford & Clendenin by Harry H. Clendenin III for plaintiff appellant.*

*Whiting, Horton & Hendrick by P. B. Whiting for defendant appellees.*

**CLARK, Judge.**

Plaintiff assigns as error the court's dismissal of the complaint pursuant to G.S. 55-154(a), for failure to obtain a Certificate

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of Authority as required by G.S. 55-131. Plaintiff contends that it was not transacting business in North Carolina within the meaning of G.S. 55-131(a) since its business activities were solely interstate in nature. Therefore, plaintiff was not required to procure a Certificate of Authority and it was error to deny plaintiff access to the courts of North Carolina. In addition, plaintiff contends that if the statutory provisions of G.S. 55-131 and G.S. 55-154 are applicable to the plaintiff, then the statutes place an unreasonable burden on interstate commerce in violation of the commerce clause of the Constitution of the United States. U.S. Const., art. I, § 8, cl. 3.

G.S. 55-131 provides in pertinent part as follows:

“(a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall transact business in this State. . . .

(b) [A] foreign corporation shall not be considered to be transacting business in this State, for the purpose of this Chapter, by reason of carrying on in this State any one or more of the following activities:

\* \* \* \*

(8) Transacting business in interstate commerce.”

The initial inquiry, then, is whether the plaintiff was transacting business within this State as defined by G.S. 55-131. The statutory provisions clearly provide that the State may not require a foreign corporation to obtain a Certificate of Authority by reason of its transacting *interstate business*.

Defendant contends that several North Carolina cases have held that activity similar to plaintiff’s constituted “transacting business” within North Carolina pursuant to G.S. 55-144 and are controlling in this case. G.S. 55-144 provides that:

“*Suits against foreign corporations transacting business in the State without authorization.*—Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon

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whom any process, notice or demand in any suit upon a cause of action arising out of such business may be served.”

In *Dumas v. Chesapeake and Ohio Ry.*, 253 N.C. 501, 117 S.E. 2d 426 (1960), the North Carolina Supreme Court held that the definition of “transacting business” as set forth in G.S. 55-131 was applicable to G.S. 55-144. In *Dumas*, the defendant was a foreign corporation which had sent agents into this State to procure orders for freight and passenger traffic. The agent, in addition to processing orders, telephoned the defendant’s passenger department in Virginia and ordered tickets. The bills of lading for freight traffic were signed in North Carolina. The court held that G.S. 55-131(b)(5), which provides that soliciting orders which are accepted outside of this State does not constitute transacting business in North Carolina, was applicable to G.S. 55-144. The court found, however, that defendant corporation engaged in more activity in this State than the mere solicitation of orders and therefore was not exempted from procuring a Certificate of Authority and was amenable to service of process pursuant to G.S. 55-144.

In *Schnur and Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), *appeal dismissed*, 328 F. 2d 103 (4th Cir. (1964)), the court held that service of process on the defendant foreign corporation pursuant to G.S. 55-144 was invalid because, according to G.S. 55-131(b)(5), defendant was not transacting business within North Carolina merely by soliciting orders in North Carolina. See *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E. 2d 473 (1970).

The definition of “transacting business” set forth in G.S. 55-131 is, therefore, applicable to G.S. 55-144, and any cases determined under the latter statute are relevant in considering the applicability of G.S. 55-131.

There are two cases decided pursuant to G.S. 55-144, which are cited by the defendant in support of his contention that the plaintiff was transacting business within this State. In *Abney Mills v. Tri-State Motor Co.*, 265 N.C. 61, 143 S.E. 2d 235 (1965), the defendant was a foreign corporation which purchased a controlling interest in a domestic corporation. The defendant sent officers and agents to North Carolina to control and manage the internal affairs of a domestic corporation. Thereafter, plaintiff



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brought suit in North Carolina, issuing a summons for service on defendant pursuant to G.S. 55-144. The court noted that, although mere ownership of a domestic corporation does not constitute doing business in this State, the activity of a foreign corporation in controlling the internal affairs of a domestic corporation would constitute transacting business in this State, within the meaning of G.S. 55-144. The court remanded for further findings of fact.

In *Throwing Corp. v. Deering Millikin Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969), the defendant was a foreign corporation which had granted licenses for its yarn manufacturing process to 23 North Carolina residents. Defendant sent auditors into North Carolina to inspect the records and books of the local licensees. The defendant had also received royalties from its local licensees. The court held that the defendant was "transacting business" within this State pursuant to G.S. 55-144 as well as G.S. 55-145 (a)(1) and upheld the exercise of *in personam* jurisdiction over the defendant. Neither of these cases, however, considered whether the activity of the foreign corporation was "transacting business in interstate commerce" and was therefore excluded from the requirement of obtaining a Certificate of Authority pursuant to G.S. 55-131(b)(8). These cases, therefore, are not controlling on the issue of whether the plaintiff's activity constituted "interstate commerce" within the meaning of G.S. 55-131(b)(8).

We must, therefore, determine whether the activities of Snelling & Snelling, Inc. within the State of North Carolina constituted "transacting business in interstate commerce," or were intrastate activities which subjected the plaintiff to the requirements of G.S. 55-131(a). The activities of Snelling & Snelling fall into the following general categories: (1) soliciting franchise agreements and promoting the sales of its business forms, (2) the training and instruction of franchisees and the inspection of the licensees' books and records, and (3) the control exercised by Snelling & Snelling over the business methods of its licensees. We will consider each of these activities separately, since if any one of these is deemed to be *intrastate* activity, the statutory exemption would not apply and plaintiff would be required to obtain a Certificate of Authority.

We note at the outset that "all interstate commerce is not sales of goods. Importation into one state from another is the in-

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dispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce." *Butler Brothers Shoe Co. v. United States Rubber Co.*, 156 F. 1, 17 (8th Cir. 1907), *cert. denied*, 212 U.S. 577, 53 L.Ed. 658, 29 S.Ct. 86 (1908); *International Textbook Co. v. Pigg*, 217 U.S. 91, 54 L.Ed. 678, 30 S.Ct. 481 (1909). Therefore, the sale of services can constitute *interstate* commerce.

The plaintiff's activity included the solicitation of licensing agreements with North Carolina residents and the solicitation of sales of its products such as business forms. In the landmark decision of *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 6 L.Ed. 2d 288, 81 S.Ct. 1316, *reh. denied*, 366 U.S. 978, 6 L.Ed. 2d 1268, 81 S.Ct. 1913 (1961), the Supreme Court considered what type of business solicitation would constitute intrastate business. In *Eli Lilly*, the plaintiff, a foreign corporation, contracted with New Jersey wholesalers for the distribution of plaintiff's products. Plaintiff maintained an office in New Jersey, was listed in the telephone directory and maintained a staff of 18 salesmen in New Jersey. The salesmen visited retailers to encourage sales between New Jersey wholesalers and retailers, and often placed orders with wholesalers on behalf of the retailers. The Supreme Court held that the plaintiff was engaged in intrastate commerce and could be required to procure a Certificate of Authority. The holding was based upon the fact that plaintiff's salesmen were promoting dealings *between* the wholesalers and retailers who were all residents of New Jersey. See *Robbins v. Shelby County*, 120 U.S. 489, 30 L.Ed. 694, 7 S.Ct. 592 (1887); *Champion Spark Plug Co. v. T. G. Stores, Inc.*, 356 F. 2d 462 (4th Cir. 1966); and *Materials Research Corp. v. Metron, Inc.*, 64 N.J. 74, 312 A. 2d 147 (1973).

In the case *sub judice*, the plaintiff maintained no offices in this State and its salesmen solicited sales between plaintiff, a foreign corporation, and North Carolina residents. There is no evidence that plaintiff engaged in or promoted any dealings between North Carolina residents and its North Carolina franchisees. The plaintiff's solicitation of business, therefore, was interstate in nature and plaintiff cannot be required to procure a Certificate of Authority by reason of this activity.

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Next, defendant contends that plaintiff sent agents into this State to train its franchisees and to inspect the premises, books and records of its licensees, and therefore was engaged in intrastate commerce.

In *Allenburg Cotton Co. v. Pittman*, 419 U.S. 20, 42 L.Ed. 2d 195, 95 S.Ct. 260 (1974), the plaintiff, a Tennessee corporation, contracted to purchase cotton from a Mississippi farmer. The plaintiff stored its cotton in a Mississippi warehouse for sorting and classifying. The plaintiff brought suit for breach of contract against the farmer in Mississippi and the farmer moved to dismiss the complaint because plaintiff was transacting business in intrastate commerce without having obtained a Certificate of Authority. The Supreme Court held that the storing of cotton in Mississippi was only an incidental part of an interstate contract, and that plaintiff could not be required to obtain a Certificate of Authority.

In *York Manufacturing Co. v. Colley*, 247 U.S. 21, 62 L.Ed. 963, 38 S.Ct. 430 (1918), the plaintiff, a foreign corporation, sold an ice plant to a Pennsylvania corporation. The plaintiff agreed to furnish an engineer to assemble and erect machinery in the forum state. The Supreme Court held that in order to determine whether the corporation's activity in the state was interstate or intrastate the court must consider the nature and character of the business. The court stated that a corporation's activity, although apparently intrastate in nature, is interstate "where the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale; that is, might be made to appropriately inhere in the duty of performance. . . . [T]he right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made." 247 U.S. at 24-25, 62 L.Ed. at 965. The court held that the engineers' duties were incidental to the interstate contract and therefore the state had no authority to require the plaintiff to obtain a Certificate of Authority. See also *In re Delta Molded Products, Inc.*, 416 F. Supp. 938, (N.D. Ala. 1976), *aff'd sub nom. Sterne v. Improved Machinery, Inc.*, 571 F. 2d 957 (5th Cir. 1978).

A franchise "arises where a national franchisor of a national brand or service subcontracts to permit a local dealer or person,

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to use his brand and agrees to provide advertising and other materials, services and equipment." 62 Am. Jur. 2d *Private Franchise* § 3 at 761 (1972). The franchisor is obligated by the agreement to provide advertising, training and other services. "It is of vital importance . . . that [the franchisee] be properly and effectively trained by the franchisor in the rudiments of operations required by the type of service. . . ." 62 Am. Jur. 2d *Private Franchise* § 6 at 765. If the franchisor fails to train or to supervise the franchisee, the franchisor is in breach of contract. See *Runyan v. Pacific Air Industries, Inc.*, 2 Cal. 3d 304, 85 Cal. Rptr. 138, 466 P. 2d 682 (1970); *Aberle v. North Dakota B & B Permanent & Temporary Personnel Systems, Inc.*, 186 N.W. 2d 446 (N.D. 1971).

In *First Investment Company v. McLeod*, 363 So. 2d 774 (Ala. 1978), the Great Lakes Nursery Corporation entered into a Christmas tree franchising agreement with defendant McLeod. Two salesmen for Great Lakes went to Alabama to sell the franchise. The agreement provided that McLeod would purchase 30,000 seedlings from Great Lakes, and Great Lakes would provide services, such as technical training for planting and marketing the trees. Great Lakes was also required to advertise and promote the sale of defendant's Christmas trees. McLeod also went with agents of Great Lakes to promote the sale of franchises to Alabama residents. McLeod gave a note to Great Lakes for \$8,000 which was negotiated to plaintiff, First Investment Company. Plaintiff brought suit on the promissory note in Alabama, and defendant moved to dismiss the complaint for failure of Great Lakes to qualify to do business in violation of the Constitution of Alabama, Art. XXI, § 232 and Code of Alabama § 10-2-254. The plaintiff contended that these provisions were inapplicable because Great Lakes' activity was solely interstate in nature, and that *Kentucky Galvanizing Co. v. Continental Casualty Co.*, 335 So. 2d 649 (Ala. 1976), held that the provisions of Ala. Code § 10-2-254 are not applicable to foreign corporations engaged only in "interstate commerce." The court noted that "the requirements to furnish expert help, equipment and advice were merely incidental attributes of the main undertaking of Great Lakes . . ." 363 So. 2d at 777, and held that Great Lakes was engaged in interstate commerce and was therefore not required to obtain a Certificate of Authority to do business in Alabama. See *Sausman Diversified Investments, Inc. v. The Cobbs Co.*, 208 So. 2d 873 (Fla. App. 1968); *In re Delta Molded Products, Inc.*, *supra*.

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The four licensing agreements in the case *sub judice*, provide in pertinent part:

"2. (a) SNELLING shall, within a reasonable time following the execution of this agreement, provide to Licensee and/or Licensee's employer instruction, advice and guidance as in SNELLING'S judgment shall be appropriate with respect to the establishment of Licensee's business, and with respect to the methods and techniques developed by SNELLING for the operation of such business, such services to be provided by SNELLING without charge to Licensee at a place and time designated by SNELLING. The instruction, advice and guidance to be rendered by SNELLING as aforesaid shall include the following subjects: interviewing of clients; evaluation of clients; preparation of job orders; telephone usage; preparation of advertising; record keeping; usage of forms; selection of office location; office layout and furnishing; selection of office personnel; office operations. All expenses of Licensee incident to attendance at instruction sessions shall be borne by Licensee. SNELLING shall also supply to Licensee, for the exclusive use of Licensee and its employees, copies of SNELLING training manuals; and Licensee shall treat the contents of said manuals as confidential and shall not disclose the contents thereof to unauthorized persons.

(b) In the event that Licensee shall request instruction in addition to that to be provided by SNELLING under paragraph 2(a), SNELLING shall provide such instruction to Licensee or its employees at Licensee's place of business at a mutually convenient time; provided, however, that the cost of such additional instruction, including transportation, subsistence and a reasonable charge for the time and services of SNELLING'S representative, shall be borne by Licensee and, if requested by SNELLING, shall be paid in advance.

(c) Licensee shall provide to each person employed in the operation of Licensee's business a minimum of three days' training and instruction in the methods and techniques developed by SNELLING. Such training and instruction shall be based upon and in accordance with the SNELLING training manuals, and shall be provided prior to participation by such employee in Licensee's business. As an alternative to the

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foregoing instruction Licensee may request SNELLING to render training instruction to Licensee's employees in accordance with the provisions of paragraph 2(b) either at Licensee's place of business or at such other place as SNELLING shall designate for such training."

The activity of plaintiff in training and supervising the defendant licensees, under the test set forth above, is an integral part of the interstate franchise agreement and is therefore also interstate in nature.

Defendants also contend that the facts establish an agency relationship or joint venture between plaintiff and defendants, and therefore the acts of the agent are attributed to the principal for qualification purposes. *See Scott Co. v. Enco Construction Co.*, 264 So. 2d 409 (Miss. 1972); Annot., 18 A.L.R. 2d 187 (1951). However, in *T. E. McCutcheon Enterprises, Inc. v. Snelling and Snelling, Inc.*, 232 Ga. 609, 212 S.E. 2d 319 (1974), on facts almost identical to the case at hand, the court held that the licensees were not agents of the franchisor but were independent contractors. There was no evidence presented in the case *sub judice* that the licensees were acting on behalf of the plaintiff or were acting in any capacity other than as independent contractors. Therefore, the activities of the licensees within this State cannot be attributed to the plaintiff.

Finally, defendants contend that the plaintiff exerted so much control over the defendant licensees that plaintiff was engaged in intrastate commerce. The record does indicate that the plaintiff exercised a great deal of control over the licensees. The licensing agreement required the licensee to: use only the Snelling and Snelling name, adhere to specific procedures and methods outlined by plaintiff, maintain accurate records and to provide reports and copies of invoices.

All of these controls, however, are designed to ensure that the licensees are not abusing the service mark, to ensure that the quality of service among licensees is uniform and to ensure that the licensees are properly accounting for their profits.

In exchange for the right to use a service mark, a franchisor "retains the right to control the manner in which the franchisee conducts his business. Indeed, such control is essential to the

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validity of the franchisor's trademark since trademarks function in part to guarantee the consistent quality of the product identified by the mark." D. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 295 (1973). "The quality of the services must be controlled or all rights in the mark will be lost." T. Arnold, B. Durkee, *Trademark and Unfair Competition Considerations in Franchised Business Operations*, 15 N.Y.L. Forum 80, 89 (1969).

In *State v. Ford Motor Co.*, 208 S.C. 379, 38 S.E. 2d 242 (1946), the State of South Carolina sought to recover license fees and penalties from the defendant foreign corporation, because it had failed to file or obtain a license to do business in South Carolina. The defendant had contracted with eighty Ford dealers in South Carolina and had five Ford distributorship agreements with South Carolina dealers. The dealers were required to make 10-day reports on their activities and sales prospects. Agents of the defendant traveled to South Carolina and regularly visited dealers to advise them of sales and service methods. The dealers were required to sell parts at specified prices. The court held that the Ford Motor Companies' activities were interstate in nature and that the defendant's activities in sending representatives into South Carolina, servicing warranties, and supervising the dealers constituted interstate commerce. In *Carolina Components Corp. v. Brown Wholesale Co.*, --- S.C. ---, 250 S.E. 2d 332 (1978), the plaintiff was a North Carolina corporation which sent salesmen into South Carolina to solicit sales resulting in over 100 separate shipments. The court noted that "where a foreign corporation's contacts involve only soliciting, cultivating and supervising its interstate business, such corporation is not subject to domestication requirements." 250 S.E. 2d at 334.

The controls exercised by plaintiff over the four licensees, although numerous, are all directly related to the protection of plaintiff's rights in its service mark and to ensure accurate accounting by the licensees. There is no evidence that the plaintiff's agents actually operated the day-to-day business of the licensees. In *Filmaker's Releasing Organization v. Realart Pictures, Inc.*, 374 S.W. 2d 535 (Mo. App. 1964), the plaintiff, a foreign corporation, entered into a franchising agreement with the defendant for the distribution of plaintiff's films. The contract provided that the defendant was to inform plaintiff of the whereabouts of the films,

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that defendant could not change his personnel and that defendant must display plaintiff's name. The court held that the plaintiff was engaged in interstate business and need not qualify to do business within the State prior to bringing suit, noting that the plaintiff had no control over the employees' wages or hours of the defendant franchisee. *See* Abney Mills, *supra*.

The licensing agreements between plaintiff and the four defendant licensees were interstate contracts and plaintiff's activity, pursuant to the terms of those agreements, was incidental to the interstate contract and was, therefore, interstate in nature. Plaintiff was, therefore, transacting business in interstate commerce within the meaning of G.S. 55-131(b)(8) and is not required to obtain a Certificate of Authority from the Secretary of State as a prerequisite to bringing suit in this State.

The judgment is

Reversed and remanded.

Chief Judge MORRIS and Judge ARNOLD concur.

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STILLWELL ENTERPRISES, INC., PLAINTIFF v. INTERSTATE EQUIPMENT  
COMPANY, ORIGINAL DEFENDANT AND THIRD-PARTY PLAINTIFF v. THE  
TRAVELERS INDEMNITY COMPANY, AND ROBERT D. KELLY, THIRD-  
PARTY DEFENDANTS

No. 7830SC603

(Filed 15 May 1979)

**1. Landlord and Tenant § 5— defect in leased equipment—provision limiting liability valid**

Provision in a lease of business equipment absolving the lessor of responsibility for damages resulting from defects in the equipment was valid.

**2. Bailment § 6— negligence of bailor alleged—no showing that defect existed at time of leasing**

In an action by plaintiff to recover damages allegedly sustained when defendant failed to repair a piece of equipment leased by plaintiff, the trial court properly entered summary judgment for defendant on plaintiff's claim of negligence, since a bailor is liable for injury to the bailee or a third person for injuries proximately caused by a defect in the equipment of which he had



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knowledge or which he could have discovered by reasonable care and inspection, but plaintiff offered no evidence to show that the defect alleged existed at the time of leasing.

**3. Attorneys at Law § 7.4— breach of lease agreement—no recovery of attorney fees**

Even though attorney's fees were expressly provided for in the parties' lease agreement, the trial court erred in awarding defendant attorney's fees, since the lease contract was not evidence of indebtedness within the meaning of G.S. 6-21.2, and attorney's fees were therefore not recoverable, as they were not specifically allowed by statute.

**4. Guaranty § 2— agreement to be liable for debts—summary judgment against guarantor proper**

The trial court did not err in entering summary judgment for defendant against the third-party defendant guarantor since, in his guaranty contract, third-party defendant specifically agreed to be liable for all debts arising under plaintiff's lease obligations.

APPEAL by plaintiff and third-party defendant Robert D. Kelly from *Thornburg, Judge*. Order entered 23 March 1978 in Superior Court, JACKSON County. Heard in the Court of Appeals 27 March 1979.

Plaintiff leased two WABCO Model 229G Pushloading Scrapers from defendant on 15 October 1975. The scrapers were to be used in construction operations which use was known to defendant. After 358 hours of use, one of the scrapers broke and was inoperative. On 22 July 1976, plaintiff filed complaint alleging:

"That on or about February 17, 1976, one of the pushloading scrapers leased by the Plaintiff from the Defendant broke in two, without any fault of the Plaintiff; that the reason that said pushloading scraper broke was that the same was defective at the time it was delivered by the Defendant to the Plaintiff.

\* \* \*

That the Defendant failed and refused to provide the Plaintiff with a substitute pushloading scraper and that by reason of the Defendant's failure to provide the Plaintiff with a pushloading scraper that was fit for use, and by further reason of the Defendant's having failed to properly repair said pushloading scraper, the Plaintiff has been damaged in the sum of \$10,000.00."

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Defendant answered, denied breach of the lease agreement, and filed counterclaim for rental payments, sales tax, and repairs to leasehold equipment. Defendant filed third-party complaint against Travelers Indemnity Company, as surety on the general contractor's payment bond, and against Robert D. Kelly, as guarantor of payment on the plaintiff subcontractor's lease agreement. Plaintiff amended its complaint, admitted payment of all rentals except \$14,000.00, and alleged the defect in the scraper was latent. Defendant filed a motion for summary judgment against plaintiff on the ground that:

"Paragraph 9 of the aforesaid lease contract provides as follows:

"The lessor shall not be liable in any event to the lessee for any loss, delay or damage of any kind or character resulting from defects in, or inefficiency of equipment hereby leased or accidental breakage thereof."

Defendant moved for summary judgment against plaintiff and third-party defendants. Defendant sought to recover from plaintiff the sum of \$19,532.53 as principal, interest on the sum at a rate of six percent per annum beginning 30 days after date of each invoice as to the alleged principal debt, and attorney's fees at the rate of fifteen percent of the amount of the principal debt. Defendant prayed recovery from third-party defendant Robert D. Kelly in the amount of \$19,532.53, and interest thereon at the rate of six percent per annum. Finally, defendant prayed recovery from third-party defendant Travelers Indemnity Company in the amount of \$19,532.53 and interest thereon at the rate of six percent per annum beginning 30 days after date of each invoice. Later, defendant moved for judgment on the pleadings as to plaintiff's claims. On 26 January 1978, defendant filed a voluntary dismissal of its third-party complaint against Travelers Indemnity Company.

The trial court entered summary judgment against plaintiff's claims, entered summary judgment for defendant against plaintiff for \$14,010.00 in unpaid rental costs, \$420.00 for North Carolina sales tax, \$471.60 for insurance premiums advanced by defendant, \$4,630.93 for labor and parts expended and provided by defendant, \$2,929.00 for attorney's fees, and \$2,343.15 for interest. The trial court entered summary judgment for defend-

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ant against third-party defendant Robert D. Kelly for the same amounts except that no attorney's fees were allowed, and only \$2,221.53 was allowed for interest.

Plaintiff and third-party defendant appealed.

*Smith, Currie & Hancock, by Joseph A. McManus, Jr., for plaintiff appellant and Robert D. Kelly, third-party defendant appellant.*

*Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for defendant appellee and third-party plaintiff appellee.*

ERWIN, Judge.

[1] Plaintiff assigns as error the court's enforcement of the contractual limitations provided in the lease agreement. We find no error. The lease agreement entered in between plaintiff and defendant constituted a bailment contract. Parties to a bailment contract may limit the rights of the bailee in case of a breach of an express warranty. Annot., 68 A.L.R. 2d 850 (1959). The measure of the rights, duties, and obligations of bailor and bailee can be ascertained by looking at the terms of the contract itself. 8 Am. Jur. 2d, Bailments, § 120, pp. 1014-15. Paragraph 6 of the lease in question provides:

"The receipt and acceptance by the lessee of said equipment shall constitute acknowledgment that said property has been accepted and found in good, safe and serviceable condition and fit for use, unless the lessee makes claim to the contrary to the lessor by registered mail with return receipt demanded, addressed to the lessor's home office within three days after receipt of said equipment. The complaint as made shall set forth in detail its complete nature and the condition of the property received."

Under Paragraph 11 of the lease, plaintiff's sole remedy if the equipment proved to be defective or unfit for use after the three-day period was to return the machinery to lessor and terminate the contract. In that event, plaintiff would have only been liable for the minimum rental charges supposedly embodied in the agreement. Paragraph 9 of the agreement provided that:

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"The lessor shall not be liable in any event to the lessee for any loss, delay or damage of any kind or character resulting from defects in, or inefficiency of equipment hereby leased or accidental breakage thereof."

We need not consider what the consequence would have been if plaintiff had sought to terminate the contract under Paragraph 11.

In *Falco Corp. v. Hood*, 7 N.C. App. 717, 173 S.E. 2d 578 (1970), we upheld a lease agreement which precluded the recovery of damages because of any defect in the equipment leased at the time of delivery where no notice was given in the five-day period provided therein. Quoting from 5 Strong, N.C. Index 2d, Landlord and Tenant, § 5, p. 156, we said:

"Where a lease of business equipment makes no provision that the lessee might recover damages because of any defect in the equipment at the time of delivery and that the lessee should give the lessor written notice of any defect within 5 days or it would be conclusively presumed that the equipment was delivered in good repair, the lessee is not entitled to damages or replacement as against the lessor for an asserted defect or misrepresentation as to the condition of the machinery at the time of delivery, no notice of any defect having been given the lessor as required by the instrument.'" (Citation omitted.)

*Id.* at 720, 173 S.E. 2d at 581; see also *Leasing Corp. v. Hall*, 264 N.C. 110, 141 S.E. 2d 30 (1965). We believe that our holding in *Falco Corp. v. Hood*, *supra*, is dispositive of the validity of the contractual limitation presented here. We affirm the entry of summary judgment as to the contractual limitation of damages.

[2] Plaintiff next assigns as error the trial court's dismissal of the counts of its complaint inasmuch as they allege a claim for relief based on negligence.

It is the duty of a bailor for hire to see that equipment leased is in good condition, and while he is not an insurer, he is liable for injury to the bailee or a third person for injuries proximately caused by a defect in the equipment of which he had knowledge or which he could have discovered by reasonable care and inspection. See *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721

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(1972); *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4 (1952); Products Liability—Liability of the Bailor for Hire for Personal Injury Caused by Defective Goods, 51 N.C.L. Rev. 786-87 (1973). See also 8 Am. Jur. 2d, Bailments, § 143, p. 1039. The bailor's breach of this duty of reasonable care may give rise to an action in tort, as well as in contract. 8 Am. Jur. 2d, Bailments, § 150, p. 1045. This possibility was recognized by our Supreme Court in *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). In setting forth the instances in which a breach of contract action may give rise to a tort, the Supreme Court stated:

"It may well be that this enumeration of categories in which a promisor has been held liable in a tort action by reason of his negligent, or wilful, act or omission in the performance of his contract is not all inclusive. However, our research has brought to our attention no case in which this Court has held a tort action lies against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill."

*Id.* at 82-83, 240 S.E. 2d at 351. The fact that the breach of duty under bailment contract gives rise to an action in tort for negligence was recognized in *Insurance Asso. v. Parker*, 234 N.C. 20, 65 S.E. 2d 341 (1951); see also 8 Am. Jur. 2d, Bailments, § 285, p. 1173. Our Supreme Court stated in *Insurance Asso. v. Parker*, *supra*:

"At first blush it would seem that the duty of a bailee to exercise due care to protect the thing bailed against loss, damage, or destruction is an obligation imposed by the contract, and that a breach thereof gives rise to an action on the contract rather than in tort for negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472. But the courts uniformly hold that it is a legal duty arising out of the relationship created by the contract. If a person accepts and receives the property of another for safe keeping or other purpose under a contract of bailment, the law requires of him due care by reason of the semitrust relation he thus assumes. *Hanes v. Shapiro, supra; Trustees v. Banking Co.*, 182 N.C. 298, 109 S.E. 6. The obligation to use due care in contracts of this type arises from the relation created by the contract and is independent, rather than a part of it. 6 A.J. (Rev.) 343. That the obligation arises from the relation and not as an implied term of the contract

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is shown by the refusal of the law under certain circumstances to give effect to provisions in the contract undertaking to nullify the effect of the obligation. *Kenney v. Wong Len*, 128 A. 343.

It is a well-recognized rule of law that in an ordinary mutual benefit bailment, where there is no great disparity of bargaining power, the bailee may relieve himself from the liability imposed on him by the common law so long as the provisions of such contract do not run counter to the public interest." (Citations omitted.)

*Id.* at 23, 65 S.E. 2d at 343.

If the scraper contained a preexisting defect which could or should have been discovered by a proper inspection, and if the defect was the proximate cause of plaintiff's damages, defendant would be liable to plaintiff. *Mann v. Transportation Co. and Tillet v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973).

Here, however, plaintiff has offered no evidence to show that the defect alleged existed at the time of leasing. On the contrary, plaintiff's evidence merely states:

"When I examined the scraper at Stillwell's request, I noticed that there was no lock wire to these bolts or screws.

...

Normal driving time from Statesville to Sylva is 2<sup>3</sup>/<sub>4</sub> hours. If two service personnel spent 22<sup>3</sup>/<sub>4</sub> hours in travel time and on the job setting up the machines for operations, such inspection should encompass the inspection of the front hitch ball joint.

...

From my experience of 25 years, *if* such front hitch ball joint were inspected and *if* lock wires were absent from the screws, this would signal some problems and further investigation of the matter would be in order." (Emphasis added.)

Plaintiff's hypothetical assumption of a prior defect is not sufficient to impose liability on a bailor for hire. The defect must be shown to have existed at the time of delivery. *See Hudson v.*

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*Drive It Yourself, Inc., supra.* We hold the court's entry of summary judgment as to plaintiff's claim of negligence was proper.

Plaintiff's final assignment of error is that the trial court erred in its entry of summary judgment as to defendant's damages. We agree.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 11 Strong's N.C. Index 3d, Rules of Civil Procedure, § 56.3, p. 356. Under the express terms of the lease agreement, plaintiff obligated itself to pay a monthly rental of \$7,000.00. In its pleadings, it admits that \$14,000.00 in rental payments have not been made. Likewise, plaintiff agreed to pay all sales taxes and to obtain insurance coverage to protect defendant against damage to the property during the lease term. The trial court's award of these damages was clearly proper. See *Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977).

Under Paragraphs 5 and 10 of the lease agreement, plaintiff agreed to pay for all damages to the equipment except reasonable wear and tear and to pay defendant its regular charges for any material or labor furnished. In moving for summary judgment, defendant offered into evidence invoices of the amount due for labor and materials. It is clear from the record that these repairs were other than ordinary wear and tear. Defendant offered a sworn affidavit to that effect. Plaintiff failed to introduce any materials in opposition and failed to point to specific areas of impeachment and contradiction. Under such circumstances, the court's entry of summary judgment for costs and repairs in the undisputed amount of \$4,630.93 was proper, *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), and plaintiff was entitled to recover interest at the legal rate of six percent on all sums due under the contract computed from the date of breach. *Equipment Co. v. Smith, supra.* Thus, defendant was entitled to recover interest on the unpaid rental amount, the advanced insurance premium, and the cost of repairs.

[3] However, the trial court erred in awarding defendant attorney's fees. The lease contract is not an evidence of indebtedness within the meaning of G.S. 6-21.2, and attorney's fees

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were not recoverable, unless specifically allowed by statute. *See Systems, Inc. v. Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E. 2d 613 (1979). This is so even though attorney's fees were expressly provided for in the contract. *See Construction Co. v. Development Corp.*, 29 N.C. App. 731, 225 S.E. 2d 623, *dis. rev. denied*, 290 N.C. 660, 228 S.E. 2d 459 (1976). The court's entry of summary judgment against plaintiff for attorney's fees in the amount of \$2,929.00 is vacated.

Third-Party Defendant's Appeal

[4] Third-party defendant Robert D. Kelly contends the court erred in entering summary judgment against him in the amount of \$21,754.06. We find no error.

A guaranty of the payment of a debt is an absolute promise to pay the debt at maturity if not paid by the principal debtor. *Garren v. Youngblood*, 207 N.C. 86, 176 S.E. 252 (1934). Third-party plaintiff's rights against third-party defendant Robert D. Kelly arise out of the guaranty contract and must be based on that contract. *Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E. 2d 752 (1972).

The guaranty contract provided:

"In consideration of your entering into a lease agreement with Stillwell Enterprises, Inc. by contract dated October 15, 1975. I hereby contract and guarantee that the said Stillwell Enterprises, Inc. will pay all lease obligations arising under the aforesaid lease agreement on the dates set forth therein, failing which I shall pay to you all sums due under said lease contract within ten days after notice of default is received from you.

Witness my hand and seal this the 15th day of October 1975."

In his guaranty contract, third-party defendant specifically agreed to be liable for all debts arising under plaintiff's lease obligations. We find no error in the court's entry of summary judgment. *Cf. Equipment Co. v. Smith, supra.* (Surety held liable for rental payments and interest thereon from date on which rental payments became due.)



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Third-party defendant Robert D. Kelly contends that the voluntary dismissal of the Travelers Indemnity Company operated as a discharge of his liability under his guaranty contract. We find no error.

Defendant was entitled to dismiss his suit against the Travelers Indemnity Company under G.S. 1A-1, Rule 41(a), of the Rules of Civil Procedure. Third-party defendant was not prejudiced in any way by the dismissal nor was he discharged from liability under his guaranty.

Summary judgment entered below against plaintiff is affirmed in part as follows:

- "a. For unpaid rental costs in the amount of \$14,010;
- b. For North Carolina Sales Tax in the amount of \$420;
- c. For insurance premiums advanced by the defendant in the amount of \$471.60;
- d. For labor and parts expended and provided by the defendant in the amount of \$4,630.93. . ."

The judgment entered below against plaintiff for attorney's fees is reversed; the amount of interest awarded against plaintiff is to be redetermined in accordance with the above judgment.

Summary judgment against third-party defendant is affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. FATE LEDFORD, DEFENDANT

No. 7924SC63

(Filed 15 May 1979)

**1. Criminal Law § 71—freshness of blood—shorthand statement of fact**

Testimony by the sheriff that blood he observed on the ground was fresh "within one to three hours, maybe" was admissible as a shorthand statement of fact.

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**2. Criminal Law § 55— blood alcohol content—failure to show chain of custody of sample**

Although the trial court erred in permitting a pathologist to testify as to the blood alcohol content of deceased when the State failed to establish the chain of custody of the blood sample taken from deceased, such error was harmless where no attempt was made to establish that alcohol played a role in the death of the deceased.

**3. Criminal Law § 77.1— statements made by defendant—witness's uncertainty as to when made—credibility**

Even if a witness's testimony conveyed an uncertainty as to whether statements made to him by defendant occurred prior to or subsequent to the shooting of deceased, such uncertainty went to the credibility and weight of the testimony and not to its admissibility.

APPEAL by defendant from *Howell, Judge*. Judgment entered 25 August 1978 in Superior Court, MADISON County. Heard in the Court of Appeals 24 April 1979.

Defendant was indicted for first degree murder, tried by a jury for second degree murder and convicted of voluntary manslaughter. From judgment imposing an active sentence of not less than 17 nor more than 20 years, defendant appeals.

Evidence for the State tended to show the following: That on 24 April 1978 the deceased, Troy Arrington, ate supper with his mother at 6:00 p.m. and left her house between 6:30 p.m. and 7:00 p.m. to take some clothes to his two daughters who live with their mother, Geneva Arrington, in Long Branch; that the deceased and Geneva had entered into a separation agreement approximately a year before; that the deceased was right handed. Dr. W. O. Duck, a family practitioner, testified that he was called to examine the body of the deceased by Sheriff Ponder at 11:45 p.m. on 24 April 1978. He observed the body lying in the yard of a dwelling house in Long Branch, lying face up with a revolver under the left hand. There was an entrance wound and exit wound in the body, and Dr. Duck smelled a moderate odor of alcohol about the body. He was unable to determine the time of death. A small amount of rigor was observable in the body "which occurs one to eight hours after death." Another witness also smelled alcohol about the body.

The deceased's older daughter testified that defendant had visited with her mother, Geneva Arrington, before her mother

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and father separated. On cross-examination, she stated that she had heard her father threaten to beat defendant with his hands on numerous occasions during the past year.

Sheriff Ponder testified that at 11:04 p.m. on 24 April 1978 he was called to Geneva Arrington's house; that he arrived at 11:28 p.m. and saw the body of the deceased lying 15 feet from the porch; that the deceased was lying with his arms spread out and with a pistol containing five spent shells under his left arm; that no one was in the house; that he then drove about a half mile to the home of Kitty Blankenship (the grandmother of Geneva Arrington); that he found the defendant and Geneva there; that he then returned to cover the body since it was raining hard; that he found three spots of blood lying between the porch steps and the body; that, in his opinion, the blood was "within one to three hours, maybe" old; that when he first observed defendant, he believed that defendant's clothes were dry even though it had been raining hard; that defendant told him that he and Geneva had walked across the mountain from Raymond Ramsey's house and that when they reached Geneva's house, the deceased ran from behind a wood pile and said, "Oh yes, damn you, I've got you now"; that defendant started to run and the deceased fired four to five shots; that defendant fell and then fired his rifle once at deceased and saw the deceased fall; that he found no bullet holes, shells or alcoholic beverages at the scene.

Dr. Carl Biggers, a physician certified in anatomical and clinical pathology, testified that he examined the body on the morning of 28 April 1978. He sent a blood sample to Chapel Hill for blood alcohol determination. The blood alcohol level was negative. The stomach of the deceased contained approximately one quart of recently ingested and partially digested food material including beans and leafy green vegetables. In his opinion, if the deceased ate his last meal on 24 April 1978, consisting of potatoes, beans, cornbread and milk at approximately 6:00 p.m., then he would not expect to find a quart of food material in deceased's stomach at 10:45 p.m. on the same day. On cross-examination, Dr. Biggers stated that he could not determine the precise time of death.

Billie Jones testified that he saw a life insurance policy in the glove compartment of the deceased's truck the day before he was

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killed. Evidence was then presented that deceased owned an insurance policy with an accidental death benefit of \$4,000 with his widow as beneficiary. After the death of deceased, Geneva submitted a claim form for the benefits.

Ida Ramsey testified that on 24 April 1978, between 5:30 and 6:00 p.m., she saw Geneva and defendant in the mountain field above her house. Long Branch is directly across the mountain from her house. Edward Eugene Arrington testified that on 24 April 1978 at approximately 7:30 or 8:00 p.m. he saw deceased in his pickup truck turn at the fork of Long Branch Road which was where Geneva lived. George Blankenship, a neighbor of Geneva's, testified that on 24 April 1978 at about 10:15 p.m. he heard five shots in rapid succession. Raymond Ramsey, the husband of Ida Ramsey, testified that from his house there was a long way and short way to get to Long Branch. Depending on which way one traveled, the walk would take from a half hour to an hour. He also testified that defendant carried a gun just about all the time. On the afternoon of 23 April 1978, deceased and Calvin Rice visited with Ramsey. Deceased asked Ramsey to try to persuade Geneva to come back to him. When deceased and Rice left Ramsey's house, they headed in the direction of the defendant's house. Ramsey later saw the deceased's Jeep in front of the defendant's house. The next day, defendant told Ramsey that deceased and Rice had come to his house and "fired some shots." On cross-examination, Ramsey testified that on 23 April 1978 the deceased threatened to kill defendant if he found defendant with his wife. Ramsey heard the deceased make numerous similar threats during the previous year. He testified that a walk from his place to Geneva's place would take an hour to an hour and a half. In his opinion, it would be hard for a woman to make the walk in one and a half hours. On 24 April 1978, defendant told Ramsey he had run from deceased for the last time.

A deputy sheriff testified that the deceased was a good marksman. Charlie Shook testified that several weeks after defendant was released from jail on bond, he helped Shook haul hay for Raymond Ramsey. Defendant told Shook that he shot deceased in Geneva's house. Several weeks later, defendant told Shook that when the decedent ran from a wood pile and began shooting at defendant and Geneva, the defendant shot him in the

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yard. Shook was not certain when defendant made either of these statements, but thought it was in April.

The defendant presented the testimony of eleven witnesses, including himself. Raymond Ramsey's daughter testified that she kept cattle at her father's place until May and was responsible for ordering and obtaining hay. The last time she bought any hay was in March. Calvin Rice testified that on 23 April 1978 he heard the deceased say that he was going to kill the defendant and Geneva if he found them together. Kitty Blankenship, Geneva's grandmother, testified that on 24 April 1978 at 8:00 p.m. the deceased came to her house to return some of his children's clothes. He left a few minutes later traveling in the opposite direction from Geneva's house. About 10:45 p.m., she heard several shots. A few minutes later, Geneva and the defendant came into her house and defendant indicated that he thought he had killed the deceased and then made a telephone call. Both Geneva and defendant were wet.

Geneva's mother, Edna Robinson, testified that she was at the home of Kitty Blankenship when deceased arrived at 8:00 p.m. on 24 April 1978. After Mrs. Robinson refused to give the deceased the keys to Geneva's house, he left driving at a high rate of speed in the opposite direction from Geneva's house. She also testified that she had recently walked from Geneva's house to defendant's house and that it took three hours. She admitted that there was a shorter route but did not know how long that route took.

Laura Parker, the defendant's aunt, testified that on 23 April 1978, the defendant telephoned her and asked her to call the sheriff to report that the deceased and Rice were at defendant's house shooting.

Geneva testified that on 24 April 1978 she and the defendant left this house at 7:00 p.m. to walk to her house. They took the long way in order to stay off the public road and rested several times along the way. As she and defendant approached the porch to her house, deceased ran from behind a wood pile and began shooting. She denied that after the shooting she poured alcohol on the deceased and searched his truck for a life insurance policy. She also denied that she had refused to allow the sheriff to investigate the inside of her house for bullet holes.

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Defendant testified that when he and Geneva reached Geneva's house after 10:00 p.m. the deceased came from behind a wood pile and began shooting. The defendant began running backwards and fell and fired at deceased. Defendant and Geneva then ran to the house of Geneva's grandmother and the sheriff arrived about a half hour later. Defendant denied that he shot the deceased around 8:00 p.m. in Geneva's house, poured alcohol on his body, moved the body to the porch, fired five shots around 10:00 p.m., and then called for help.

Sheriff Ponder was recalled and testified that he was never refused admission into Geneva's house and that an automobile insurance policy was the only policy found in deceased's truck.

*Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.*

*Staunton Norris, for defendant appellant.*

CARLTON, Judge.

In his brief, defendant brings forward six arguments out of 20 assignments of error. The remaining assignments of error are deemed abandoned. Rule 28, North Carolina Rules of Appellate Procedure.

It is essential in understanding the arguments presented by defendant on appeal to note the theories of the State and the defendant at trial: The State apparently proceeded on the theory that the defendant shot the deceased at approximately 8:00 p.m. on the evening of 24 April 1978 inside the home of Geneva Arrington or upon the front porch; that defendant and Geneva Arrington thereafter waited until approximately 10:00 p.m. and placed the body of the deceased in the yard of her home, fired the pistol of deceased and then arranged his body and the pistol in a manner calculated to give the appearance that the killing had been committed in self defense. Defendant contended that he and Geneva Arrington arrived at her home by foot at approximately 10:45 p.m. on 24 April 1978 and that, upon approaching the front porch of the dwelling, they were surprised by the deceased who had been hiding behind a wood pile and that the deceased rushed toward them firing a pistol requiring defendant to fire upon the deceased in self defense. Defendant's arguments on appeal evolve primarily around testimony of witnesses tending to establish the time of death.

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[1] Defendant first contends that the trial court erred in allowing Sheriff Ponder to give opinion testimony concerning the freshness of blood he observed on the ground near the body of the deceased. After Sheriff Ponder described the blood spots he observed on the ground, the following exchange took place:

Q. Do you have an opinion as to whether or not the blood spots you described were fresh or otherwise?

MR. NORRIS: OBJECTION.

THE COURT: OVERRULED. If he has an opinion.

A. Yes, sir, I have the opinion that it was fresh blood that it curdled. I wouldn't say how fresh, I would say within one to three hours, maybe.

Defendant argues that the sheriff's answer could not reasonably have been expected to be reliable or trustworthy and was a "mere surmise based upon insufficient knowledge and experience."

We believe the sheriff's answer to be a mere shorthand statement of fact. Our Supreme Court has held that a witness may testify as to whether a substance he observed was blood. *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977). We do not believe it too great an extension of the rule to allow the witness to go further and state that the blood appeared fresh or otherwise. In *State v. Jones, supra*, 291 N.C. at 685, 231 S.E. 2d 254, the Supreme Court stated:

The average layman is familiar with bloodstains; they are a part of common experience and knowledge. When a witness says he saw blood he states an opinion based on his observations, and most likely it would be exceedingly difficult for him to describe the details which lead him to conclude that the stains were blood. When he testifies they looked like blood to him he has stated his conception. "This Court has long held that a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' Such statements are usually referred to as shorthand statements of facts." *State*

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*v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975). See 1 Stansbury, N. C. Evidence, § 125 (Brandis rev. ed. 1973).

Moreover, defendant has shown no prejudice by the admission of this testimony. The sheriff's statement that the blood was fresh "within one to three hours, maybe" is as consistent with the defendant's contentions as it is with the contentions of the State. The sheriff did not arrive on the scene until 11:28 p.m. and defendant contended the shooting took place sometime after 10:00 p.m. This assignment of error is overruled.

Defendant next contends that the trial court committed prejudicial error in allowing inconsistent testimony by Sheriff Ponder. The sheriff initially stated that the defendant was first seen by him at the Blankenship home and that he "don't recall much about him. He looked much as he does now." Immediately thereafter this exchange took place:

Q. Was his clothing wet or dry, Sheriff Ponder?

A. I was soaked and I don't recall his clothes. I believe they were dry, that's what I would say if I had to say anything, it was pouring the rain and I don't recall myself.

Defendant argues that this contradictory testimony was prejudicial because the time of the shooting was a critical issue of fact. We do not agree.

While this witness was obviously uncertain as to the correct answer, we do not believe that, taken contextually, his answer could have any prejudicial effect on the jury. In the first place, the witness clearly indicated that he was not certain whether the defendant's clothes were wet or dry when he observed him. His uncertainty was apparent to the jury and surely affected the probative value of the testimony. In essence, the witness impeached his own testimony. We note also that defendant elected not to challenge the sheriff's testimony in this respect on cross-examination.

[2] Defendant next contends that the trial court erred in permitting the State's witness, Dr. Biggers, to testify as to the blood alcohol content of the deceased. He argues that there was no evidence to establish the chain of custody of the blood sample



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from the pathologist in Asheville to the medical examiner in Chapel Hill and no evidence as to how the sample was sent to Chapel Hill. In its brief, the State concedes that, under the requirements stated by this Court in *Wood v. Brown*, 20 N.C. App. 307, 201 S.E. 2d 225 (1973), the district attorney failed to establish a proper foundation for tracing an identification of the blood specimen. State argues, however, that admission of this evidence was not prejudicial to the defendant and we agree.

Not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. 1 Stansbury, N.C. Evidence, § 9, p. 20 (Brandis rev. ed. 1973). "[T]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *Collins v. Lamb*, 215 N.C. 719, 720, 2 S.E. 2d 863, 864 (1939). In the present case, defendant has failed to show any possible prejudicial error resulting from the admission of this testimony. Two witnesses had testified that they smelled a moderate odor of alcohol about the body of the deceased. However, the record discloses no issue being made over the matter of consumption of alcohol by the deceased. There was other testimony that no alcohol was found in the area. The record is barren of any theory in which the consumption of alcohol by the deceased contributed to his death nor is there any indication of any attempt made to establish that alcohol played a role in the death of the deceased. Contextually, this testimony appears to be, at most, irrelevant and harmless.

Defendant also contends that the trial court erred in permitting the State to propound certain questions on cross-examination of the defendant and his witness, Geneva Arrington, which insinuated supposed facts for which there was no evidence at the trial. Defendant cites the rule of law which forbids the prosecuting attorney to inject into the trial of a cause to the prejudice of the accused by argument or insinuating questions supposed facts of which there is no evidence. *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954).

We have carefully reviewed each of the questions by the State cited under this assignment of error. Suffice it to say that, with respect to each question, the record discloses at least some evidence to provide a factual basis for the questions asked on

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cross-examination. We do not believe the trial court allowed the State to exceed reasonable bounds on cross-examination; nor did it abuse its broad discretionary authority over questions propounded on cross-examination. See 1 Stansbury, N.C. Evidence, § 38, p. 113 (Brandis rev. ed. 1973); *State v. Dickerson*, 189 N.C. 327, 127 S.E. 256 (1925).

[3] Defendant's final contention is that the trial court committed prejudicial error in permitting the State's witness, Charlie Shook, to testify as to statements made by the defendant without first determining whether the statements were made before or after the shooting. We do not agree.

The substance of Shook's testimony was that the defendant gave Shook two conflicting accounts of how the shooting occurred. Defendant first told Shook that he shot the decedent inside Geneva Arrington's home. He later told Shook that he shot the decedent in Geneva Arrington's yard. Defendant argues that the witness appeared unsure as to *when* the statements were made and that the timing of the statements is critical as the distinction between a threat or statement of intention made prior to an incident and the admission of an accused made after the commission of an alleged crime is a dramatic one.

The witness's testimony on direct examination indicates that the statements were made after the shooting. The witness testified as to the time of his conversations with the defendant saying, "I believe it was after he had been released from jail on bond. I would say it was weeks afterwards." On cross-examination, the witness testified that he believed the conversation occurred in April, which could have placed the conversation either before or after the shooting, as the incident occurred on 24 April.

While the witness's cross-examination testimony could conceivably be susceptible to two differing interpretations, we do not feel that it is contradictory when considered in conjunction with the witness's testimony on direct examination. Moreover, even if the witness's total testimony did convey an uncertainty as to whether the conversations occurred prior or subsequent to the shooting, such uncertainty goes to the credibility and weight of the testimony. It is well established that the credibility, probative force, and weight of testimony are matters for the jury to decide.

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1 Stansbury, N.C. Evidence, § 8, p. 17 (Brandis rev. ed. 1973);  
*State v. McLean*, 17 N.C. App. 629, 195 S.E. 2d 336 (1973).

We have reviewed the defendant's remaining assignments of error and are impelled to conclude that they are without merit. The defendant received a fair trial, free from prejudicial error. In the trial below, we find

No error.

Judges VAUGHN and CLARK concur.

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GEOFFREY BAUMANN D/B/A BAUMANN BUILDING AND COMPANY v. MR.  
PETER SMITH AND WIFE, MRS. MIMI SMITH

No. 787SC701

(Filed 15 May 1979)

**1. Rules of Civil Procedure § 56— alternative theories—complaint insufficient as to some—summary judgment entered as to all**

When a complaint attempts to allege alternative theories to support a cause of action and summary judgment is proper with respect to one or more of the attempted theories, it will also be proper with respect to the remaining one or more theories which may fail to comply with the minimum pleading requirements of G.S. 1A-1, Rule 8.

**2. Contracts § 27.1— express contract denied—summary judgment proper**

In an action to recover for construction work on defendants' home renovation project where plaintiff alleged an express contract with defendants, the trial court properly entered summary judgment for defendants, since defendants filed an affidavit in support of their summary judgment motion alleging that the express contract was between defendants and a third person who employed plaintiff as a subcontractor and defendants did not at any time discuss the cost or price of any work to be performed by plaintiff, and plaintiff did not come forward with any information in opposition to the summary judgment motion.

**3. Quasi Contracts and Restitution § 1— plaintiff as subcontractor—no implied contract between parties—no recovery on quantum meruit**

In an action to recover for construction work on defendants' home renovation project where plaintiff sought to recover on the basis of quantum meruit, summary judgment was properly entered for defendants since defendants alleged that services and materials were provided by plaintiff pursuant to a

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contract between plaintiff and a third person and that defendants accepted the benefits pursuant to another separate contract between themselves and the third person.

Judge CLARK dissenting.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered 16 May 1978 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 24 April 1979.

Plaintiff filed a complaint alleging that he is a cabinet maker and does other residential construction work; that on 9 March 1977 Lee Miles informed him that he had completed certain construction work on defendants' home renovation project and that someone was needed to do cabinet and other interior work in the residence; that he met with Miles and the defendants and "an agreement was made with the Defendants that the Plaintiff would proceed with the construction of the cabinets and other renovations to the residence of the Defendants as the Defendants would direct . . ."; that no contract price for the completed work was entered into, the agreement being that plaintiff would be compensated at an hourly rate and defendants would pay for materials as required; that between 23 March 1977 and 15 April 1977 plaintiff proceeded to accomplish the work as directed by the defendants and thereafter submitted a statement for \$6,520.16 to Miles "as agent for the Defendants," and to the defendants directly; that defendants refused to pay, and that plaintiff filed a notice of claim of lien against defendants pursuant to Article 2 of Chapter 44A of the General Statutes. Plaintiff also alleged that he rendered services and furnished materials to defendants, that defendants knowingly accepted the services and materials and received benefits therefrom and that defendants refused or failed to pay him for services rendered and materials furnished. Plaintiff seeks to recover upon an express contract or, alternatively, on the basis of *quantum meruit* upon an implied contract between plaintiff and defendants.

Defendants filed answer and denied the material allegations in the complaint. Defendants asserted as further defenses that they entered into a contract with Lee Miles for renovation of their home; that Miles employed plaintiff as a subcontractor; that they never entered into any agreement or contract with plaintiff; that they did not exercise any control or supervision over plain-

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tiff's work; and that Miles did not have any authority to contract with plaintiff on their behalf or to accept a statement from plaintiff on their behalf. Defendants further asserted that the notice of claim of lien filed by the plaintiff is a subcontractor's lien and that plaintiff stated in the notice of claim of lien that the labor and materials were furnished to defendants' property pursuant to an agreement between the plaintiff and Lee Miles. Alternatively, defendants asserted that, should it be determined that they entered into a contractual agreement with plaintiff, plaintiff breached the contract by not completing the contemplated work in their residence, by refusing to work under their direction and supervision and by submitting unconscionable charges for time not actually spent on the job and for tools used only incidentally on the job. Moreover, plaintiff actually damaged their residence by leaving the work and construction unfinished.

Pursuant to G.S. § 1A-1, Rule 56, defendants moved for summary judgment on the ground that there was no genuine issue as to any material fact relating to liability of defendants to plaintiff. They submitted an affidavit in which they reaffirmed the allegations of the further defenses in their answer and produced the 5 January 1977 contract with Miles. Plaintiff submitted no affidavits or documents in opposition to the motion for summary judgment.

The trial court allowed the defendants' motion for summary judgment and plaintiff appeals.

*Frank M. Wooten, Jr., by Thomas B. Carpenter, Jr., for plaintiff appellant.*

*Taylor, Brinson & Aycock, by James C. Marrow, Jr., for defendant appellees.*

CARLTON, Judge.

The sole question presented by this appeal is whether the trial court properly allowed defendants' motion for summary judgment.

G.S. 1A-1, Rule 56(c) provides in pertinent part as follows:

The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

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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).

Of particular pertinence to the case at bar is this portion of subsection (e) of Rule 56:

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.

Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material

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fact exists in the case. However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. He may not rest upon the mere allegations or denial of his pleading, for he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. See Shuford, N.C. Civil Practice and Procedure, § 56-9, p. 475; *Millsaps v. Contracting Company*, 14 N.C. App. 321, 188 S.E. 2d 663 (1972); *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971). Also, subsection (e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976). And, subsection (e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

In his brief, plaintiff argues that his complaint was sufficient to state these legal theories under which defendants might be liable to him: (1) A contract with Lee Miles, in which event defendants would be liable for undisbursed funds under the subcontractor's lien, (2) a contract directly with defendants by which they would be liable to him under the alleged agreement to pay him at an hourly rate and for the cost of materials required, and (3) if it should be determined that no contractual arrangement existed, then a claim in *quantum meruit* for the reasonable value of the services and materials. We agree with plaintiff that G.S. 1A-1, Rule 8(e)(2) would allow the alternative pleading of these claims. We also agree that his complaint was sufficient to adequately state his claims under the second and third theories upon which he relies. However, we do not believe his complaint sufficient to state a claim for relief under the first theory which he argues. For that reason, we cannot find the trial court's allowance of the motion for summary judgment erroneous for the primary reason argued by the plaintiff in his brief, *to wit*, that the trial court ignored or failed to understand the first theory relied on by plaintiff at the summary judgment hearing.

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In contending that his complaint stated a claim for relief pursuant to Part 2, Article 2, Chapter 44A of the General Statutes, plaintiff relies on the liberal pleading rules set out in G.S. 1A-1, Rule 8. Subsection (a) of that rule provides in pertinent part as follows:

(a) *Claims for Relief*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third party claim shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Plaintiff's primary argument on appeal is that the trial court, at the summary judgment hearing, interpreted his complaint to only state claims for relief under an express contract between him and defendants and under the theory of *quantum meruit*. He does not concede that the trial court's ruling was proper in granting summary judgment under those two theories but does argue that the trial court ignored his first claim for relief which was that a contract existed between him and the primary contractor, Lee Miles, and he is therefore entitled to relief under Part 2, Article 2 of Chapter 44A of the General Statutes. Since the trial court did not find facts in its order allowing summary judgment, such findings not being required, we are unable to say whether the trial court gave consideration to that theory. We do not believe, however, that the trial court should have given consideration to that theory because we do not believe plaintiff's complaint complied with the requirements of Rule 8(a) stated above. With respect to this theory, plaintiff's complaint did not give "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions . . . intended to be proved showing that the pleader is entitled to relief . . . ." The only reference to this theory in plaintiff's complaint is contained in paragraph 16 which reads as follows: "That plaintiff has filed a notice of claim of lien pursuant to Article 2 of Chapter 44A



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of the North Carolina General Statutes against defendants herein and their premises upon which said construction and renovation work was performed by plaintiff." For example, the complaint fails to state whether the defendants, as "obligors," made further payments to the contractor after receiving notice of lien, such as would make them personally liable to him under G.S. 44A-20(a)(b). Moreover, read contextually, it is obvious that the entire thrust of plaintiff's complaint is to establish an express contract between him and the defendants or to establish a claim for relief based on *quantum meruit*. While we construe pleadings liberally, the "short and plain statement of the claim" required by G.S. 1A-1, Rule 8(a)(1) requires more than a general statement that a notice for relief has been filed pursuant to some statute.

There is another, and more compelling, reason for concluding that plaintiff did not state a claim for relief under the theory of a subcontractor's lien. Rule 8(a)(2) requires "a demand for judgment for the relief to which he deems himself entitled." While plaintiff's complaint demands judgment against defendants in the amount of \$6,520.16, "the relief to which he deems himself entitled" was clearly not intended by plaintiff to be based on the theory of a subcontractor's lien. Following the demand for the monetary judgment, the prayer section of plaintiff's complaint reads as follows: "That as an alternate to judgment upon the express contract, the plaintiff recover from the defendants on the basis of *quantum meruit* upon the implied contract between plaintiff and defendants, for services rendered and materials furnished to and accepted by defendants." While the plaintiff later prayed that the judgment be declared a lien on defendants' property pursuant to Article 2, Chapter 44A of the General Statutes, it is obvious that plaintiff intended to establish his entitlement to judgment on one of the other two theories.

We therefore hold that summary judgment with respect to plaintiff's first alleged claim for relief was proper because plaintiff's complaint was insufficient to state a claim for relief under that theory.

[1] We do not hold, however, that a motion for summary judgment is the proper device for challenging a complaint which fails to state a claim upon which relief can be granted. We simply hold that, when a complaint attempts to allege alternative theories to

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support a cause of action and summary judgment is proper with respect to one or more of the attempted theories, it will also be proper with respect to the remaining one or more theories which may fail to comply with the minimum pleading requirements of G.S. 1A-1, Rule 8.

[2] We next turn to the question of whether plaintiff's complaint adequately established an express contract with defendants to overcome the motion for summary judgment. Plaintiff's complaint alleges that he entered into an express contract with defendants. The complaint, however, contains only these general and vague allegations concerning the alleged express contract: That plaintiff, defendants and Lee Miles "conferred and an agreement was made with the defendants that the plaintiff would proceed with the construction . . ."; that no contract price for the completed work was entered into; that "the agreement between the plaintiff and defendants was such that plaintiff would be compensated at an hourly rate . . ."; that the defendants would pay for materials as required. The affidavit submitted by defendants in support of the motion for summary judgment denied that any express contract existed between plaintiff and defendant and alleged that the contract was between defendants and Lee Miles. Further, defendants' affidavit alleged that Lee Miles employed the plaintiff as a subcontractor and that defendants did not at any time discuss the cost or price of any work to be performed by the plaintiff. We do not believe that the factual allegations of the complaint by themselves are sufficient to support a finding that a contractual relationship existed between the plaintiff and the defendants, particularly in light of our holding in *Leffew v. Orrell*, 7 N.C. App. 333, 172 S.E. 2d 243 (1970).

In *Leffew, supra*, the plaintiff contractor, seeking the enforcement of a lien against property, alleged, but failed to prove, an express contractual agreement with the defendant property owners. The plaintiff's discussion with the defendants concerning the proposed construction of a house never resulted in any agreement regarding the contract price of the house, when the house would be paid for, etc. The trial court determined that the plaintiff's evidence was insufficient to support a finding of an express contract and this Court affirmed.

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In light of the denial of any contract in defendants' affidavit submitted in support of its motion for summary judgment, the failure of plaintiff to come forward with an affidavit or other supporting information in opposition to the motion as contemplated by subsection (e) of Rule 56, and our holding in *Leffew*, we believe the trial court properly allowed summary judgment with respect to an alleged claim for relief on the basis of an express contract.

[3] Plaintiff's final theory for recovery is based on the equitable principle of *quantum meruit* upon an implied contract between the plaintiff and the defendants. We find that summary judgment was proper under this theory as well.

In their affidavit, defendants alleged that services and materials were provided by plaintiff pursuant to a contract between plaintiff and Lee Miles, and that defendants accepted the benefits pursuant to another separate contract between themselves and Lee Miles. It is well established that where there is a contract between persons for the furnishing of services or goods to a third person, the third person is not liable on an implied contract simply because he has received such services or goods. *Suffolk Lumber Co. v. White*, 12 N.C. App. 27, 182 S.E. 2d 215 (1971); *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962). In the absence of implied contract, no recovery will lie on the theory of *quantum meruit*. *Burns v. Burns*, 4 N.C. App. 426, 167 S.E. 2d 82 (1969). Plaintiff did not refute the allegations of defendants' affidavit. We hold that the granting of summary judgment was proper with respect to this theory of plaintiff's complaint also.

Affirmed.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

Defendants' affidavit supporting their motion for summary judgment consisted of two paragraphs as follows:

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"1. That they do reaffirm the statements in paragraph nos. 29 through 44 of the verified Answer filed in this case and ask that said paragraphs of said Answer be incorporated herein as if fully set out.

2. That the undersigned did enter into an agreement dated January 5, 1976 (sic) on or about January 5, 1977, with Lee Miles, a copy of which is attached hereto."

This affidavit did not place a duty on plaintiff of taking affirmative steps to defend his position by proof of his own in addition to his verified complaint, which met the requirements of Rule 56(e) and should have been considered by the trial court in ruling on the motion. The complaint alleged an agreement between plaintiff and defendants subsequent to the written agreement between defendants and Lee Miles.

It is not the purpose of Rule 56 to resolve disputed material issues of fact nor to allow a trial by affidavits. Rule 56 should be utilized cautiously and with due regard to its purposes and requirements. W. Shuford, N.C. Civil Practice and Procedure, § 56-3 (1975).

In my opinion summary judgment on all claims was improvidently entered.

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Cedar Works v. Mfg. Co. and Edwards v. Chesson

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RICHMOND CEDAR WORKS v. FARMERS MANUFACTURING COMPANY, JOHN L. ROPER LUMBER COMPANY, ADDIE R. KNIGHT, SAMUEL D. EURE AND WIFE, SALLIE S. EURE, MARY E. HARRELL, C. L. HARRELL, ESTELLE R. GATLING AND HUSBAND, WILLIAM E. GATLING, AND TOBE DANIELS

— AND —

RICHMOND CEDAR WORKS v. FARMERS MANUFACTURING COMPANY, JOHN L. ROPER LUMBER COMPANY, ADDIE R. KNIGHT, SAMUEL D. EURE AND WIFE SALLIE S. EURE, MARY E. HARRELL, C. L. HARRELL, ESTELLE R. GATLING AND HUSBAND WILLIAM E. GATLING AND TOBE DANIELS

— AND —

CHARLES C. EDWARDS, JR., RUTH J. HOOVER AND HAROLD M. MANESS AND WIFE BUENA B. MANESS SUCCESSORS IN TITLE TO RICHMOND CEDAR WORKS v. SAMUEL E. CHESSON

No. 781SC562

(Filed 15 May 1979)

**1. Deeds § 25— proceeding for new certificate of title under Torrens Law—notice by publication—inadequate description**

A notice published in a newspaper of a petition for a new certificate of title to land under the Torrens Law did not contain an adequate "short but accurate description of the land" within the meaning of G.S. 43-10 where it described the land only as "Registered Estate No. 9, Book 1, Page 33, of Gates County Public Registry."

**2. Deeds § 25— proceeding under Torrens Law—superior title from common source**

In a contested proceeding for the registration of a land title under the Torrens Law, the evidence was sufficient to establish appellees' superior title to the land under the common source doctrine, and a new certificate of title was properly issued to appellees.

APPEAL by Samuel E. Chesson, petitioner in *Richmond Cedar Works v. Farmers Manufacturing Company et al.*; and respondent in *Charles C. Edwards, Jr., et al. v. Samuel E. Chesson*, from *Tillery, Judge*. Judgment entered 24 July 1977 in Superior Court, GATES County. Heard in the Court of Appeals 8 March 1979.

On 3 August 1972, Samuel Chesson filed a petition and motion in the cause in the Office of the Clerk of Superior Court in Gates County for a new certificate of title to certain land pursuant to the Torrens Law, G.S., Chap. 43. Chesson alleged that he had purchased the land in question from Richmond Cedar Works

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(hereinafter referred to as Richmond) on 19 May 1972. Certificate of title for the land had been issued to Richmond on 26 March 1928 pursuant to the Torrens Law. The original certificate of title had been lost. Chesson moved that the certificate issued to Richmond be cancelled and that a new certificate be issued to him. Thereafter, a notice of the petition was published in the Gates County Index, as required by G.S. 43-10. On 15 September 1972, the Clerk of Superior Court entered an order cancelling the certificate of title issued to Richmond and issued a new certificate of title to Chesson.

On 31 August 1973, Charles C. Edwards, Jr., Ruth J. Hoover, and Harold M. Maness and wife, Buena B. Maness (hereinafter referred to as Edwards), alleged successors in title to Richmond Cedar Works, filed a motion to vacate the order of the Clerk of Superior Court dated 15 September 1972. Edwards alleged that the purported notice of publication was invalid, in that no sufficient description of the lands was given to alert anyone who had a claim or interest in the land. Edwards further alleged that they were the holders of record title to said land which was superior to Chesson's. Edwards filed an answer to Chesson's petition and a petition on 31 August 1973 alleging that they were the *bona fide* purchasers for value of said land by reason of the *mesne* conveyance of Richmond to Edwards; that Richmond had failed to surrender its certificate of title when it conveyed the land; and that the common-law deed to Chesson was inferior and junior to the title held by Edwards. On 8 October 1973, Chesson filed a response to the petition of Edwards denying that Edwards owned any interest in the lands in question since Chesson held the certificate of title and since no adverse claims were noted on the certificate. In Chesson's reply to Edwards' answer, Chesson denied that Edwards held any interest in the land, and pleaded that Edwards' negligence and the doctrine of laches barred any recovery.

On 29 August 1974, the Clerk of Superior Court entered an order vacating his order of 15 September 1972 and allowing Edwards to file an answer to Chesson's petition. After hearing arguments on the petitions filed by both parties, the clerk entered another order on 29 August 1974 cancelling the certificate of title of Chesson and Richmond and issued a new cer-

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tificate of title to Edwards. Chesson and Edwards appealed to the Superior Court.

At a hearing in the Superior Court, an order was entered by Judge Peel affirming the vacating and setting aside of the 15 September 1972 order and allowing Edwards to file answer. Judge Peel entered a companion order of remand to the clerk directing the clerk to hold a full hearing on the issues or questions before him respecting claim to title of the lands. In an order filed 24 September 1976, Judge Small transferred the scheduled hearing before the Clerk of Superior Court of Gates County to the Clerk of Superior Court of Perquimans County.

On 26 November 1976, an order was entered by the Clerk of Superior Court of Perquimans County holding the Edwards' claim of title was superior to Chesson's based upon the application of the common source doctrine. The clerk ordered a new certificate of title to be issued to Edwards. Judge Tillery affirmed the order of the Clerk of Perquimans County. Chesson appealed.

*Hutchins, Romanet, Thompson & Hillard, by R. W. Hutchins, for Samuel Chesson, appellant.*

*White, Hall, Mullen, Brumsey & Small, by Gerald F. White; J. Kenyon Wilson, Jr. and M. H. Hood Ellis, for appellees.*

ERWIN, Judge.

The first question presented on this appeal is: "Did the Court err in vacating and setting aside the September 15, 1972, Judgment?" We answer, "No."

These special proceedings were filed pursuant to the provisions of G.S., Chap. 43, entitled "Land Registration," and commonly known as the "Torrens Law." A discussion of the history and development of the Torrens Law is set forth in *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914). Justice Allen, speaking for our Supreme Court in *Dillon v. Broeker*, 178 N.C. 65, 67, 100 S.E. 191, 192 (1919), quoted Devlin on Deeds, Vol. 3, Secs. 1439, 1440, as follows:

"[T]he object of the system [Torrens] is, first, to secure by a decree of court, or other similar proceedings, a title which shall be impregnable against any attack, and when this title

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is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title. The object is to secure the evidence of title exclusively by a certificate issuing from public authority.

'When title has been registered the owner who desires to sell produces his original certificate, as he would the certificate of stock in a corporation, and the buyer may safely purchase on the faith of what the certificate shows. If a sale has been affected, the old certificate is surrendered and a new one received in its place. Under this system title to land is not conveyed by a deed, as such, but only by the registration of the transfer, as in the case of the sale of the shares of stock in a corporation, and the deed, if made, is considered as nothing more than a contract between the parties by which the officer intrusted with the duty is authorized to make the transfer. As many times as a sale is made the old certificate is surrendered and a new one given in return. If a mortgage is executed, the transaction is noted on the certificate (and on record), and when it is paid its release is likewise noted. If a trust is created, proper endorsements are made; in a word, the object of the system is to make the certificate the complete repository of all that may affect the title as there is only one certificate of title on file at any time which shows the state of the title and to what extent, if any, it is affected by incumbrances.'

With the above in mind, we will now consider the record before us.

The clerk entered the following order, which was affirmed by Judge Peel:

"This proceeding coming on to be heard and being heard on motion of Charles C. Edwards, Jr., Ruth J. Hoover, Harold M. Maness and wife, Buena B. Maness, movants as appear of record herein, to vacate Order herein dated September 15, 1972, pursuant to the applicable provisions of G.S. 1A-1, Rule 60, Rules of Civil Procedure, and other applicable law, and the court having considered the said motion and other documents comprising the Record Proper, and having heard the arguments of counsel the court is of the opinion that said



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motion was filed in apt time and that movants were taken by surprise in the entry of the aforementioned order; that said movants had no notice of the 'PETITION AND MOTION IN THE CAUSE' filed herein, that these movants had no notice that said order was about to be entered, and that the said purported notice by publication incident to the entry of said order is and was invalid and of no force and effect and is and was particularly invalid and of no force and effect as to said movants; that movants have a good and meritorious defense to the said 'PETITION AND MOTION IN THE CAUSE,' as shown by proposed answer of movants filed of record herein;

WHEREUPON, it is ORDERED, ADJUDGED, and DECREED:

1. That the said order heretofore entered herein on September 15, 1972, be and the same is hereby vacated and set aside.

EXCEPTION NO. 1

2. That the filing of said answer by said movants be and the same is hereby approved and allowed.

EXCEPTION NO. 2

This 29th day of August, 1974.

s/HAYES CARTER  
Clerk"

A portion of Judge Peel's order reads:

"WHEREUPON, it is ORDERED, ADJUDGED, and DECREED:

1. That the said ORDER of the clerk, dated August 29, 1974, vacating and setting aside his ORDER herein of September 15, 1972, and allowing said movants to file Answer herein, is affirmed.

EXCEPTION NO. 4"

[1] The appellees contend that they received no notice, actual or constructive, of the appellant's proceeding to have a new certificate of title issued pursuant to G.S. 43-17 or G.S. 43-17.1. Therefore, the clerk's order, as set out above, was proper, and Judge Peel's judgment affirming the clerk's order was also valid and proper.

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The appellant contends that the order entered 15 September 1972 issuing a new certificate of title to him was completely proper, and all orders and judgments following such order should be held by this Court to be error. The problem presented on the issue of adequate notice has not been decided by either appellate court of this State. This case will be of first impression.

The appellees contend that the notice in question as published in the county newspaper was defective, in that "a short but accurate description of the land" was not set forth in the notice.

The notice read in part: "The lands covered by said certificate of title are described as follows: Being Registered Estate No. 9, Book 1, Page 33, of Gates County Public Registry, to which reference is made for a more full and complete description."

The appellees further contend that their petition and motion in the cause was timely filed on 31 August 1973 pursuant to G.S. 43-26, and they have called into question and attack the certificate of title issued on 15 September 1972 to the respondent.

G.S. 43-10 provides in part:

*"Notice of petition published.*—In addition to the summons issued, prescribed in the foregoing section [§ 43-9], the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together *with a short but accurate description of the land* and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper." (Emphasis added.)

Service of process by publication is in derogation of the common law; therefore, statutes authorizing it are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1973); *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E. 2d 593 (1965); *Jones v. Jones*, 243 N.C. 557, 91 S.E. 2d 562 (1956).

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"[W]here the notice is required to contain a short form of description of the property, it is sufficient if it clearly calls the attention of adjoining owners or others interested to the particular property intended and need not contain all of the elements of a full description. . ." 76 C.J.S., Registration of Land Titles, § 14a, p. 536.

G.S. 43-10 requires that the Clerk of Superior Court, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together "with a short but accurate description of the land," and the relief demanded. To us, the description given by the respondent in his published notice was inadequate. A complete and adequate description was available to respondent. The record does not show any reason why a fuller description was not given. Appellees fall within the limitations of G.S. 43-26. Their motion was filed within twelve months from the date of the 15 September 1972 order of the clerk. *See State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971). The notice by publication was inadequate to give the notice required by statute. *Sears Roebuck & Co. v. Stockwell*, 143 F. Supp. 928 (D. Minn. 1956), cited by respondent, does not control the issue before us.

[2] On 26 November 1976, Clerk of Superior Court, W. J. Ward (Jarvis Ward) of Perquimans County filed his order which found:

"That neither Samuel E. Chesson nor Charles C. Edwards, Jr., Ruth J. Hoover and Harold M. Maness and wife, Buena B. Maness have certificates of title for the land in controversy heretofore described in Paragraphs 2 and 4, but all claim said property by, through or under common law deeds."

The following conclusion of law was entered:

"A. That based upon application of the common source doctrine and the fact that Charles C. Edwards, Ruth J. Hoover, Harold M. Maness and wife, Buena B. Maness have the elder, and therefore superior chain of title, Charles C. Edwards, Jr., Ruth J. Hoover, Harold M. Maness and wife, Buena B. Maness are the sole owners in fee simple of the land heretofore described in Paragraph 2 of the Findings of Fact.

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B. That the original certificates of title issued to their predecessor in title, Richmond Cedar Works having been lost, Charles C. Edwards, Jr., Ruth J. Hoover, Harold M. Maness and wife, Buena B. Maness are entitled to have said original certificates cancelled and new certificates of title issued in their names pursuant to N.C. Gen. Stat. Sec. 43-17.1.

WHEREUPON IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Charles C. Edwards, Jr., Ruth J. Hoover, and Harold M. Maness and wife, Buena B. Maness are the owners in fee simple of the land heretofore described in Paragraph 2 of the Findings of Fact and in the respective Petitions heretofore filed; and

2. The original certificates of title, heretofore described in Paragraph 4 of the Findings of Fact, issued to Richmond Cedar Works be cancelled by the Register of Deeds of Gates County; and

3. The Register of Deeds of Gates County is hereby ordered to issue new certificates of title to the land heretofore described in Paragraphs 2 and 4 in the names of Charles C. Edwards, Jr., Ruth J. Hoover and Harold M. Maness and wife, Buena B. Maness.

This 26 day of November, 1976."

At this hearing, the respondent and the appellees were required to prove their title to the land in question. Neither party, at this point, had a certificate of title under the Torrens Law. Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by subdivisions (a), (b), and (c) of G.S. 43-11. The same rules for proving title apply in these actions as in ejectment and other actions involving the establishment of land titles. *Paper Co. v. Cedar Works*, 239 N.C. 627, 80 S.E. 2d 665 (1954).

The court found facts in part as follows:

"The Registered Owner aforesaid, Richmond Cedar Works, has made two deeds of conveyance to said Registered Lands, heretofore described in Paragraphs 2 and 4; same being identical lands, without the surrender of the certificates of title issued to it as set out in Paragraph 4; one being to

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Charles C. Edwards, Jr., Ruth J. Hoover, and Harold M. Maness and wife, Buena B. Maness's predecessor in title and one being to Samuel E. Chesson. The original certificates of title, issued to Richmond Cedar Works and above referred to in Paragraph 4, have been lost and cannot after due diligence, be found.

Richmond Cedar Works is the common source of title through which the parties hereto derive and assert title to the lands heretofore described in Paragraphs 2 and 4."

The record clearly shows a complete chain of title in the appellees starting with a deed from Richmond dated 23 July 1941 and other deeds in the chain of title to the time the case was heard by the Clerk of Superior Court of Perquimans County. Respondent does not contest this elder chain of title. Respondent's chain of title is clearly shown by a deed from Richmond to him dated 19 May 1972. The appellees' deed from Richmond is 31 years older than the respondent's deed.

Chief Justice Bobbitt stated for our Supreme Court in *King v. Lee*, 279 N.C. 100, 105, 181 S.E. 2d 400, 403 (1971):

"Petitioners, in attempting to prove the alleged tenancy in common, relied upon the sixth method stated in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889), that is, the common source doctrine. This doctrine is aptly stated by Justice Battle in *Gilliam v. Bird*, 30 N.C. 280, 283 (1848), as follows: '(W)henever both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail.' This statement is quoted with approval in *Stewart v. Cary*, 220 N.C. 214, 221, 17 S.E. 2d 29, 33 (1941), where many cases relating to the common source doctrine are cited. See Annotation, 'Comment Note.—Common Source of Title Doctrine,' 5 A.L.R. 3d 375 (1966)."

We hold that the evidence was sufficient and proper to establish appellees' claim of title to the land in question under the common source doctrine and that a new certificate of title was properly issued to the appellees.

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Judgment affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

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HENRY H. SINK, JR., ANCILLARY ADMR. OF THE ESTATE OF SAMMY P. MERCURIO v. DONALD ELDRIDGE SUMRELL

No. 7810SC633

(Filed 15 May 1979)

**1. Automobiles § 62— deceased asleep on highway—no negligence of motorist in hitting**

In a wrongful death action arising from an automobile accident, evidence was insufficient to show that defendant was negligent with respect to speed, lookout, failing to turn to avoid striking deceased, failing to keep his vehicle under control, failing to sound his horn, or failing to apply his brakes where the evidence tended to show that defendant was travelling 50 mph in a 55 mph speed zone on a level, straight, dry road in the nighttime and there were no circumstances existing requiring defendant to reduce his speed; defendant was driving with his lights on dim, but G.S. 20-131(d) did not require that deceased, who was sleeping on the highway, be rendered clearly discernible as a human being from 75 feet away; absent evidence that defendant knew or should have known that the object on the road in front of him was a person, defendant had no duty to sound his horn, stop, or turn to the left or right; since defendant travelled the 50 to 75 feet from the point he first observed the object in no more than 1½ seconds, his failure to sound his horn, slam on brakes or turn to one side was not evidence of negligence; and there was no evidence that defendant's ability to keep a proper lookout was affected by his consumption of beer four hours earlier or by the presence of two females in the car with him.

**2. Automobiles §§ 83, 89.4— deceased asleep on highway—contributory negligence—no last clear chance**

In a wrongful death action arising from an automobile accident, evidence established plaintiff's contributory negligence as a matter of law and failed to establish the elements of last clear chance as a matter of law where the evidence tended to show that deceased was sleeping in defendant's lane of travel; defendant first saw deceased when he was 50 or 75 feet from him, but did not recognize deceased as a person; and defendant, who was travelling at 50 mph, did not have time to avoid striking deceased.

APPEAL by plaintiff from *Smith (Donald L.)*, Judge. Judgment entered 2 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 March 1979.

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This is an action for wrongful death. Plaintiff appeals from the entry of directed verdict for defendant at the close of plaintiff's evidence. We find no error.

Plaintiff's evidence showed that on 30 September 1972 defendant, Donald Sumrell, closed the store where he worked about 9:00 p.m., drove to Kinston and picked up a girl that he had been dating. They went to a lounge where they stayed for an hour or so and during that time the defendant consumed some quantity of beer. About 11:00 p.m. they left the lounge and went to a pig-pickin', where defendant drank one or two beers. During the entire evening he did not drink more than four beers, and he ate at the pig-pickin'. About 4:00 a.m., 1 October 1972, he with his girlfriend and another girl left the pig-pickin' riding in his Corvette automobile which had two bucket seats. The defendant was in one seat and both girls were in the other. Defendant was driving on N.C. Highway 11 which had two northbound lanes, a median, and two southbound lanes with a paved emergency strip about six feet wide adjoining the west margin of the southbound lanes. A grassy shoulder some nine feet wide adjoined the emergency strip. It was stipulated that the posted speed limit in the area was 55 m.p.h.

The defendant was travelling south in the right, outside lane as he approached the area where the impact occurred. Defendant, going about 50 m.p.h., had gone through a right-hand curve about one-fourth mile before reaching the impact area. After leaving the curve, the road was level and straight. Immediately before the collision defendant met a car travelling north and defendant's lights were on dim. No one was travelling on the inside lane to defendant's left, but a car was following approximately 300 or 400 feet behind him and he was not concerned about it. The weather was clear with no rain or fog.

Meanwhile, in the early morning hours of 30 September 1972, plaintiff's intestate, Sammy Mercurio, with his brother Anthony left Cranston, Rhode Island, hitchhiking to Camp LeJeune, North Carolina, to visit their brother who was stationed there in the Marine Corps. Anthony was fifteen years old at the time and carrying a gym bag while Sammy was carrying a fifty or sixty pound backpack. Around midnight of 30 September 1972 they had reached Wilson, North Carolina, where a car let them off on N.C.

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11 about six or seven miles north of Kinston. Sammy was tired because he had been carrying the backpack all day and had been without sleep for almost twenty hours. He took off the backpack, placed it on the emergency lane, and lay down. Anthony stood for a while watching the traffic, and then he, too, lay down to rest on the emergency lane, with Sammy being closer to the road. Anthony did not intend to go to sleep, but did.

About this time defendant saw what appeared to him to be a big black-looking box when he was 50 or 75 feet from it. He took his foot off the accelerator, put it on the brake pedal but did not slam on the brakes or turn to the left or right, blow the horn or blink his lights. He went straight ahead and hit the object. Defendant did not attempt to stop his car immediately but brought it to a gradual stop about 397 feet from the place of impact. Sammy's body was dragged beneath the car for about 155 feet. Defendant did not realize he had hit a person until after he had stopped the car and someone told him.

Anthony was awakened by the noise, looked, and his brother was not there. He then looked up the road, saw clothes and articles scattered all over the road and the Corvette parked off the road. Anthony had been asleep when his brother was struck by defendant's car and did not know what had happened until it was over. Afterwards, he saw his brother's body in the center of the right-hand lane. It was stipulated that Sammy Mercurio was instantly killed when struck by the automobile operated by defendant.

Plaintiff also produced evidence as to damages.

*Johnson, Gamble & Shearon, by Samuel H. Johnson, for plaintiff appellant.*

*Teague, Johnson, Patterson, Dilthey & Clay, by Robert W. Kaylor and I. Edward Johnson, for defendant appellee.*

MARTIN (Harry C.), Judge.

Plaintiff assigns as error the dismissal of the case at the close of his evidence. The appeal raises three questions for review: negligence of defendant Sumrell, contributory negligence of plaintiff's intestate and the doctrine of last clear chance. As to each of these principles of law, the evidence must be viewed in



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the light most favorable to the plaintiff. *Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E. 2d 329 (1968).

The trial court based its decision to dismiss the case on *Battle v. Chavis*, 266 N.C. 778, 147 S.E. 2d 387 (1966), and *Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315 (1958). These cases are primarily concerned with the last clear chance doctrine. We discuss all three of the issues raised by the appeal.

[1] Plaintiff alleges defendant was negligent with respect to speed, lookout, failing to turn to avoid striking Sammy, failing to keep his vehicle under control, failing to sound his horn and failing to apply his brakes. The evidence indicates defendant was travelling 50 m.p.h. in a 55 m.p.h. speed zone on a level, straight, dry road in the nighttime; he did not sound his horn; he continued to drive straight ahead and did not turn to the left or right; when defendant saw the object in front of him, he took his foot off the accelerator, placed it on the brake pedal but did not slam on the brakes; defendant was driving with his lights on dim and saw the object when it was 50 to 75 feet in front of him.

A careful review of the record fails to disclose evidence to support a finding that defendant was operating his car in excess of the posted speed limit or at an excessive speed under the circumstances then existing. N.C. Gen. Stat. 20-141(a). The weather was clear and the road straight, level and dry. There were no skid marks or tire marks on the highway. No special hazard existed because of road conditions, traffic, or otherwise. There were no circumstances existing requiring defendant to reduce his speed. *Hoke v. Greyhound Corp.*, 226 N.C. 692, 40 S.E. 2d 345 (1946).

Plaintiff's other contentions of negligence by defendant may be considered together. In the operation of his car, defendant had a duty to keep a reasonable and proper lookout under the circumstances existing for other persons on the highway; to keep his car under reasonable and proper control and to take such actions as a reasonably prudent person would take under the same circumstances to avoid colliding with persons on the highway.

One is not negligent as a matter of law in operating a motor vehicle on the public highway with its lights on dim. Upon meeting another vehicle, the headlights shall be dimmed to prevent the projection of a dazzling or glaring light to persons within a

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distance of 500 feet of such headlights. N.C. Gen. Stat. 20-131(a). Lights on dim must be capable of rendering clearly discernible, under normal atmospheric conditions, a person 75 feet ahead on a level road. N.C. Gen. Stat. 20-131(d). In meeting the northbound car immediately before the collision, defendant was required to dim his headlights. The statute does not state the position or posture of the "person" to which it refers. As the law does not require a motorist to anticipate that a person may be lying or sleeping on the travelled portion of the highway, *Barnes v. Horney, supra*, we hold the statute does not require that persons lying or sleeping on the highway be rendered clearly discernible as human beings by motor vehicle headlights. The evidence indicates defendant saw an object on the highway when it was 50 to 75 feet away. He did not realize it was a person lying on the road. Absent evidence that defendant knew, or should have known, the object on the highway was a person, defendant had no duty to sound his horn, stop or turn to the left or right. Defendant thought the object was a box and, after striking it, did not attempt to stop his car immediately, but brought it to a gradual stop. The duty of a motorist at night to exercise ordinary care does not require that he must be able to bring his car to an immediate stop upon the sudden arising of a dangerous situation which he could not have reasonably anticipated. *Rouse v. Peterson*, 261 N.C. 600, 135 S.E. 2d 549 (1964).

A motorist is required to keep a reasonable and proper lookout in the operation of his motor vehicle. He has a duty not only to look, but to see what is there to be seen. He must keep such an outlook in the direction of travel as a reasonably prudent person would keep under the same or similar circumstances. *Sugg v. Baker*, 261 N.C. 579, 135 S.E. 2d 565 (1964); *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330 (1942).

There was no evidence that defendant's ability to keep a proper outlook was affected by his consumption of beer. The accident occurred almost four and one-half hours after he drank any beer and some two hours after he had eaten. The state highway trooper, trained in detecting persons under the influence of alcohol, testified he did not detect any odor of alcohol about defendant and that there was nothing unusual about defendant's activities, other than he was emotionally upset. Defendant's personal appearance was normal.

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Although there were two females in the car with defendant, the record does not disclose he was distracted by them, by looking at them or in talking with them. Defendant's girlfriend, seated in the middle, was asleep at the time. Defendant had met a northbound car immediately before the collision. Defendant's headlights were on dim, but it is not clear from the record that they were dimmed because of the oncoming northbound car. Defendant would have had a duty to dim his headlights, if they were not already on dim. N.C. Gen. Stat. 20-131(a). He saw the object on the road when about 50 to 75 feet from it. We take judicial notice that a car operated at a speed of 50 m.p.h. is moving at approximately 73.3 feet per second. Defendant traveled the 50 to 75 feet to the object in no more than one to one and a half seconds. Under these circumstances, defendant's failure to sound his horn, slam on brakes, or turn to one side is not evidence of negligence. See *Williamson v. McNeill*, 8 N.C. App. 625, 175 S.E. 2d 294, *aff'd*, 277 N.C. 447, 177 S.E. 2d 859 (1970).

The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.

*Osborne v. Coal Co.*, 207 N.C. 545, 546, 177 S.E. 796, 796-97 (1935). Foreseeability does not require omniscience.

[2] Plaintiff's evidence is not sufficient to submit the issue of defendant's negligence to the jury. Assuming, *arguendo*, that plaintiff's evidence made out a case of actionable negligence, we are of the opinion that such evidence also established plaintiff's contributory negligence as a matter of law and failed to establish the elements of last clear chance as a matter of law. Defendant was travelling in the right lane for southbound traffic. There is no evidence he left that lane before hitting plaintiff's intestate. Defendant did not drive on the emergency lane before striking Sammy. The only permissible inference from the evidence is that Sammy was in the right lane of the travelled portion of the highway.

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We hold the case is within the principles set out in *Barnes* and *Williamson*. In *Barnes*, plaintiff was asleep in the travelled portion of the highway at 8:30 p.m. on the Fourth of July. Defendant, driving with headlights on dim, saw plaintiff when about five or six feet away. He did not recognize plaintiff as a person but thought he was a box. Justice Higgins, speaking for the Court, stated:

Negligence is not presumed from the mere fact an accident has occurred. [Citations omitted.] However, the very fact the plaintiff, without sleep for two days and nights, attempted to make his bed in the middle or on the side of a crooked, shaded, dirt road, shows negligence as a matter of law. *Holderfield v. Trucking Co.*, 232 N.C. 623, 61 S.E. 2d 904. A driver of an automobile may anticipate that other travelers will be using the highway and he should be on the lookout for them. However, it would seem to be too much to require him to anticipate the highway would be used as sleeping quarters. Of course, a pedestrian has the right to use the highway, but a pedestrian is a foot traveler, and the right to walk does not carry with it the right to lie down and go to sleep. One who voluntarily places himself in a position of known peril fails to exercise ordinary care for his own safety. [Citation omitted.]

*Barnes v. Horney*, *supra* at 498, 101 S.E. 2d at 317.

By voluntarily placing himself on the highway, Sammy failed to exercise for his own safety the care of an ordinary prudent person and his negligence was a proximate cause of his unnecessary death. *Starnes v. McManus*, 263 N.C. 638, 140 S.E. 2d 15 (1965); *Barnes v. Horney*, *supra*. "A plaintiff will not be permitted to recover for injuries resulting from a hazard he helped create." *Blevins v. France*, 244 N.C. 334, 343, 93 S.E. 2d 549, 556 (1956).

Plaintiff relies upon the discovered peril or last clear chance doctrine. The law in North Carolina in this respect is reviewed and analyzed by Justice Lake in *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968). A defendant who does not actually know of plaintiff's perilous situation may still be liable under this theory if, but only if, the defendant owed a duty to plaintiff to maintain a lookout and would have discovered plaintiff's perilous position had such a lookout been maintained. Thus, plaintiff must show

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that defendant owed plaintiff a duty to keep a reasonable and proper lookout in the direction of travel, and also, that if defendant had fulfilled that duty, he would have discovered plaintiff's helpless peril in time to avoid injuring him by then exercising reasonable care. Although defendant had no duty to anticipate, or foresee, that plaintiff's intestate would be lying on the highway asleep, he did have a duty to maintain a reasonable lookout in the direction of travel. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515 (1962); *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184, 85 A.L.R. 2d 609 (1960). There is no evidence that defendant failed to keep a reasonable lookout in the direction of travel or that he should have seen Sammy lying on the road before he was within 50 to 75 feet from him. There is no evidence that a person exercising a proper lookout would have been able in the exercise of reasonable care to avoid the collision. *Williamson v. McNeill*, *supra*. In order for the last clear chance doctrine to apply, there must be evidence that a reasonable person under the conditions existing had the time and means to avoid injury to the imperiled person by the exercise of reasonable care after he discovered, or should have discovered, the perilous situation. *Battle v. Chavis*, *supra*. The doctrine contemplates the last "clear" chance, not the last "possible" chance to avoid injury; it must be such a chance as would enable a reasonably prudent man in a like situation to act effectively. *Aydlett v. Keim*, 232 N.C. 367, 61 S.E. 2d 109 (1950).

As noted above, at a speed of 73.3 feet per second, defendant did not have time to avoid striking plaintiff's intestate. Defendant was only 75 feet at most from Sammy when defendant first saw him as a "box." The case is distinguishable from *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150 (1954), where plaintiff was plainly visible to defendant at a distance of 225 feet, creating a jury question concerning last clear chance. Likewise, in *Exum*, *supra*, plaintiff was clearly visible to defendant 600 feet away and plaintiff was beside a lighted parked car which served as a warning to defendant that some person might be about the car. As Justice Lake stated, "[T]he doctrine of the last clear chance is not a single rule, but is a series of different rules applicable to differing factual situations." *Exum v. Boyles*, *supra* at 575, 158 S.E. 2d at 852.

The death of Sammy is indeed regrettable, another in the long line of unnecessary highway statistics. However, negligence

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is not presumed from the mere happening of an event. In the dismissal of plaintiff's case, we find

No error.

Judges PARKER and ERWIN concur.

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ROSBON DANIEL WHEDBEE, PETITIONER v. EDWARD POWELL, COMMISSIONER OF MOTOR VEHICLES AND THE STATE OF NORTH CAROLINA, RESPONDENT

No. 7815SC770

(Filed 15 May 1979)

**1. Criminal Law § 142.1— prayer for judgment continued to certain session— judgment entered at later session—effect of continuance for defendant, failure to appear**

Where prayer for judgment was continued in a drunk driving case without conditions until the 21 April 1975 session of superior court, the case was continued for defendant at the 21 April 1975 session, and defendant was called and failed to appear at the 26 June 1975 session, the court had authority to enter judgment against defendant at the 4 September 1975 session of court, since the fact that no judgment was entered at the 21 April 1975 session was chargeable solely to conduct of the defendant, and defendant could not deprive the court of power to render judgment against him by having the case continued and thereafter failing to appear. Even if the case had not been continued for defendant and no action had been taken at the 21 April 1975 session, a judgment thereafter entered imposing punishment would not be void such that it could be treated as a nullity in a collateral proceeding but at most would be irregular and would stand until set aside by direct appeal or by a direct attack by a motion in the cause for appropriate relief.

**2. Courts § 10— civil session of court—motion to set aside criminal judgment**

A motion which, if allowed, would set aside a judgment in a criminal case may not be determined at a session of court designated for the trial of civil cases only. G.S. 7A-49.2(b).

APPEAL by respondent, North Carolina Division of Motor Vehicles, from *Farmer, Judge*. Judgment dated 2 May 1978 entered in Superior Court, ORANGE County. Heard in the Court of Appeals 3 May 1979.

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On 11 December 1974 Rosbon Daniel Whedbee, the petitioner herein, pled guilty in Superior Court in ORANGE County in Case No. 74CR5767 to a second offense of driving a motor vehicle on the public highway while under the influence of intoxicating liquor. On receiving this plea, Judge Coy E. Brewer, the judge presiding, directed that prayer for judgment be continued until the 21 April 1975 session of Superior Court in Orange County. Judgment was not imposed at that session. Thereafter, petitioner appeared before Judge Harry E. Canaday, Judge Presiding at a session of Superior Court held in Orange County on 4 September 1975, at which time judgment was entered in Case No. 74CR5767 sentencing petitioner to prison for a term of six months, this sentence being suspended for three years on condition that the defendant (the petitioner herein) pay a fine and costs and not operate a motor vehicle during the period of suspension unless he have in his possession a valid operator's license. Defendant did not appeal from that judgment.

Upon receiving a record of the judgment entered against petitioner in Case No. 74CR5767, the North Carolina Division of Motor Vehicles issued notice it was revoking petitioner's driver's license for one year effective 6 October 1975. On petitioner's ex parte motion, the district court in Orange County on 13 October 1975 issued an order restraining the Division of Motor Vehicles from revoking petitioner's driving privileges. On 24 October 1975 the Division of Motor Vehicles moved to dismiss the restraining order, but by consent of counsel the restraining order was allowed to remain in effect. At the time the restraining order was issued, no action had been brought in the district court by the petitioner against the Division of Motor Vehicles. Subsequently, on 13 January 1976, petitioner filed in the district court in Orange County a petition captioned "*Rosbon Daniel Whedbee, Petitioner v. Edward Powell, Commissioner of the State of North Carolina Department of Motor Vehicles and the State of North Carolina, Respondent,*" in which the petitioner alleged that he had requested and been denied a hearing pursuant to G.S. 20-16 and in which he prayed for a determination that he was entitled to such a hearing prior to revocation of his driver's license. The case in which this petition was filed was given docket number 76CVD17. As far as the record on this appeal discloses, nothing else occurred in Case No. 76CVD17 during 1976.

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By order dated 15 March 1977 the district court transferred Case No. 76CVD17 to the Superior Court Division in Orange County, where the case was docketed as No. 76CVS17 and was heard at the 19 September 1977 Civil Session of Superior Court before Judge Frank W. Snapp. On 22 September 1977 Judge Snapp entered judgment finding that petitioner's driving privilege had been revoked under the mandatory provisions of G.S. 20-17(2) and that petitioner was not entitled to a hearing under G.S. 20-16. On these findings Judge Snapp dismissed Case No. 76CVS17. Petitioner gave notice of appeal but did not perfect an appeal. On 18 October 1977 the Division of Motor Vehicles notified petitioner it was revoking his driver's license for one year effective 28 October 1977.

The present proceeding was commenced 17 February 1978 when petitioner filed a motion in the Superior Court in Orange County to set aside the judgment which had been entered against him on 4 September 1975 in the criminal case No. 74CR5767 and to enjoin the Division of Motor Vehicles from revoking his driver's license. The matter was heard before Judge Farmer, the judge presiding at the 1 May 1978 civil session of superior court in Orange County, who on 2 May 1978 entered judgment concluding as a matter of law that the judgment entered against petitioner by Judge Canaday on 4 September 1975 in Criminal Case No. 74CR5767 was void in that the direction that prayer for judgment be continued, which Judge Brewer had ordered on 11 December 1974, became a final judgment at the expiration of the 21 April 1975 Session and the court was thereafter without jurisdiction to enter any further orders in that case. On this conclusion, Judge Farmer ordered that Judge Canaday's 4 September 1975 judgment be vacated and that the Division of Motor Vehicles forthwith rescind the revocation of petitioner's operator's license and return the same to the petitioner. From this judgment the respondent, Division of Motor Vehicles, appeals.

*Perry Martin for petitioner appellee.*

*Attorney General Edmisten by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray for the North Carolina Division of Motor Vehicles, Appellant.*



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PARKER, Judge.

The judgment appealed from was predicated entirely upon Judge Farmer's conclusion that Judge Canaday's judgment entered 4 September 1975 in criminal case No. 74CR5767 was void as a matter of law. We find that conclusion to be in error and reverse.

The inherent power of the court after a plea of guilty or conviction in a criminal case to suspend judgment, or, as it is now more frequently expressed, to direct that prayer for judgment be continued, has long been recognized in this jurisdiction. *State v. Miller*, 225 N.C. 213, 34 S.E. 2d 143 (1945); *State v. Everitt*, 164 N.C. 399, 79 S.E. 274 (1913); *State v. Crook*, 115 N.C. 760, 20 S.E. 513 (1894); *See* Annot., 73 A.L.R. 3d 474, § 12, p. 506-07 (1976); 21 Am. Jur. 2nd, Criminal Law, § 552, p. 527. "After a conviction or a plea, the court has power: (1) to pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3) to continue prayer for judgment." *State v. Thompson*, 267 N.C. 653, 655, 148 S.E. 2d 613, 615 (1966). "In the event the court, after a conviction or plea, finds it desirable not to pass judgment immediately, it may continue the prayer for judgment from one term to another without the defendant's consent if no terms or conditions are imposed." *State v. Griffin*, 246 N.C. 680, 682, 100 S.E. 2d 49, 51 (1957); *accord*, *State v. Graham*, 225 N.C. 217, 34 S.E. 2d 146 (1945). "Where prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor." *State v. Pledger*, 257 N.C. 634, 638, 127 S.E. 2d 337, 340 (1962). However, if conditions amounting to punishment (fine or imprisonment) are imposed, the order is in the nature of a final judgment from which an immediate appeal will lie, and the court having once imposed punishment cannot thereafter impose additional punishment. *State v. Griffin*, *supra*. In this connection, an order that defendant pay the costs does not constitute a part of the punishment in a criminal case, *Barbour v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 169, 97 S.E. 2d 855 (1957); *State v. Crook*, *supra*, nor does a directive that the defendant refrain from breaking the law. *State v. Cheek*, 31 N.C. App. 379, 229 S.E. 2d 227 (1976). When prayer for judgment has been continued to a subsequent term of court, judgment may be imposed by the judge pre-

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siding at that term even though he was not the trial judge. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976); *State v. Sampson*, 34 N.C. App. 305, 237 S.E. 2d 883 (1977).

[1] Applying these well established principles to the facts disclosed by the present record, we note initially that when Judge Brewer on 11 December 1974 directed that prayer for judgment be continued in Case No. 74CR5767 until the 21 April 1975 session of superior court, he did not impose any conditions. Therefore, no judgment had been imposed and the case remained in the trial court for appropriate action to be taken at the 21 April 1975 session. The docket entries appearing on the superior court criminal docket in Orange County in Case No. 74CR5767 show under date "4-21-75" the entry "Continued for the defendant." (A copy of these docket entries appears as page 1 of Exhibit A to the record on this appeal; the parties stipulated that Exhibit A constitutes a part of the record on appeal.) This docket entry, which is an official record of the superior court, imports verity. It shows that at the 21 April 1975 session the case was continued for the defendant. This being so, petitioner is in no position to complain that judgment was not entered against him at the 21 April 1975 session. It was not necessary, as Judge Farmer apparently held, that an order continuing the case be reduced to writing and signed by the judge presiding at the 21 April 1975 session, else the court thereafter lose all power to impose judgment in the case. Other docket entries in Case No. 74CR5767 show that on 26 June 1975 defendant was called and failed to appear and that a *capias in-stanter* was issued for his arrest. Certainly defendant could not deprive the court of power to render judgment against him by first having the case continued and thereafter failing to appear. That no judgment was entered at the 21 April 1975 session was not due to any lack of diligence on the part of the court, but was chargeable solely to conduct of the defendant. Therefore, we hold that Judge Canaday did have authority to enter judgment against defendant in Case No. 74CR5767 on 4 September 1975. See, *State v. Pelley*, 221 N.C. 487, 20 S.E. 2d 850 (1942). The decisions in *State v. Hilton*, 151 N.C. 687, 65 S.E. 1011 (1909) and *State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927) were based on factual situations very different from those presented in the present case and are not here apposite.

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[1, 2] There is another reason, also, why Judge Farmer's judgment should be reversed. Even had Case No. 74CR5767 not been continued for the defendant and no action had been taken at the 21 April 1975 session, the superior court would still have retained jurisdiction of the case and of the defendant, and a judgment thereafter entered imposing punishment would not have been void such that it could be treated as a nullity in a collateral proceeding. At most it would have been irregular, to stand until set aside either by direct appeal or by a direct attack by motion in the cause for appropriate relief. There was no appeal from the judgment entered by Judge Canaday on 4 September 1975 in Case No. 74CR5767, and the present proceeding was not a motion in the cause in that case. The motion filed by petitioner in the superior court in the present proceeding, while it made reference to Case No. 74CR5767, did not even purport to be made in that case. Instead, it was captioned "*Rosbon D. B. Whedbee, Petitioner v. J. G. Wilson, Commissioner Division of Motor Vehicles, Department of Transportation of the State of North Carolina,*" and service was had upon J. G. Wilson, not upon the solicitor who alone would have had authority to represent the State in a criminal proceeding. (We take judicial notice that J. G. Wilson upon whom petitioner's motion was served was not even the Commissioner of Motor Vehicles.) A response to the motion was filed on behalf of Elbert L. Peters, Jr., who was the Commissioner of Motor Vehicles, but he had no authority to represent the State in any criminal proceeding. Not only was petitioner's motion heard without notice to the solicitor, but it was heard at a civil session of court, and a motion which, if allowed, would set aside a judgment in a criminal case may not be determined at a session of court designated for the trial of civil cases only. G.S. 7A-49.2(b); *In re Renfrow*, 247 N.C. 55, 100 S.E. 2d 315 (1957). Thus, the present proceeding was a collateral attack made in a civil proceeding upon the judgment entered in the criminal case, and Judge Farmer in this proceeding had no authority to vacate that judgment.

We note that, for some reason not apparent from the present record, the record on appeal would indicate that this is an appeal in Case No. 76CVS17. That case was terminated when it was dismissed by judgment entered by Judge Snapp on 22 September 1977. Appeal from that judgment was not perfected.

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Finally, we note that no reason appears in the present record why the Division of Motor Vehicles apparently acquiesced for a period of almost two years in permitting the restraining order, which was entered *ex parte* on 13 October 1975 by the district court without any action then pending before it, to remain in effect until 22 September 1977 when Judge Snepp dismissed Case No. 76CVS17. During that entire period the mandate of G.S. 20-17(2), which provides that "the Division shall forthwith revoke the license" of an operator upon receiving a record of such operator's conviction of driving while under the influence of intoxicating liquor, was effectively thwarted.

The judgment appealed from is

Reversed.

Judges MITCHELL and MARTIN (Harry C.), concur.

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KAVANAU REAL ESTATE TRUST, PLAINTIFF, AND THE BANK OF NEW YORK, ASSIGNEE OF PLAINTIFF *v.* LEE A. DEBNAM, A GENERAL PARTNER OF YORKTOWNE VILLAGE, LTD., AND ALGIE STEPHENS, A GENERAL PARTNER OF YORKTOWNE VILLAGE, LTD., TRADING AND DOING BUSINESS AS YORKTOWNE VILLAGE, LTD., A GENERAL PARTNERSHIP, DEFENDANTS

No. 7814SC495

(Filed 15 May 1979)

**1. Mortgages and Deeds of Trust § 32.1— mortgage on leasehold interest—action on underlying obligation not prohibited**

Because a leasehold interest in real property is a chattel real and subject to rules of law applying to personal property, G.S. 45-21.38 does not prohibit an *in personam* action based upon an underlying obligation secured by a mortgage on a leasehold interest, since the protection provided by the statute applies only to transactions involving the sale of real property.

**2. Rules of Civil Procedure § 56.1— summary judgment before responsive pleading—summary judgment not premature**

There was no merit to defendants' contention that entry of summary judgment was premature in that the 20-day period in which defendants were allowed to answer following the denial of their G.S. 1A-1, Rule 12(b) motion had not yet expired, since there was no justifiable reason for delaying summary judgment, as defendants had had nearly four months to prepare defenses and come forward with material questions of fact with which to defeat the summary

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judgment motion; defendants argued only that, if given an opportunity to file a responsive pleading, they might be able to raise further matters in defense; and, even if defendants had been allowed to answer, they could not rest upon the mere allegations or denials of their pleadings to defeat the motion for summary judgment.

APPEAL by defendants from *McKinnon, Judge*. Judgment entered 6 March 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 March 1979.

Plaintiffs initiated this action to recover the principal, plus the legal rate of interest from 1 June 1977, allegedly due on a promissory note secured by a deed of trust encumbering a leasehold interest. Defendants did not answer the complaint but instead moved for dismissal primarily on the grounds that the federal bankruptcy court had exclusive jurisdiction of the controversy.

Yorktowne Village, Ltd., is a general partnership composed of general partners Lee A. Debnam and Algie Stephens. The record indicates that on 3 June 1974, Lee Debnam, acting apparently within his authority as general partner of Yorktowne Village, Ltd., executed in favor of plaintiffs a promissory note in the face amount of \$100,000 secured by a deed of trust on defendants' leasehold interest in the Yorktowne Apartments, Durham. The promissory note provided a due date of 31 May 1977. Plaintiffs allege, and defendants do not deny, that no part of that indebtedness has been paid.

Plaintiff, Kavanau Real Estate Trust, became lessee of the Yorktowne Apartments by assignment, on 1 May 1968, of a lease held by Consolidated Properties, Ltd. Lessor and owner of the fee is Ward Realty Company. First mortgagee is the State of Wisconsin Investment Board by assignment from Cameron Brown Company. Kavanau Real Estate Trust, in a transaction giving rise to this lawsuit, thereafter assigned its leasehold interest to Yorktowne Village, Ltd., on 1 June 1974, and in return took the note secured by a second deed of trust on the leasehold which is the subject of this action. Yorktowne Village, Ltd., then assigned the lease to Yorktowne Apartments, Inc., on 22 April 1975. Yorktowne Apartments, Inc., assigned the lease to O.C.G.-York-Woods, Ltd., 31 December 1975. Finally O.C.G.-York-Woods, Ltd., assigned the lease to Tudor Associates Limited II, on 13 January

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1976. The assignment by Yorktowne Village, Ltd., and the subsequent assignments were completed without any participation or involvement by Kavanau Real Estate Trust, and at no time has Yorktowne Village, Ltd., been released from its obligation by Kavanau Real Estate Trust. Such assignments were made "subject to" the lien on the property interest created by the deed of trust executed by Yorktowne Village, Ltd., and the first mortgage noted above.

Plaintiffs have not elected to seek foreclosure against the leasehold interest encumbered by the deed of trust, but have elected to proceed *in personam* directly on the promissory note. Defendant has not answered the complaint but has sought dismissal of the action, continuance, or abatement until the bankruptcy proceeding involving the present lessee, Tudor Associates, Ltd., II, is completed. Plaintiffs countered with a motion for summary judgment. The initial hearing on these matters was heard 24 February 1977. At the request of counsel for the defendants, a further hearing was scheduled for 3 March 1978 to allow defendants time to present additional arguments and affidavits in opposition to the motion for summary judgment. Following the second hearing, the trial court entered orders denying defendants' motions for dismissal, continuance, and abatement, and entered summary judgment in favor of the plaintiffs. The decree ordered defendants to pay the sum of \$100,000 with interest from 1 June 1977, attorney's fees of \$15,532.60, and the costs of the action. Defendants appealed.

*Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray III, for plaintiff appellees.*

*Seay, Rouse, Johnson & Harvey, by James L. Seay and Ronald H. Garber, for defendant appellant Lee A. Debnam.*

*Sanford, Cannon, Adams & McCullough, by J. Allen Adams, E. D. Gaskins, Jr., and Catharine B. Arrowood, for defendant appellant Algie Stephens.*

MORRIS, Chief Judge.

The parties have narrowed the questions presented on appeal to two: (1) Did the trial court err in concluding that G.S. 45-21.38 (the "anti-deficiency statute") did not bar an *in personam* judg-

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ment on a purchase money note where there was no recourse against the security evidenced by the deed of trust on the leasehold interest? (2) Did the trial court err in entering summary judgment prior to the expiration of the time for defendants to file an answer after the denial of their motion to dismiss?

[1] Defendants argue that the "Anti-deficiency Statute", G.S. 45-21.38, precludes the plaintiffs' suit on the promissory note either before or after recourse against the security. They urge this Court to reconsider the decision in *Realty Co. v. Trust Co.*, 37 N.C. App. 33, 245 S.E. 2d 404 (1978), which permitted suit on the underlying obligation without foreclosure under the deed of trust. We need not reconsider *Realty Co. v. Trust Co.*, *supra*. That decision was recently reversed by our Supreme Court in *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). The Court abandoned a strict interpretation of the statute in an attempt to give effect to the perceived intent of the legislature to limit a purchase money mortgagee to the remedy of foreclosure under the security instrument. Despite the recent *Realty Co. v. Trust Co.* decision, plaintiffs maintain that the plain words of the "anti-deficiency statute" preclude its application in the context of the assignment of a leasehold interest. Plaintiffs contend that G.S. 45-21.38 applies only to purchase money security interests in *real estate* resulting from *sales of real estate*, and that a leasehold interest is treated in law as *personalty*. They rely on the following emphasized language of the statute:

"§ 45-21.38. *Deficiency judgments abolished where mortgage represents part of purchase price.*—In all sales of real property by mortgagees and/or trustees under powers of sale . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee . . . shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same. . . ." (Emphasis supplied.)

The rule in this State appears to be well settled that a leasehold interest in real property is a chattel real and subject to rules of law applying to personal property. In *Moche v. Leno*, 227 N.C. 159, 41 S.E. 2d 369 (1947), the Supreme Court determined that because a lease of real estate for a term of more than three years is personal property rather than real property, the writing

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need not be under seal to be valid. That decision cited the opinion in *Waddell v. Cigar Stores*, 195 N.C. 434, 142 S.E. 585 (1928), which, during its discussion of the validity of a decree empowering a trustee to lease certain lands for a period possibly extending beyond the period of the trust, observed that a lease is treated as a chattel real, falling within the classification of personal property. Likewise, in *Cordell v. Sand Co.*, 247 N.C. 688, 102 S.E. 2d 138 (1958), the Court concluded that failure to list a leasehold interest for tax purposes was not conclusive evidence of nonuser with respect to land under lease because, *inter alia*, a leasehold interest for a term of years is a chattel real and for purposes of taxation the whole of the land is assessable against the owner of the fee. Finally, in a tax refund suit our Supreme Court noted that a leasehold interest is a chattel real, a species of intangible personal property, and subject to ad valorem tax. *Investment Co. v. Cumberland County*, 245 N.C. 492, 96 S.E. 2d 341 (1957). We conclude, therefore, that G.S. 45-21.38 does not prohibit an *in personam* action based upon an underlying obligation secured by a mortgage on a leasehold interest. Additionally, it is clear from the language of the statute that the protection provided by the statute only applies to transactions involving the sale of real property. In this case there was no sale of real property, only an assignment for valuable consideration of a leasehold interest.

[2] By their final argument defendants contend that the entry of summary judgment on 6 March 1978 was premature in that the 20-day period in which defendants are allowed to answer following the denial of their G.S. 1A-1, Rule 12(b) motion had not yet expired. The record indicates the occurrence of the following sequence of events: (1) Complaint filed 9 November 1977, (2) Order for extension of time for defendants to file answer, 22 November 1977, (3) Defendants' motion to dismiss, 9 January 1978, (4) Plaintiff's motion for summary judgment, 1 February 1978, (5) Defendants' Third Party complaint, 24 February 1978, (6) Motions for Election of Remedies, Continuance, and Abatement, 3 March 1978, (7) Order and Summary Judgment entered 6 March 1978, (8) Corrected Order and Summary Judgment, 18 April 1978.

The proper time period for filing a motion for summary judgment is determined by G.S. 1A-1, Rule 56(a), which provides as follows:



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*"For claimant.*—A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

However, G.S. 1A-1, Rule 12(a)(1)a., provides that responsive pleadings shall be served within 20 days after notice of the court's action in ruling on a Rule 12 motion, unless a different time is fixed by order of court. G.S. 1A-1, Rule 6(b) permits the time within which to file responsive pleadings to be extended for 30 days. While defendants contend summary judgment should not be entered before their time for filing a responsive pleading, plaintiffs contend that summary judgment is proper at any time after the expiration of 30 days from commencement of the action.

This Court in *Village, Inc. v. Financial Corp.*, 27 N.C. App. 403, 219 S.E. 2d 242 (1975), *cert. denied*, 289 N.C. 302, 222 S.E. 2d 695 (1976), faced the question of whether it was appropriate to enter summary judgment before the period for answering had expired. In that case, defendant filed an affidavit in response to the plaintiff's motion for summary judgment which was rejected for failure to comply with G.S. 1A-1, Rule 56(e). The Court noted that the affidavit, if it had been proper in form, would have been sufficient to raise genuine issues of material fact so as to defeat the motion for summary judgment. Judge Hedrick, speaking for the Court, concluded that under the unusual posture of that case, summary judgment was premature. In a caveat to the decision, it was noted, however, that "summary judgment for claimant, under some circumstances, might be appropriate before the responsive pleading has been filed or even before the time to file responsive pleadings has expired." 27 N.C. App. at 404, 219 S.E. 2d at 243.

The facts of this case present no justifiable reason for delaying entry of summary judgment. Defendants had nearly four months to prepare defenses and to come forward with material questions of fact with which to defeat the motion for summary judgment. They still have not come forward with such questions of fact, but argue that if given an opportunity to file a responsive pleading they *might* be able to raise further matters in defense

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such as fraud, usury, novation, and mutual mistake. However, the burden is on the party opposing summary judgment to set forth specific facts showing that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e). Even if defendants had been allowed to answer, they could not rest upon the mere allegations or denials of their pleadings to defeat the motion for summary judgment. *Id.* Plaintiff was acting within the guidelines of G.S. 1A-1, Rule 56(a), in filing the motion for summary judgment nearly two months after commencement of the action and one month after defendants' motion to dismiss. In fact, it has been observed that the purpose of the 1946 amendments to Rule 56(a) of the Federal Rules of Civil Procedure, now identical to G.S. 1A-1, Rule 56(a) in all respects except for the enlargement of the time period for filing from 20 to 30 days, "was to permit a plaintiff to move for summary judgment while a pre-answer rule 12(b) motion was pending". *Stein v. Oshinsky*, 348 F. 2d 999, 1001 (2d Cir. 1965). See generally 6 Moore, Federal Practice § 56.07 (2d ed. 1976); 10 Wright and Miller, Federal Practice and Procedure: Civil § 2717 (1973). The entry of summary judgment for plaintiff was not premature.

For the reasons discussed above, the trial court's entry of summary judgment for the plaintiffs is

Affirmed.

Judges CLARK and ARNOLD concur.

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SHIRLEY R. JENKINS v. STEWART & EVERETT THEATRES, INC.

No. 788SC610

(Filed 15 May 1979)

**Negligence § 57.6— fall on theater floor—negligence in failing to clean—question of material fact**

In an action to recover for injuries received by plaintiff in a fall in defendant's movie theater, the trial court erred in granting summary judgment in favor of defendant on the issue of whether defendant was negligent in failing adequately to clean the theater and in thereby creating an unsafe condition which proximately caused plaintiff's injury where plaintiff presented evidence on the motion for summary judgment that she fell when she slipped on popcorn and soft drink which had been spilled on the theater floor, and defendant

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**Jenkins v. Theatres, Inc.**

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presented evidence that it cleaned its theater once a day and had cleaned it on the evening prior to plaintiff's injury, and that its cleaning procedures met the standard practice for movie theaters.

APPEAL by plaintiff from *Strickland, Judge*. Judgment entered 20 March 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 28 March 1979.

The plaintiff, Shirley R. Jenkins, instituted this action by filing a complaint alleging that she slipped and fell in the defendant's motion picture theater as a result of the defendant's negligence. The defendant answered denying most of the allegations of the plaintiff and moved for summary judgment in its favor. At the hearing on the defendant's motion, the defendant presented an affidavit of the manager of the theater in which the plaintiff was injured. The plaintiff presented a transcript of her own deposition. Upon the pleadings, affidavit and deposition, the trial court granted summary judgment in favor of the defendant. The plaintiff appealed from that judgment.

In her deposition, the plaintiff indicated that she had gone with her husband to the Mall Cinema in Kinston, North Carolina to see a motion picture. When they entered the theater, they walked about three-fourths of the way down the right aisle and entered a row of seats on the right side of the theater. The plaintiff entered the row first and sat in the second seat from the aisle. Her husband sat in the seat immediately adjacent to the aisle. During the showing of the motion picture, the defendant went to the rest room. She left her seat and moved around her husband's knees to the aisle without difficulty. In returning to her seat, the plaintiff held onto the back of one of the "rocking chair" type seats in the row in front of the one in which she and her husband had been sitting. Immediately after passing in front of her husband's knees, she slipped and fell on the floor in front of her seat. She then got up and sat in her seat during the remainder of the motion picture.

When the motion picture was over, the plaintiff got up from her seat and examined the floor in order to determine what had caused her to fall. During her examination, she saw "some popcorn and some slimy-looking substance that made the popcorn look like cracker jacks and there was also a cup right down beside the end of the seat and it looked like it had turned over and run

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**Jenkins v. Theatres, Inc.**

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down to right in front of, between his seat and my seat." The slimy-looking substance "looked like a Coke that had been on the floor a good while." The substance was not like the coating on Cracker Jacks; instead, "it looked like Coca-Cola or Pepsi that had been left there for a while, it was a certain black substance. It was sticky." The plaintiff was unable to state who had put any of the items on the floor.

The plaintiff alleged in her complaint that her fall was caused by the defendant's negligence. She specifically alleged that "the defendant knew or should have known that the selling of beverages in paper cups containing ice and various liquids as well as popcorn, candy wrappers and other debris would . . . create a dangerous and hazardous condition for patrons of the theatres and particularly the plaintiff herein." The plaintiff further alleged that the defendant was negligent in that it sold confections to its customers "knowing that said customers had no trash containers in which to place their refuse and knowing that said customers would throw and spill said cups, ice, popcorn and other matter on the floor of the theatre and in places where the defendant knew or should have known customers would be walking and standing on the slightly slanted floor of said theatre, thereby creating the dangerous and hazardous condition heretofore mentioned." The plaintiff additionally alleged that the defendant was negligent in failing to pick up debris and clean in the areas where beverage and food containers had been deposited and spilled.

The defendant's affidavit indicated that it was the policy of the Mall Cinema at the time of the accident to clean the theater following the end of the final motion picture each day. The theater was cleaned by "picking up trash and other debris, sweeping, mopping and vacuuming the floor and scraping from the floor any matter which could not otherwise be removed." This was done after the last motion picture was shown on the day before the plaintiff's accident. The manager further indicated in his affidavit that prior to the plaintiff's fall he had not received any notice that there was any matter on the floor of the theater which would create a hazardous condition.

*Hulse & Hulse, by H. Bruce Hulse, Jr., for plaintiff appellant.*

*Taylor, Warren, Kerr & Walker, by Gordon C. Woodruff, for defendant appellee.*

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MITCHELL, Judge.

The plaintiff assigns as error the judgment of the trial court granting summary judgment for the defendant. If the pleadings, deposition and affidavit in the present case showed that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law, the trial court did not err in granting summary judgment in favor of the defendant. *See* G.S. 1A-1, Rule 56(c). In order to bear its burden of showing that it was entitled to summary judgment, the defendant was required to present a forecast of the evidence which would be available at trial and which showed that there was no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. *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).

There are four essential elements of a claim for relief based on negligence: (1) one of the parties must have been under a duty to conform to a certain standard of conduct, (2) there must have been a breach of that duty, (3) there must have been an injury, and (4) the injury must have been proximately caused by the breach. *See* W. Prosser, *Torts* § 30 (4th ed. 1971). The forecast of evidence presented by the defendant in the present case clearly failed to indicate that the plaintiff would not be able to prove at trial that the defendant was under a duty to conform to a certain standard of conduct or that the plaintiff was injured. Therefore, we turn to an examination of the defendant's forecast of evidence to determine whether it revealed that the plaintiff would be unable to prove that the defendant breached its duty and thereby proximately caused the plaintiff's injury.

The plaintiff alleged that she was the defendant's business invitee, and the defendant's forecast of evidence did not indicate that she would be unable to prove that allegation. The defendant owed a duty to its business invitees to conform to a certain standard of care. That standard required the defendant to exercise ordinary care in keeping its premises in a reasonably safe condition and to warn its invitees of any hidden perils or unsafe conditions that it knew or should have known existed on the premises. *Rapaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Dawson*

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*v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831 (1965); *Stoltz v. Hospital Authority, Inc.*, 38 N.C. App. 103, 247 S.E. 2d 280 (1978). Although the standard of care to which the defendant must conform is established as a matter of law,

[T]he degree—that is the quantity—of care necessary to measure up to the standard is as variable as the attendant circumstances. . . . Hence the quantity of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. And whether defendant exercised or failed to exercise ordinary care as understood and defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances.

In short, the standard of care is a part of the law of the case for the court to explain and apply. The degree of care required, under the particular circumstances, to measure up to the standard is for the jury to decide.

*Rea v. Simowitz*, 225 N.C. 575, 579-80, 35 S.E. 2d 871, 874-75 (1945) (citations omitted).

The plaintiff alleged that the defendant breached its duty of care by failing to adequately clean the theater thereby creating an unsafe condition which proximately caused her injury. The defendant attempted to overcome that allegation and the plaintiff's forecast of evidence by a forecast of evidence showing that it cleaned its theater at least once a day and had cleaned the theater on the evening prior to the plaintiff's injury. However, we cannot say as a matter of law that the defendant's forecast of evidence was sufficient to reveal that it exercised a degree or quantity of care under the circumstances of this case such as would conform to the required standard of care. That determination can be made only by the jury. Although the defendant's forecast of evidence tended to establish that its cleaning procedures met or exceeded standard customs and practice, "negligence may exist notwithstanding [the fact that] the means and methods adopted are in accordance with those customary in the business." *Watts v. Manufacturing Co.*, 256 N.C. 611, 616, 124 S.E. 2d 809, 813 (1962). Therefore, the defendant's forecast of evidence did not show that the plaintiff would be unable to prove that the defendant breached its duty of care or that the breach

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proximately caused the plaintiff's injury. Since the defendant's forecast of evidence does not show that it is entitled to judgment as a matter of law, the judgment of the trial court was erroneous.

The plaintiff additionally asserted that the defendant was negligent in selling confections to its customers without maintaining trash containers and thereby caused its customers to throw and spill foreign substances on the theater floor creating a hazardous condition. That allegation was not specifically denied by the defendant. Our disposition of this case on appeal, however, makes it unnecessary for us to consider whether such an allegation by the plaintiff constitutes an allegation of negligent acts of commission imposing any higher or different standard upon the defendant than that previously discussed.

For errors previously discussed herein, the judgment of the trial court must be and is hereby

Reversed.

Judges MARTIN (Robert M.) and WEBB concur.

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RACHEL ELVA RECTOR, PLAINTIFF v. TOMMY JAMES AND JAMES ADAM TEAGUE D/B/A J. A. ANDREWS COMPANY AND CLYDE CLEMMON FOXX, AGENT, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. VERA JANE RECTOR KENNEDY AND JOHN ALLEN KENNEDY, THIRD-PARTY DEFENDANTS

No. 7822SC719

(Filed 15 May 1979)

**1. Appeal and Error § 48.2— objection to evidence—similar evidence admitted without objection—objection waived**

Defendants waived their objection to evidence by a State Trooper where they subsequently offered similar evidence themselves.

**2. Evidence § 44— physical pain—nonexpert opinion evidence**

A nonexpert witness may testify as to pain suffered by another, based upon his personal observation.

**3. Automobiles § 53.2— passing in intersection—collision—no directed verdict**

In an action to recover for injuries sustained when the pickup truck in which plaintiff and third-party defendant were riding collided with a tractor-trailer driven by one defendant, the trial court properly denied defendants'

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motions for directed verdict where the evidence tended to show that defendant was negligent in operating his truck by attempting to pass at an intersection, that this negligence was a proximate cause of the injuries sustained, and that the driver of the pickup was not contributorily negligent as a matter of law.

**4. Automobiles § 90.9— instructions—parties' contentions—double yellow line—stopping at stop sign**

In an action to recover for injuries sustained in an automobile accident, instructions by the trial court were proper with respect to defendants' contentions, the purpose of a double yellow line, and evidence as to whether the third-party defendant driver failed to stop at a stop sign.

**5. Evidence § 3.4— permanent scarring—judicial notice of mortuary tables**

Permanent scarring is sufficient evidence to permit judicial notice of mortuary tables.

APPEAL by defendants from *Collier, Judge*. Judgment entered 8 May 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 26 April 1979.

Plaintiff sued defendants for damages for personal injuries. On 28 July 1976, plaintiff sustained injuries to her head and knee when the 1975 pickup truck in which she was a passenger collided with a 1973 Kenworth tractor-trailer being operated by defendant Foux.

Defendants denied plaintiff's allegations and filed a third-party complaint joining Vera Jane Rector Kennedy, the driver of the pickup truck, and John Allen Kennedy, the owner of the pickup truck, as third-party defendants, alleging their negligence was responsible for any injuries or damages plaintiff sustained, and requesting contribution. The Kennedys filed an answer and counterclaim against the defendants for personal injuries and property damages resulting from the alleged negligence of defendants.

The jury returned a verdict for plaintiff and third-party defendants, awarding \$28,000 to plaintiff, Rachel Elva Rector, \$10,000 for personal injuries to third-party defendant Vera Jane Rector Kennedy and \$6,000 for property damage to third-party defendant John Allen Kennedy. Defendants appeal from this judgment.



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*Harris and Pressly, by Edwin A. Pressly, for plaintiff appellee.*

*Sowers, Avery & Crosswhite, by William E. Crosswhite, for defendant appellants.*

*Pope and McMillan, by C. H. Kutteh II, for third-party defendant appellees.*

MARTIN (Harry C.), Judge.

[1] Defendants present several assignments of error on appeal. The first assignment is a twofold challenge to the admission in evidence of certain testimony. First, defendants objected to testimony by trooper Davis that defendant Foxx was convicted of a traffic violation as a result of the accident. Immediately thereafter, he further testified without objection as to what those convictions were. Subsequently, defendant Teague testified without objection on cross-examination that defendant Foxx was convicted of driving on the wrong side of the road and pled guilty to driving after his license was revoked. Assuming, *arguendo*, that defendants' first objection to this evidence was valid, we hold that defendants waived the benefit of their objection. "The general rule is that when evidence is admitted over objection and the same evidence is thereafter admitted without objection, the benefit of the objection is lost." *State v. Smith*, 290 N.C. 148, 163, 226 S.E. 2d 10, 19, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301 (1976); *Dunes Club v. Insurance Co.*, 259 N.C. 293, 130 S.E. 2d 625 (1963).

[2] Second, defendants objected to testimony by witness Timothy Dwayne Rector, son of the plaintiff, as to the pain his mother experienced and her condition when he visited her in the hospital and when she came home. He lived with his parents. Defendants contend the testimony was hearsay, incompetent and prejudicial because the witness testified to things that were not within his realm of knowledge. The witness testified as to what he observed and heard, and formed the opinion that his mother was in pain. Pain is a mental condition that may be the result of physical injury. It is often manifested in the actions, statements, utterances and behavior of the injured person which may be observed by another. The witness had reasonable opportunities to observe his mother at the hospital and at home, and to form an

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opinion concerning her pain and suffering. We hold a non-expert witness may testify as to pain suffered by another, based upon his personal observation. *Pridgen v. Produce Co.*, 199 N.C. 560, 155 S.E. 247 (1930). The first assignment of error is overruled.

[3] Defendants challenge the trial court's denial of their motions for directed verdict at the close of their evidence and at the close of third-party defendants' evidence, respectively. They contend there was insufficient evidence to support the claim of plaintiff and the crossclaim of third-party defendants, and that the evidence showed Vera Jane Rector Kennedy contributorily negligent as a matter of law. Taking the evidence as true and considering it in the light most favorable to plaintiff and the third-party defendants, the evidence tends to show:

On the morning of 28 July 1976, plaintiff was a passenger in a 1975 pickup truck operated by Vera Kennedy and owned by John Kennedy. They were travelling north along State Road 1637 as they approached its intersection with Highway 90, where a duly erected stop sign controls traffic on State Road 1637 entering Highway 90. The pickup truck stopped at the intersection. Vera Kennedy intended to turn right at the intersection onto Highway 90 to travel in an easterly direction. At the intersection, plaintiff and Vera Kennedy observed a green car coming from their right travelling west and did not see any traffic coming from their left travelling east. Vera Kennedy entered the intersection to proceed with her right turn. Highway 90 east and west of the intersection was designated as a no passing zone, and was duly marked as such by solid double yellow lines down the center of the highway. Then plaintiff and Vera Kennedy observed defendant Foxx, travelling west in a 1973 Kenworth tractor-trailer, pull out from behind the green car, cross the double yellow lines, and proceed to pass it in the eastbound lane of travel. The front of the pickup truck collided with the rear of the tractor-trailer.

Both plaintiff and Vera Kennedy presented evidence to establish injuries resulting from the collision. John Allen Kennedy presented evidence of the damage to his 1975 pickup truck.

A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the claimant. *Manganello v. Permastone, Inc.*, 291 N.C. 666,

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231 S.E. 2d 678 (1977). In considering the motion for directed verdict, the evidence must be taken as true and considered in the light most favorable to plaintiff and third-party defendants. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Wilson v. Auto Service*, 20 N.C. App. 47, 200 S.E. 2d 393 (1973). "The general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976); *Harrington v. Collins*, 40 N.C. App. 530 (1979). Taking the evidence in the light most favorable to the plaintiff and third-party defendants, there is evidence that Foxx was negligent in operating defendants' tractor-trailer truck by attempting to pass at an intersection and that this negligence was a proximate cause of the injuries sustained. N. C. Gen. Stat. 20-150(c); N.C. Gen. Stat. 20-147; *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502 (1957). The evidence did not establish that Vera Kennedy was contributorily negligent as a matter of law. We find the trial court properly denied defendants' motions for directed verdict. The second and third assignments of error are without merit.

[4] Defendants contend the court erred in its charge to the jury. First, defendants contend the trial judge failed to give equal stress to the contentions of defendants in contravention of Rule 51(a) of the Rules of Civil Procedure. Although the trial court is not required to state the contentions of the parties, if it undertakes to do so, it must give the contentions of all parties. *Comer v. Cain*, 8 N.C. App. 670, 175 S.E. 2d 337 (1970). Defendants argue the charge failed to state defendants' contentions that Vera Kennedy failed to see that her movement could be made in safety and that she failed to keep a proper lookout. These very contentions of defendants were recited by the trial judge in the charge, although they were not given immediately after the court stated the contentions of the plaintiff and third-party defendants. Just as the length of the statement of contentions does not have to be exactly equal, the order of stating the contentions of each party does not have to follow any precise sequence. *Id.* Objections to the statement of contentions must ordinarily be brought to the attention of the court before verdict, otherwise they are deemed to

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be waived. *Doss v. Sewell*, 257 N.C. 404, 125 S.E. 2d 899 (1962). The charge viewed as a whole states the contentions of the parties fairly and evenly, without prejudice to appellants.

Second, defendants contend the charge was inadequate because the instructions on the purpose of double yellow lines should have been more elaborate. We find these instructions to have been adequate and proper. Furthermore, defendants did not timely request additional instructions and therefore cannot now argue that the instructions were inadequate. *King v. Powell*, 252 N.C. 506, 114 S.E. 2d 265 (1960). If defendants desired greater elaboration on a particular point of the case, they had the duty to make a special request therefor prior to verdict. Such request should be made before argument of counsel, in writing and signed by counsel. *State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971).

Defendants argue the trial court erred by instructing the jury that there was no evidence Vera Kennedy failed to stop at the stop sign. The charge to the jury must explain the law as it applies to the evidence in the case. *Price v. Conley*, 12 N.C. App. 636, 184 S.E. 2d 405 (1971). All the evidence indicated Vera Kennedy did stop at the stop sign; therefore the instruction was correct. This instruction did not foreclose consideration by the jury of the defense of contributory negligence.

[5] Defendants contend the trial court erred in admitting into evidence on its own motion and instructing the jury on the mortuary tables and that the evidence failed to substantiate claims for permanent injuries justifying use of the mortuary tables. Judges, of their own motion, may take judicial notice of mortuary tables when facts are in evidence requiring their application. *Chandler v. Chemical Co.*, 270 N.C. 395, 154 S.E. 2d 502 (1967). Here, there was evidence that plaintiff and Vera Kennedy sustained permanent facial scars resulting from injuries received in the accident. Plaintiff's head was cut requiring thirty-six stitches. Vera Kennedy had a cut over her right eye and a fracture of the distal end of the radius at the wrist. Plaintiff also received an injury to her left leg and knee that still had some residual effect when last seen by the doctor and which plaintiff testified still bothered her. Permanent scarring is sufficient evidence to permit judicial notice of mortuary tables. *Id.* We find no error in the court's charge.

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**General Specialties Co. v. Teer Co.**

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We have carefully considered appellants' arguments with respect to the motion for judgment notwithstanding the verdict and the amount of the verdicts. We find them to be without merit. The case was submitted to the twelve and they resolved the issues against the appellants. In the trial we find

No error.

Judges PARKER and MITCHELL concur.

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GENERAL SPECIALTIES COMPANY, INC. v. NELLO L. TEER COMPANY

No. 7826SC655

(Filed 15 May 1979)

**1. Contracts § 18.1— claim for extra costs—waiver of written notice**

Defendant contractor waived any rights it had under a subcontract to written notice of the subcontractor's claim for extra costs incurred for the storage of building materials in an off-site bonded warehouse by its agreement with the subcontractor for the off-site storage.

**2. Contracts § 18.1— recovery for extra costs**

In a subcontractor's action against a contractor to recover extra costs incurred in the performance of the subcontract, the evidence supported the trial court's findings that plaintiff subcontractor was entitled to recover extra costs for the storage of building materials in a dry warehouse off the project site and for additional work caused by a change in the plans and specifications for the corner ridges of the building being constructed.

**3. Contracts § 18.2— denial of recovery for extra costs—sufficiency of supporting evidence**

In a subcontractor's action against a contractor to recover extra costs for glass curtain wall work in a building constructed by the contractor, the evidence supported the trial court's determination that plaintiff subcontractor was not entitled to recover extra costs incurred to realign support steel for the curtain wall which it alleged defendant installed with improper tolerance because (1) incompatibility of tolerances of the support steel and the glass curtain wall resulted from the project design rather than from defendant's failure to follow contract specifications, and (2) defendant contractor issued no written order for the extra work as required by the terms of the subcontract.

APPEAL by defendant and plaintiff from *Lewis, Judge*. Judgment entered 26 October 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 April 1979.

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General Specialties Co. v. Teer Co.

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Defendant, Nello L. Teer Company, was the general contractor for the construction of the North Carolina Blue Cross and Blue Shield, Inc. building in Chapel Hill, North Carolina. Defendant employed plaintiff, General Specialties Company, Inc., as a subcontractor to construct a glass curtain wall around the building. The glass curtain wall was to be the exterior of the building, an architecturally unique structure. Plaintiff and defendant entered into the subcontract on 28 January 1972 for plaintiff to furnish and install the curtain wall in accordance with the general conditions, drawings and specifications prepared by the architects and engineers, Odell Associates, Inc.

Construction of the building began in February 1972 and was completed in October 1973. Plaintiff performed its work under the subcontract during this period. During the performance of the subcontract, plaintiff complained of extra costs incurred which it claimed defendant should pay by the terms of the subcontract. On 26 August 1975, plaintiff brought this action against defendant alleging six separate claims for relief of certain extra costs. Plaintiff's claims against defendant were as follows:

1. extra costs incurred for having to store building materials in an off-site bonded warehouse, in the amount of \$8,865.13;
2. extra work and costs incurred because defendant and its other subcontractors used plaintiff's building scaffolding during construction of the building, in the amount of \$23,889.86;
3. extra work and costs incurred due to a change in the original design of the corner ridges for the building, in the amount of \$10,886.32;
4. extra costs incurred to realign certain structural work improperly done by Teer to enable proper installation of the curtain wall, in the amount of \$57,249.40;
5. extra costs incurred supervising defendant's work forces to correct work defendant had improperly installed, in the amount of \$2,173.22;
6. windstorm damage to plaintiff's scaffolding claimed under defendant's Builders Risk Insurance Policy, in the amount of \$1,277.08.

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**General Specialties Co. v. Teer Co.**

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Defendant denied plaintiff incurred any of these extra costs and alleged that if plaintiff did incur such extra costs, it is not entitled to recover because plaintiff failed to comply with the notice requirement for claims under the subcontract, and plaintiff executed a release of claims against defendant.

The case was tried before Judge Lewis without a jury. Plaintiff prevailed on its first and third claims. Plaintiff's second, fourth, fifth and sixth claims were denied.

Defendant appeals from the order of the court allowing plaintiff to recover on the first and third claims for relief.

Plaintiff appeals from the denial of its fourth claim for relief.

*Robert D. Potter for plaintiff.*

*Nye, Mitchell & Bugg, by John E. Bugg and Charles B. Nye, for defendant.*

MARTIN (Harry C.), Judge.

Neither party requested a jury trial and the case was tried by Judge Lewis deciding both questions of law and fact. Where the trial judge sits as the trier of the facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Associates, Inc. v. Myerly and Equipment Co. v. Myerly*, 29 N.C. App. 85, 223 S.E. 2d 545, *dis. rev. denied and appeal dismissed*, 290 N.C. 94, 225 S.E. 2d 323 (1976). The trial judge is both judge and jury, and he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). Judge Lewis had the duty to find facts, state separately his conclusions of law and enter judgment. N.C. Gen. Stat. 1A-1, Rule 52(a)(1); *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971). It is incumbent on this Court to review the evidence to determine if it supports the findings of fact presented by assignments of error on appeal. *Whitaker v. Earnhardt, supra*. We discuss the required findings of fact separately.

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General Specialties Co. v. Teer Co.

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[1, 2] In plaintiff's first claim, it alleges extra expense for storage of materials in a dry warehouse off the project site, in order to comply with defendant's work schedule. The following evidence sustains this finding:

There was no dry place on the site where the material could be stored; therefore, we asked permission to store the material off the site. . . .

. . . The agreement with Mr. DuBose, Assistant Vice President of Nello Teer, was that we would be allowed to store the material in a bonded warehouse off the site since there was no facility at the site to store it.

. . . .

. . . Irvin Chatham determined (job superintendent for Nello Teer) that it would not be practical to store this material within the building. . . .

. . . .

. . . Our total cost for storing the material and glass at the warehouse was \$8,520.98.

Teer was a party to this agreement through its vice president, DuBose. It had knowledge of the off-site storage before it was ever begun. Defendant relies on the provision in the contract requiring notice of any claim against contractor (Teer) to be given in writing within seventy-two hours after the cause of the claim occurred, citing *Construction Co. v. Highway Comm.*, 28 N.C. App. 593, 222 S.E. 2d 452 (1976). It is true that in *Construction Co.* the Court upheld a notification clause of the contract in litigation. However, in that case there was no evidence of any additional agreement between the parties covering alleged extra work. To the contrary, officials of the Commission told plaintiff that it would be a "waste of time" to discuss it. Here, Teer waived any rights it had under the subcontract to written notice by its agreement through DuBose with plaintiff for the off-site storage.

Plaintiff's third claim for relief is admitted by defendant's answer, except as to the amount of plaintiff's damages. This claim involved changes in the plans and specifications for the corner ridges. Plaintiff was ordered to make these changes by Teer in a



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General Specialties Co. v. Teer Co.

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letter to plaintiff dated 19 March 1973. Plaintiff's evidence sustained a finding that the required changes resulted in additional costs to plaintiff of \$10,886.32.

[3] Plaintiff's fourth claim involves defendant's installing the curtain wall support steel with improper tolerance, requiring plaintiff to realign and modify the curtain wall grid system at an alleged cost of \$57,249.40. Judge Lewis found that all the parties knew of the required tolerances in the construction of the curtain wall, and that the installation of the structural and support steel was probably incompatible with the curtain wall, and that this probably resulted from the project design. These findings are amply supported in the record by the evidence of DuBose and Smith, who testified in detail as to the requirements of the support steel in relation to the curtain wall.

Judge Lewis further found this claim was controlled by Article 19 of the subcontract which stated the subcontractor (plaintiff) could not recover for extra work unless the contractor gave a written order for the work. The record sustains this finding as there is no evidence of any waiver by defendant, Teer, of this requirement. There is no evidence that Teer issued such written order with respect to this work by plaintiff, or that plaintiff requested a written order from Teer.

The remaining findings are not the subject of assignments of error nor argued in the briefs of either party. The findings of fact support the separate conclusions of law stated by Judge Lewis allowing plaintiff to recover on its first and third claims in the total amount of \$19,751.45 and denying plaintiff's fourth claim for relief. *Knutton v. Cofield, supra.*

This complicated case was carefully tried by the able and experienced trial judge, and his judgment is

Affirmed.

Judges VAUGHN and ERWIN concur.

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**In re Memorial Park**

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IN THE MATTER OF: THE PETITION OF ALAMANCE MEMORIAL PARK, INC.  
FOR JUDICIAL REVIEW OF THE DECISION OF THE TAX REVIEW BOARD CONCERNING  
AN ASSESSMENT OF INTANGIBLES TAXES FOR THE YEARS 1968 THROUGH 1970

No. 7810SC384

(Filed 15 May 1979)

**Taxation § 32— notes receivable of cemetery corporation—valuation for intangibles taxes**

The Secretary of Revenue properly refused to allow a cemetery corporation to deduct reserves for pre-need markers, contributions to perpetual care funds and commissions payable to salesmen in determining the value of its notes receivable for intangibles tax purposes, and the Secretary properly allowed the cemetery corporation to determine the actual value of its notes by using a reduction formula based on the ages of the notes.

APPEAL by petitioner from *Clark, Judge*. Judgment entered 20 February 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 2 February 1979.

Petitioner sells cemetery plots, markers, and crypts on a pre-need basis. Generally, such sales are financed by petitioner through the acceptance of its vendees' notes or contracts of sale accompanied by small down payments. The Secretary of Revenue (hereinafter referred to as the Secretary) disallowed certain deductions made by petitioner in establishing the "actual value" of its notes and contracts receivable. Specifically, the Secretary refused to permit petitioner to deduct monies allegedly required by G.S., Chap. 65 to be placed in its perpetual care funds, reserves maintained by petitioner in respect to its sales of pre-need markers and vaults, and the amount of commissions petitioner may pay its employees in respect to the sales of plots and markers from which such notes may arise. The Secretary refused to allow petitioner to deduct a flat 25% from the value of such notes in order to reflect possible cancellations of the notes. The Secretary allowed petitioner to determine the actual value of its notes by using a reduction formula based on the ages of the notes.

Petitioner filed its petition with the Tax Review Board requesting administrative review of the final decision rendered by the Secretary under date of 15 October 1973 pursuant to G.S. 105-241.2(1). The Tax Review Board affirmed the decision of the

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**In re Memorial Park**

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Secretary on 9 December 1974. Pursuant to G.S. 143-309 and 143-310 (since repealed by 1973 N.C. Session Laws, Chap. 1331, effective 1 February 1976), petitioner filed its petition for judicial review on 28 March 1975. At the hearing in the Superior Court, Judge Clark affirmed the decision of the Tax Review Board in all respects, and from that judgment, petitioner appealed.

*Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the North Carolina Department of Revenue.*

*Ridge, Roberson & Richardson, by Paul H. Ridge; Harris, Poe, Cheshire & Leager, by W. C. Harris, Jr., for petitioner appellant.*

ERWIN, Judge.

The question presented by this record for our determination is:

“Did the trial court commit prejudicial error in affirming in its entirety the decision of the Tax Review Board, and ruling that said decision was supported by the record herein, did not prejudice the rights of the petitioner, was neither unconstitutional nor in excess of the board's statutory authority, was neither arbitrary nor capricious, and was not affected by any error of law?”

We find no error in the judgment appealed from and affirm the trial court.

The burden of proof is on a taxpayer to show that an assessment by tax officials was in error. *See Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972); 12 Strong's N.C. Index 3d, Taxation, § 38.2, p. 219. The taxpayer must show that the methods used in determining value were illegal and arbitrary and that he was substantially injured by a resulting excessive valuation of his property. *See generally Electric Membership Corp. v. Alexander, supra*, (determination of true value for purposes of *ad valorem* tax). This appellant has failed to do.

The taxes in question were levied pursuant to G.S. 105-202 (as enacted in 1972), which provides in pertinent part:

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In re Memorial Park

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"All bonds, notes . . . and other evidences of debt however evidenced . . . having a business, commercial or taxable situs in this State . . . shall be subject to annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars (\$100.00) of the actual value thereof . . . Provided, that from the actual value of such bonds, notes . . . there may be deducted like evidences of debt owed by the taxpayer as of the valuation date . . . The term 'like evidences of debt' deductible under this section shall not include:

(1) Accounts payable;

. . .

(3) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability . . ."

G.S. 105-202 provides for taxation of promissory notes based on their actual value but allows for certain deductions. The statute does not define the term, "actual value," or provide the method for ascertaining the actual value of a promissory note. Pursuant to G.S. 105-262, the Commissioner of Revenue (now called Secretary of Revenue) implemented a regulation setting forth the method of determining the actual value of notes, bonds, and other evidences of debt. Under this regulation, actual value is determined by: (1) the closing price quoted by security exchanges, (2) the last bid price listed for over-the-counter securities, (3) the outstanding or unpaid balance as of the valuation date, or (4) the appraisal value. See 1 N.C. State Tax Rep. (CCH) ¶ 28-905. The regulation provides that if appraised value is used, complete information should be furnished explaining the basis of the appraisal. *Id.* Although the Commissioner's regulation interpreting a taxing statute is not controlling, his interpretation is *prima facie* correct and such interpretative regulation will ordinarily be upheld when it is not in conflict with the statute and is within his authority. *Campbell v. Currie, Commissioner of Revenue*, 251 N.C. 329, 111 S.E. 2d 319 (1959); 12 Strong's N.C. Index 3d, Taxation, § 23.1, p. 160.

The actual value of a note, bond, or other evidence of debt is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer

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and a willing seller, neither being under any compulsion to buy or to sell. It is synonymous with the "market value," or the "true value." See G.S. 105-283 (market value equals true value); *United States v. North Carolina Granite Corporation*, 288 F. 2d 232 (4th Cir. 1961).

The Secretary of Revenue admits that age and cancellation possibilities of each contract are valid factors in the determining of the actual value of the notes and has implemented a formula to consider these possibilities in determining actual value for purposes of G.S. 105-202. Under G.S., Chap. 105, it is his duty to implement such valuation measures. Appellants have not shown that his methods are illegal, arbitrary, or that the appraised value differs excessively. The Secretary's method of valuing the notes is consistent with note valuations for federal estate and gift tax purposes. Treas. Reg. § 20.2031-4, T.D. 6296, 23 F.R. 4529 (1958), and Treas. Reg. § 25.2512-4, T.D. 6334, 23 F.R. 8904 (1958); see also 34 Am. Jur. 2d, Federal Taxation, § 8972, p. 952.

Appellant's contentions that reserves for pre-need markers, contributions to perpetual care funds, and commissions payable to salesmen should be deducted from face value to determine the actual value of a note are fallacious. The above-named costs are only necessary incidents of appellant's choosing to do business, and are not factors to be considered in the proper determination of the actual value of a note, bond, or other evidence of debt.

The judgment entered below is

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

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STATE OF NORTH CAROLINA v. CRAIG WARREN WALTON

No. 798SC106

(Filed 15 May 1979)

**1. Bastards § 2— willful failure to support—sufficiency of summons to charge crime**

A summons was sufficient to charge defendant with willful failure to provide support for his illegitimate child where it alleged that defendant was the

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parent of the illegitimate child in question; that defendant willfully neglected or refused to support and maintain such child; that defendant's willful neglect or refusal to support his illegitimate child occurred after notice of the child's birth and demand of support subsequent to the child's birth; and that criminal support proceedings were initiated only after such notice and demand.

**2. Bastards § 6— willful failure to support—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for willful failure to provide support for defendant's illegitimate child.

**3. Bastards § 9— willful failure to support—support order—failure of court to consider defendant's income**

In a prosecution for willful failure to provide support for defendant's illegitimate child, the trial court failed to comply with the dictates of G.S. 49-7 in ordering defendant to pay \$200 per month as child support where the court did not consider evidence as to defendant's income, the needs of the child, or any other circumstance relating thereto.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 7 July 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals 27 April 1979.

Defendant was ordered to appear in District Court to answer the charge of willful failure to provide support for his illegitimate child. Defendant was found guilty in the District Court and appealed to Superior Court, where he was found guilty by a jury and sentenced to a term of six months in custody of the Department of Correction. The sentence was suspended upon certain conditions, including payment of \$200 per month for the support of his child.

At trial, Martha Harrison, mother of the child, testified that defendant was her steady boyfriend in March 1977, and they had sexual relations three or four times that month; that she learned of her pregnancy in late April 1977 and had the child on 31 December 1977; that defendant is the father of her child and has not provided any support since birth; that she discussed child support with her mother and an attorney. Miss Harrison also testified that she instructed her mother to contact defendant and ask him for child support and "[t]o contact Craig and ask him if he was going to do anything as far as supporting the baby, and if he didn't to continue to take out the warrant against him."

Mrs. Jean Harrison, prosecutrix's mother, testified:

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"My daughter asked me to call the call (sic) the defendant and demand support. It was 3 or 4 weeks after he was born, shortly after he was born.

I told the defendant that she had to have some support for the child, and asked him what he intended to do. He did not give me an answer at that time. He just hum-hawed and didn't give me an answer period. He didn't say anything else at that time. I asked him again if he intended to do anything and I said, Craig, we don't have any choice. I took a warrant out for the defendant."

Defendant's evidence tended to show that: he did not have sex with Martha Harrison after February 1977; he is not the father of the child, Brandon Harrison; and he never admitted to being the father of the child.

The jury answered the issues and returned a verdict as follows:

"1. Is the defendant, Craig Walton, the father of Brandon Dail Harrison born of the body of Martha Jo Harrison on 31 December 1977?

ANSWER: Yes

2. After the birth of Brandon Dail Harrison did Martha Jo Harrison give notice to Craig Walton, demanding that he adequately support Brandon Dail Harrison?

ANSWER: Yes

3. Did the defendant willfully neglect or refuse to maintain or provide adequate support for Brandon Dail Harrison?

ANSWER: Yes

4. Is the defendant, Craig Walton, guilty of willful neglect or refusal to provide adequate support and maintain his illegitimate child?

ANSWER: Yes"

Defendant appealed.

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*Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.*

*Rafford E. Jones, for defendant appellant.*

ERWIN, Judge.

[1] Defendant contends that the criminal summons issued is defective in that it fails to contain all the essential elements of the crime charged. We disagree.

The summons provides in pertinent part:

"THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that on or about the 31 day of December, 1977, in the county named above, you did unlawfully, willfully, neglect and refuse to provide adequate support and maintain Brandon Dail Harrison, his illegitimate child born to Martha Jo Harrison on December 31, 1977. The refusal and neglect to provide adequate support and maintain the child continued after due notice and demand was made upon him on January 7, 1978 by Jean Harrison, in violation of the following law: GS 49-2."

The summons sets forth each element essential to conviction of the crime charged: (1) that defendant is the parent of the illegitimate child in question; (2) that defendant has willfully neglected or refused to support and maintain such illegitimate child, *State v. Coffey*, 3 N.C. App. 133, 164 S.E. 2d 39 (1968); (3) that defendant's willful neglect or refusal to support his illegitimate child occurred after notice of the child's birth and demand of support subsequent to the child's birth; and (4) that criminal support proceedings were initiated only after such notice and demand. *State v. Ingle*, 20 N.C. App. 50, 200 S.E. 2d 427 (1973). Under G.S. 49-2, defendant was charged with the duty to provide *adequate* support for his illegitimate child. The summons alleges that defendant failed to provide any support whatsoever. We hold that the summons contains each essential element of the crime charged and is valid.

[2] Defendant's contention that the trial judge erred in refusing to dismiss the case at the close of the State's evidence and at the close of all the evidence is without merit.



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On a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit. *State v. Snyder*, 3 N.C. App. 114, 164 S.E. 2d 42 (1968). When viewed in the light most favorable for the State, the evidence was sufficient to go to the jury on the premise that defendant's neglect or refusal to provide support for his illegitimate child was willful. We find no error in the court's denial of the motion to nonsuit.

Defendant next assigns as error the trial court's instructions to the jury. We find no error.

Defendant would have us read into the trial court's charge a limitation of the jury's consideration to only one issue. This the court did not do. On the contrary, the court stated:

"There are four questions to be answered—three of these deal with the elements of the crime and the fourth being what is in effect your verdict in the case.

That is whether or not the defendant, Craig Walton is guilty of willful neglect or refusal to provide adequate support and maintenance of said illegitimate child."

Later in its charge, the court proceeded to set forth the first three elements of the offense:

"[I] charge for you to find that the defendant is guilty of willful neglect or refusal to maintain adequate support for his illegitimate child, the State must prove to you by the evidence and beyond a reasonable doubt three things.

The first: Is the defendant, Craig Walton, the father of Brandon Dale Harrison born of the body of Martha Jo Harrison on December 31, 1977? Second, that Brandon Dale Harrison or that after Brandon Dale Harrison was born, that Martha Jo Harrison gave notice to the defendant demanding that he maintain and provide adequate support for Brandon Dale Harrison. . . .

The third thing that the State must prove to you by the evidence and beyond a reasonable doubt before you may find

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the defendant guilty of the crime charged is that the defendant willfully neglected or refused to support or refused to maintain and provide adequate support for Brandon Dale Harrison. Willfully means intentionally and without justification or excuse."

The court fully instructed the jury on all the elements of the offense charged, defined and applied the law thereto, and stated the contentions of the parties. This is all that G.S. 15A-1232 requires. See *State v. Middleton*, 25 N.C. App. 632, 214 S.E. 2d 248 (1975), (construing G.S. 1-180, the predecessor statute of G.S. 15A-1232, repealed 1977). The charge must be read contextually, and when this is done, it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt. We find no error.

[3] Defendant's last assignment of error is that the trial judge committed error by ordering him to pay \$200 per month as child support without any evidence as to his income, the needs of the child, or any other circumstance relating thereto. This assignment of error has merit.

Upon a conviction of willful failure to support an illegitimate child, the trial court has plenary power to suspend imposition or execution of defendant's sentence on condition that he pay a specified sum of money into court for support of his illegitimate child. *State v. Bowser*, 232 N.C. 414, 61 S.E. 2d 98 (1950). However, G.S. 49-7 provides in relevant part:

"[A]fter this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child."

The record does not indicate that the trial court in the instant case complied with the dictates of G.S. 49-7. Such compliance is essential to the validity of its support order.

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Accordingly, that part of the court's judgment ordering the payment of \$200 per month as child support is vacated. The case is remanded with instructions that the trial court conduct a hearing to determine the amount the defendant should pay for the support of his child. The beginning date of payment shall be 7 July 1978, the date the judgment was entered at the defendant's original trial.

Remanded for proper judgment.

Judges MARTIN (Robert M.) and ARNOLD concur.

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STATE OF NORTH CAROLINA v. NORRIS WILLIAMS

No. 797SC67

(Filed 15 May 1979)

**1. Criminal Law § 18.4— appeal to superior court—trial de novo**

The Superior Court Division, as the trial court upon appeal and trial *de novo*, is generally justified in disregarding completely the plea, trial, verdict and judgment in the court below, even in those situations in which the inferior court has not granted the defendant his constitutional rights, and defendant, by appealing to the superior court for trial *de novo*, secured and exercised his right to introduce evidence in his own behalf and therefore could not justly complain that he was deprived of that right in district court.

**2. Criminal law § 92.4— joinder of misdemeanor and felony—discretion of trial court not abused**

There was no merit to defendant's contention that separate offenses arising from the same acts or occurrences should be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading, and the trial court did not abuse its discretion in allowing the State's motion to join felony and misdemeanor charges against defendant for trial where those arose out of the same transaction, though the State's motion for joinder was not made until after defendant's arraignment.

**3. Jury § 6.3— voir dire examination—questions about impartiality**

In a prosecution for assault and common law robbery, the trial court did not err in permitting the district attorney to tell prospective jurors on voir dire that a proposed sale of marijuana was involved in the case to be tried and to inquire as to whether any of them would be unable to be fair and impartial for that reason, since such questions tended only to secure impartial jurors and did not tend to "stake out" the prospective jurors or cause them to pledge themselves to a future course of action, nor did the court, by allowing the

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questions, express an opinion with regard to the weight and credibility to be given the State's evidence.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 23 August 1978 in Superior Court, WILSON County. Heard in the Court of Appeals 6 April 1979.

The defendant, Norris Williams, was charged by warrant with the misdemeanor of assault inflicting serious injury in violation of G.S. 14-33(b)(1) and convicted in the District Court Division. The defendant moved to arrest judgment in the District Court Division on the ground that he had not been allowed to present evidence. The presiding judge agreed that error had been made but overruled the motion. The defendant then appealed to the Superior Court Division [hereinafter referred to alternatively as the "trial court"] for trial *de novo*. The charge of assault inflicting serious injury was joined for trial in the Superior Court Division with a felony charge of attempted common law robbery for which the defendant had been indicted.

At trial, the State's witness, Donald Mayfield, testified that he went to a recreation center on the evening of 24 May 1978 "to see if I could find a bag of marijuana." There he met Thorne Lee, Robert Windham, Ricky Morris, and the defendant. All of them left together in the defendant's car to look for marijuana. They later stopped on a rural road and got out of the car. Thorne Lee said, "We want your money." The defendant then hit Mayfield and knocked him down. Thorne Lee and the defendant then began hitting Mayfield and kicking him in the face, the back of the head and the body. The defendant and the others then drove away and left Mayfield, who was bleeding from the nose and a cut in the back of his head, without taking or otherwise attempting to take his money. Mayfield was later taken to the hospital where, "They cleaned me up and did something to my nose and put some stitches in the back of my head." Deputy Sheriff James Overby gave testimony tending to corroborate Mayfield's testimony.

The defendant testified in his own behalf. Thorne Lee and Robert Windham also testified for the defendant. They each testified that an argument and fight occurred between Thorne Lee and Mayfield and that the defendant did not take part in that fight.

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At the close of the evidence, the trial court dismissed the charge of attempted common law robbery. The jury returned a verdict of guilty as charged on the charge of assault inflicting serious injury, and the trial court sentenced the defendant to a term of imprisonment of not less than eighteen months nor more than twenty-four months. From this judgment, the defendant appealed.

Other facts pertinent to this appeal are hereinafter set forth.

*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.*

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

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to arrest the judgment of the District Court Division below on the misdemeanor charge of assault inflicting serious injury. In support of this assignment, the defendant contends that the record before the trial court during trial *de novo* clearly revealed error in the District Court Division which required the trial court, *ex mero motu*, to remand the matter to the District Court Division for a new trial or, alternatively, to instruct the prosecutor to comply with the exceptions set forth in G.S. 7A-271. We do not agree.

When a defendant in a criminal case appeals from a judgment in the District Court Division, the appeal is to the Superior Court Division for trial *de novo*. The jurisdiction of the Superior Court Division over misdemeanors appealed in such manner is the same as that possessed by the District Court Division in the first instance. G.S. 7A-271(a)(5); G.S. 7A-290. When an appeal of right is taken to the Superior Court Division:

It is established law in North Carolina that trial *de novo* in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court.

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*State v. Spencer*, 276 N.C. 535, 543, 173 S.E. 2d 765, 771 (1970). Additionally, the Superior Court Division, as the trial court upon appeal and trial *de novo*, is generally justified in "disregarding completely the plea, trial, verdict and judgment below," even in those situations in which the inferior court has not granted the defendant his constitutional rights. *Id.* By appealing to the Superior Court Division for trial *de novo*, the defendant secured and exercised his right to introduce evidence in his own behalf. Therefore, he cannot justly complain that he has been deprived of that right. *Id.* This assignment of error is overruled.

[2] The defendant next assigns as error the trial court's action in allowing the State's motion to join the felony and misdemeanor charges for trial. The defendant contends that G.S. 15A-926(a), when taken together with G.S. 15A-924, reflects a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. As the felony charge here is contained in a bill of indictment and the misdemeanor charge is contained in a warrant, the defendant contends the trial court erred in allowing their joinder for trial. Neither the express language of those statutes nor the apparent intent of the legislature will support this contention by the defendant.

Separate offenses may be joined for trial when they arise from the same act or transaction. G.S. 15A-926(a). The well-settled rule, that the discretion of the trial court in joining cases for trial will not be disturbed absent a showing that the defendant has been deprived thereby of a fair trial, has not been abrogated by Chapter 15A and continues to apply. *See State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). In determining whether a defendant has been prejudiced by joinder pursuant to G.S. 15A-926, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant. *Id.* In the present case the events giving rise to both charges against the defendant were clearly parts of a single transaction, scheme or plan. Therefore, joinder of the two charges was appropriate.

The defendant also contends that the trial court erred in granting the State's motion for joinder, as that motion was not

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made at or before the time of the defendant's arraignment. A motion for joinder must be made at or before the time of arraignment if arraignment is held prior to the session of court for which the trial is calendared. G.S. 15A-952(c). Further, failure to file such motion in a timely manner constitutes a waiver of the motion. G.S. 15A-952(e). The trial court may, however, grant relief from any such waiver of a motion for joinder. G.S. 15A-952(e). Therefore, the trial court did not err in allowing the State's motion for joinder made after the defendant's arraignment, as this action was within its discretion and no resulting prejudice has been shown.

[3] The defendant next assigns as error the trial court's denial of his motion for a mistrial. The defendant's motion was based upon his assertion that he suffered irreversible prejudice when the trial court permitted the district attorney to tell prospective jurors on voir dire that a proposed sale of marijuana was involved in the case to be tried and to inquire as to whether any of them would be unable to be fair and impartial for that reason. The defendant contends that the trial court's denial of his objection and motion for mistrial at that point had the effect of instructing the jury that they should not question the credibility of the prosecuting witness, even if they found that the prosecuting witness was engaged in a criminal enterprise at the time of the alleged crime. The defendant contends that the trial court thereby effectively expressed an opinion, in violation of G.S. 15A-1222, on the weight and credibility to be given evidence which the State proposed to present. We do not agree.

The regulation of the manner and extent of the exercise of the right to inquire into the fitness of jurors rests largely in the discretion of the trial court. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). Counsel may not, however, properly be allowed to ask questions tending to "stake out" the juror or to elicit in advance what the juror's decision would be upon a given state of facts. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976); *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159, *review denied and appeal dismissed*, 295 N.C. 736, 248 S.E. 2d 865 (1978). Here, we find the questions asked by the State tended only to secure impartial jurors and did not tend to "stake out" the prospective jurors or cause them to pledge themselves to a future

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course of action. The trial court properly allowed such questions and did not, in our view, express an opinion with regard to the weight and credibility to be given the State's evidence. This assignment of error is overruled.

The defendant has brought forward other assignments of error. We have reviewed each of them and find each without merit.

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

No error.

Judges MARTIN (Robert M.) and WEBB concur.

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**STATE OF NORTH CAROLINA v. HAROLD FRED LOCKLEAR**

No. 7916SC167

(Filed 15 May 1979)

**1. Criminal Law § 162.5— objections to testimony sustained—failure to give limiting instructions**

Defendant was not prejudiced when the court sustained his objections to testimony without giving limiting instructions where defendant made no request for limiting instructions.

**2. Criminal Law § 71— observations concerning bloodstains—shorthand statement of fact**

An officer's observations that certain bloodstains appeared to have been wiped up and that a towel appeared to have been saturated with blood were admissible as shorthand statements of fact.

**3. Homicide § 15.5— lay testimony as to "stab wound"—harmless error**

The trial court's erroneous admission of an officer's testimony that there was a "stab wound" in the center of deceased's chest was not prejudicial where an expert medical witness testified that deceased died as a result of bleeding from a stab wound to the chest and heart.

**4. Homicide § 15.2— absence of immediate medical attention—relevancy to show malice**

A medical expert's opinion testimony in a second degree murder case that deceased's life might have been saved if she had received immediate medical attention after she was stabbed was relevant on the issue of malice.



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**5. Constitutional Law § 30; Bills of Discovery § 6— testimony not disclosed to defendant—absence of motions for discovery, continuance or recess**

The trial court did not err in admitting the testimony of prosecution witnesses which had not been disclosed to defendant where the record does not reveal any motions or orders for discovery, and defendant made no request for a continuance or recess to prepare for cross-examination. G.S. 15A-910(3).

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 7 September 1978 in Superior Court, ROBESON County. Heard in the Court of Appeals 4 May 1979.

Defendant was charged in a bill of indictment, proper in form, with the offense of murder in the first degree. He was tried and convicted of the offense of murder in the second degree. From judgment sentencing him to imprisonment for a term of not less than 20 nor more than 25 years, defendant appealed.

At trial, the State presented evidence tending to show that Annie Sue Anderson was stabbed in the early morning hours of 18 September 1977 while in the company of defendant and that she expired as a result of excessive bleeding from the stab wound. Testimony indicated that on the morning in question, a call was placed for ambulance service, and thereafter, Deputy Sheriff Sanderson came in contact with the defendant and the deceased, who were in a truck. Ms. Anderson was later removed from the truck and taken to Southeastern General Hospital by ambulance. The evidence also tended to show that the deceased had suffered other bruises and cuts on her body and that defendant stated, "She's dead and I didn't mean to do it."

Defendant did not offer any evidence.

*Attorney General Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State.*

*Locklear, Brooks & Jacobs, by Arnold Locklear, for defendant appellant.*

ERWIN, Judge.

[1] Defendant has brought forward on appeal six assignments of error. We have considered each of them and find no error in the trial of defendant.

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Upon direct examination of Deputy Sheriff Solomon Sanderson, the following exchange took place:

“Q. All right. What, if anything, did you see him do or say there in the area of the morgue?”

A. When he was taken to the morgue to see her, I was standing at the door and he [defendant] fell over Annie Sue and went to crying and said ‘I didn’t mean to do it.’

MR. LOCKLEAR: Objection.

THE COURT: Sustained.”

Upon the direct examination of emergency medical technician, Craig Rich, the following exchange took place:

“Q. Do you know whether she was living or dead at the time she arrived at the hospital?”

A. More than likely she had passed away.

MR. LOCKLEAR: Objection. Move to strike.

THE COURT: Sustained.”

Defendant contends that merely sustaining his objections to these questions did not dispel the prejudice engendered by asking them. Defendant argues that the trial judge should have given a limiting instruction without his request.

The defendant’s objections were sustained without request for any instruction. Defendant has not shown error, nor has he shown any prejudice. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). This assignment of error is overruled.

As grounds for his second assignment of error, defendant brings forth Exceptions Nos. 2, 3, 6, 10, and 11. In our opinion, we deem it necessary to treat each exception individually.

[2] Defendant’s Exception No. 2 relates to Deputy Sheriff Sanderson’s observations concerning the wiped up blood stains. These observations were but a “shorthand” statement of facts and were clearly admissible. See *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977), and *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978). For the same reasons, we hold that Sanderson’s observation that the towel “appeared to be saturated with blood” was

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also properly admitted. Thus, we find Exceptions Nos. 2 and 6 to be without merit.

[3] Defendant's Exception No. 3 is based on Sanderson's statement that there was about a one-inch scar or stab wound about the center of the deceased's chest. As a lay witness, Sanderson was not competent to testify as to the nature of the wound. He could properly state that the wound was a scar, but he could not state that it was the result of a stabbing. Thus, admission of his testimony to that effect was error. However, in our opinion, any harm caused by the admission of this testimony was cured by Dr. Andrews' testimony that, "It is my opinion that she [the victim] died as a result of bleeding from a *stab wound* to the chest and heart." (Emphasis added.)

Defendant's Exception No. 10 is based on Dr. Andrews' testimony as to the alcoholic content in the victim's blood. In view of the court's later instructions to the jury to disregard the evidence with respect to this matter, we find no prejudicial error.

[4] Defendant's final exception is Exception No. 11, which relates to Dr. Andrews' expert medical opinion that, "[I]f she had received immediate medical attention, it's possible that her life could have been saved." This opinion was clearly relevant on the issue of malice. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978).

We find defendant's second assignment of error to be without merit.

[5] Defendant contends that the trial court erred in allowing the testimony of certain witnesses for the prosecution, the substance of which had not been disclosed to the defendant. Defendant infers that the court should have excluded the evidence in question pursuant to G.S. 15A-910(3). We do not agree. The record does not reveal any motions or orders of discovery nor does the record reveal the reasons the defendant was objecting to the questions. Defendant did not request a continuance or recess to prepare himself for cross-examination. The trial court has broad and flexible powers to rectify the events if a party fails to comply with discovery orders or provisions of G.S., Chap. 15A, Art. 48. The exclusion of evidence as a remedy is strictly within the discretion of the trial judge. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977). Here, we find no abuse of discretion.

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We have considered all other errors assigned by the defendant and find them to be without merit.

In the trial of the defendant, we find

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

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CHARLES R. HASSELL, JR., TRUSTEE FOR THE HOME INDEMNITY COMPANY  
v. FIRST PENNSYLVANIA BANK, N.A.

No. 782SC686

(Filed 15 May 1979)

**Uniform Commercial Code § 42—no continuation of financing statement—security interest unperfected—no relation back of lien by levy**

A lien by levy pursuant to judgment does not relate back to the filing date of a financing statement when the security interest has become unperfected by the lapse of time under N.C.G.S. 25-9-403(2).

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 14 December 1977 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 5 April 1979.

Plaintiff appeals from the judgment of the trial court dismissing plaintiff's complaint for failing to state a cause upon which relief can be granted, and allowing defendant's motion for summary judgment.

Plaintiff alleges he has a security interest in certain personal property located in Beaufort County based upon a purchase money security agreement and a judgment against the debtor, Seacrest Marine Corporation, recorded in Wake and Beaufort counties.

Defendant bank answered, alleging its security interest in the personal property was superior to plaintiff's claim.

The materials before the court upon the hearing of the motions showed that in 1971 Koehring Company sold certain machinery to Seacrest Marine Corporation. The property is

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located in Beaufort County. Part of the purchase price was financed pursuant to a sales contract and security agreement and on 21 January 1971 Koehring filed a financing statement with the Secretary of State and Register of Deeds of Beaufort County.

On 25 August 1972 Seacrest executed two notes to defendant bank for \$1,915,000 secured by a security interest in the subject personal property. Defendant filed financing statements with the Secretary of State and Register of Deeds of Beaufort County on 28 March 1972 and 29 January 1973. Continuation statements were filed 8 November 1976.

Koehring instituted suit on its claim against Seacrest on 16 February 1973 in Wake County and obtained judgment in April 1975. The judgment was paid by Home Indemnity Company as surety for Seacrest in October 1976 and Koehring executed assignments of its security agreements and judgment against Seacrest to plaintiff, trustee for Home Indemnity Company.

On 9 September 1976 the Wake County judgment against Seacrest was docketed in the office of the Clerk of Superior Court of Beaufort County. In September 1977 defendant proceeded to exercise its right to sell the collateral under the terms of its security agreement. The proposed sale was enjoined by court order, and postponed by attorney for defendant until 28 September 1977. On 27 September 1977, the temporary restraining order enjoining the sale was dissolved, and defendant's attorney proceeded to sell the property at the courthouse in Beaufort County when defendant was the last and highest bidder in the amount of \$400,000.

Thereafter, on 14 October 1977, the Sheriff of Beaufort County levied on the property pursuant to an execution on plaintiff's judgment against Seacrest.

*Davis, Hassell, Hudson & Broadwell, by Charles R. Hassell, Jr. and Donald A. Davis, for plaintiff appellant.*

*Spruill, Trotter & Lane, by Will H. Lassiter III, for defendant appellee.*

MARTIN (Harry C.), Judge.

In order for plaintiff to succeed on this appeal his levy of 14 October 1977 must relate back to the filing of the financing state-

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ment on 21 January 1971. N.C. Gen. Stat. 25-9-501(5). It is black letter law that plaintiff, as assignee, has no greater rights than his assignor. Koehring failed to file a continuation statement with respect to its financing statement against Seacrest. Therefore, plaintiff's financing statement lapsed on 21 January 1976 and the security interest became unperfected. N.C. Gen. Stat. 25-9-403(2). Plaintiff contends the effect of the judgment levy should relate back to the filing date of the financing statement, even though the financing statement has lapsed by the passage of the five year period, and the security interest has become unperfected. Plaintiff argues that upon beginning an action to enforce the security interest within the five year period, it is not necessary to file a continuation statement to maintain the priority of the security interest.

Plaintiff relies upon *Chrysler Credit Corp. v. United States*, 24 U.C.C. Reporting Service 794 (U.S. District Court, E.D.Va., 3 March 1978). Chrysler had filed a financing statement 9 October 1967 and a continuation statement 7 July 1972, giving it a perfected claim against debtor at the time the United States filed its tax lien 27 April 1976. The Court held the filing of the lawsuit against the United States, for the purpose of determining the priority of the parties to the debtor's assets, gave notice to United States of Chrysler's claim and tolled the obligation of Chrysler to file another continuation statement with respect to the defendant, United States.

In the Chrysler case the very purpose of the litigation was to determine priority of liens between Chrysler and the United States. The problem of relation back under Section 25-9-501(5) of the Uniform Commercial Code was not before the Court. Here, plaintiff seeks to maintain his priority by virtue of the judgment against the debtor Seacrest, not by judgment against defendant bank.

We hold the lien by levy pursuant to judgment does not relate back to the filing date of the financing statement when the security interest has become unperfected by the lapse of time under N.C.G.S. 25-9-403(2). See *Stearns Mfg. Co., Inc. v. National Bank and Trust Co. of Central Pennsylvania*, 12 U.C.C. Reporter 189 (1972).

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**Insurance Co. v. Johnson**

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Plaintiff's levy under the judgment was on 14 October 1977, more than two weeks after Seacrest's interest in the property had been extinguished by the public sale. No lien attached as to the personal property by reason of the docketing of the judgment in Beaufort County. A lien only attaches on personal property upon levy of execution. *Hardware Co. v. Jones*, 222 N.C. 530, 23 S.E. 2d 883 (1943).

The trial court correctly held defendant's lien was superior to plaintiff's claim, and the entry of summary judgment for defendant was appropriate.

The judgment of the Superior Court is

Affirmed.

Judges VAUGHN and ERWIN concur.

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UTICA MUTUAL INSURANCE COMPANY, PLAINTIFF v. LUTHER L. JOHNSON, T/A JOHNSON'S ALIGNMENT SERVICE, DEFENDANT AND THIRD-PARTY PLAINTIFF v. GEORGE L. BROADNAX, THIRD-PARTY DEFENDANT

No. 7812DC767

(Filed 15 May 1979)

**1. Judgments § 34; Rules of Civil Procedure § 60.1— vacation of order—notice**

The trial court did not have the power to vacate an order so as to affect the rights of the parties without giving the parties notice and an opportunity to be heard.

**2. Rules of Civil Procedure § 60.2— setting aside prior order—legal error**

G.S. 1A-1, Rule 60(a) does not authorize the trial court to set aside a previous ruling where the reason for so doing is legal error.

APPEAL by third-party defendant from *Guy, Judge*. Order entered 28 April 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 3 May 1979.

Utica Mutual Insurance Company brought this action against Johnson's Alignment Service to recover possession of a 1972 Plymouth automobile. Johnson answered and crossclaimed against

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George L. Broadnax, alleging Broadnax delivered the car to him for repairs which he performed and that he is entitled to recover from Broadnax \$1544.63 for the repairs, and other damages. Broadnax answered the crossclaim, denying he delivered the car to Johnson and alleging he had no interest in the car. \*

The attorney for Broadnax, on 14 February 1975, was allowed to withdraw as counsel of record in the case. On 11 October 1976, the trial court allowed Utica Mutual's motion for summary judgment in part, thereby establishing its right to the possession of the Plymouth car, reserving the question of damages.

Thereafter, on 25 April 1977, the case came on for trial. The third-party defendant, Broadnax, was not present, nor was he represented by counsel at that time. The trial court found that Broadnax had received notice of the trial. The court entered judgment finding that Utica Mutual was not entitled to any damages from Johnson and that Johnson was not entitled to recover any damages from Utica on his counterclaim.

The court further found that Broadnax falsely represented to Johnson that he was the owner of the Plymouth car and that he had entered into an implied contract with Johnson for repair of the car. In fact, the car was stolen, and Broadnax did not own any interest in it. The court held Johnson was entitled to recover from Broadnax \$1544.63 as cost of repairs and \$500 punitive damages.

Broadnax, through new counsel, filed a motion with affidavits on 21 June 1977 to vacate the judgment as to him for the reason that he did not have notice of the trial. The motion was heard on 15 August 1977, with Johnson and Broadnax appearing through counsel. The court found Broadnax did not have proper notice of the 25 April 1977 trial and that his failure to appear was the result of excusable neglect, and entered an order vacating the 25 April 1977 judgment as it applied to Johnson's claim against Broadnax. This order was filed 24 October 1977. Although the order made no finding that Broadnax had a meritorious defense to Johnson's claim, Johnson did not appeal.

Next, on 28 April 1978 an *ex parte* order was entered by the district court judge setting aside the 24 October 1977 order *ex mero motu*. The court further held Broadnax did have notice of



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the 25 April 1977 trial and denied the motion of Broadnax to set aside the 25 April 1977 judgment. The record fails to show that either Johnson or Broadnax, or their respective counsel, was present at the entry of the 28 April 1978 order. It does not show that Broadnax had notice of the proposed entry of the order or had any opportunity to be present and to be heard. From this order, Broadnax appeals.

*Barrington, Jones, Witcover and Carter, by C. Bruce Armstrong, for third-party defendant appellant.*

*No counsel contra.*

MARTIN (Harry C.), Judge.

The third-party defendant, Broadnax, contends the trial court's order of 28 April 1978 was erroneously entered and should be vacated. We agree.

[1] The 28 April 1978 order vacated the 24 October 1977 order. It was not an order correcting a clerical mistake or oversight entered pursuant to N.C.G.S. 1A-1, Rule 60(a). Rather, the order vacated the prior order and held Broadnax was not entitled to have the default judgment against him set aside. The courts have always had inherent authority to correct clerical errors in orders and judgments, but they do not have the power to amend or vacate an order or judgment so as to affect the rights of the parties, without giving the parties notice and an opportunity to be heard. *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E. 2d 715 (1975). "No person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. The "law of the land" requires notice and opportunity to be heard. *In re Wilson*, 257 N.C. 593, 126 S.E. 2d 489 (1962); *Eason v. Spence*, 232 N.C. 579, 61 S.E. 2d 717 (1950).

[2] Rule 60(a) does not authorize the trial court to set aside a previous ruling where the reason for so doing is legal error. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975); *Snell v. Board of Education*, 29 N.C. App. 31, 222 S.E. 2d 756 (1976).

Defendant Johnson made no motion challenging the 24 October 1977 order, apparently realizing his remedy, if any, was by way of appeal. The court had no authority to enter the order of 28 April 1978 and it is vacated.

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**Tucker v. Insurance Co.**

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Vacated and remanded.

Judges PARKER and MITCHELL concur.

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MARK W. TUCKER v. PEERLESS INSURANCE CO., INC.

No. 7825SC711

(Filed 15 May 1979)

**Insurance § 69.2— underinsured motorist not uninsured motorist**

Plaintiff was not entitled to recover under the uninsured motorist provision of his automobile liability insurance policy, since G.S. 20-279.21(b)(3)b and the policy definition of "uninsured motorist" excluded a motor vehicle with the minimum required liability insurance and the automobile which was involved in the collision with plaintiff was such a motor vehicle.

APPEAL by plaintiff from *Walker (Ralph A.)*, Judge. Judgment entered 2 June 1978 in Superior Court, BURKE County. Heard in the Court of Appeals 25 April 1979.

The parties have stipulated the facts. Defendant is the issuer of plaintiff's automobile liability insurance policy, which includes uninsured motorist coverage in the amount of \$15,000. On 25 January 1976 plaintiff was involved in a collision with a car owned by one Hulden Dairrell Toney and driven by one Ricky Alan Toney, and on 28 September 1977 a judgment of \$15,000 was entered in plaintiff's favor against the Toneys for injuries plaintiff incurred in the accident. The Toneys were insured by Ohio Casualty Insurance Co., with bodily injury coverage limits of \$15,000 per person and \$30,000 per accident. Five people other than plaintiff were killed or injured in the accident of 25 January, and Ohio Casualty's settlements with them left only \$11,000 of coverage to be applied to plaintiff's claim. Ohio Casualty paid plaintiff the \$11,000, and plaintiff now seeks to recover the remaining \$4,000 of his judgment award from his own insurer under the uninsured motorist clause of his policy.

The trial court found that at the time of the accident Ricky Alan Toney was not an uninsured motorist, and that plaintiff is entitled to no recovery from defendant. From this judgment plaintiff appeals.

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**Tucker v. Insurance Co.**

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*Byrd, Byrd, Ervin & Blanton, by Robert B. Byrd, for plaintiff appellant.*

*Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant appellee.*

ARNOLD, Judge.

Plaintiff's policy under which he seeks to collect from defendant defines "uninsured automobile" as "an automobile . . . with respect to . . . which there is, in at least the amounts specified by the financial responsibility law of the state. . . , no bodily injury liability . . . insurance policy applicable at the time of the accident . . . , or with respect to which there is a bodily injury liability . . . insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder." The policy also states explicitly that "the term 'uninsured automobile' shall not include . . . an insured automobile."

G.S. 20-279.21(b)(3)b states in pertinent part: "For the purpose of this section, an 'uninsured motor vehicle' shall be a motor vehicles as to which there is no bodily injury liability insurance . . . in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt. . . ." The "amounts specified in subsection (c) of G.S. 20-279.5" are coverage of not less than \$15,000 for bodily injury to any one person and not less than \$30,000 for bodily injury to two or more persons in one accident.

On the stipulated facts before us, it is clear that Ricky Alan Toney was not an uninsured motorist within the policy or the statutory definition at the time of the accident. A bodily injury liability policy was in effect on the car he was driving, in the amounts required by the statute. However, plaintiff advances several resourceful arguments as to why we should find this "underinsured" motorist to be uninsured.

Plaintiff seeks to draw analogies between the two exceptions in the statute—an insurer who denies coverage, or goes bankrupt—and his situation. We are unpersuaded. Had the legislature wished to make an underinsured motorist an exception to the general definition, it could have done so easily. Further-

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State v. Doggett

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more, the plaintiff's argument that the legislature must have recognized the possibility of accidents from which more than two claims would arise, does not improve his position. The legislature has chosen to require a minimum of \$30,000 coverage for two *or more* persons injured in one accident. As defendant points out, if the legislature wished to insure to every injured party a maximum recovery of \$15,000, it simply could have omitted the "per accident" limit from the statute.

Both the statutory and policy definitions of "uninsured motorist" exclude a motor vehicle with the minimum required liability insurance. Ricky Alan Toney's automobile was such a vehicle, and therefore plaintiff's uninsured motorist coverage does not apply. The decision of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

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STATE OF NORTH CAROLINA v. GEORGE CARSON DOGGETT

No. 7925SC105

(Filed 15 May 1979)

**Automobiles § 126.3—breathalyzer test—possession of permit by operator—failure to show when issued**

Testimony by a breathalyzer operator that he holds certificate number 2109 from the Department of Human Resources stating that he is qualified as a breathalyzer operator provided the basis for a reasonable inference that he possessed a valid permit at the time he administered a breathalyzer test to defendant, although it was not established when the permit was issued.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 27 September 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals 27 April 1979.

Defendant was convicted of driving under the influence and was given a suspended sentence of 60 days. He appeals.

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*State v. Doggett*

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

*Ingle & Joyner, by John D. Ingle, for defendant appellant.*

ARNOLD, Judge.

G.S. 20-139.1(b) sets out the two requirements for making breathalyzer test results admissible in evidence: the test shall have been performed (1) according to methods approved by the Commission for Health Services (2) by a person possessing a valid permit issued by the Department of Human Resources. Defendant does not contest the methods used for administering the test, but he does argue that no showing has been made that the administering officer possessed a valid permit at the time he gave the test.

Trooper Jack Richardson of the Highway Patrol administered the breathalyzer test to defendant. Richardson testified that he holds certificate number 2109 from the Department of Human Resources stating that he is qualified as a breathalyzer operator. Defendant argues that though Richardson may indeed have held such a permit on 27 September, the day of trial, there is no evidence that he held such a permit on the prior 27 March, the day of the offense.

Our holding, based upon the Supreme Court decision in *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh. denied* 285 N.C. 597 (1973), is that the State presented sufficient evidence to satisfy G.S. 20-139.1(b). In *Eubanks*, the administering officer "testified that he attended the breathalyzer operator's school" and that "he received a certificate issued by the North Carolina State Board of Health." *Id.* at 563, 196 S.E. 2d at 710. (Prior to the 1975 amendment of the statute, the Commission for Health Services was the appropriate agency to issue permits.) The court found this testimony to be sufficient to establish the admissibility of the test results. No mention was made of the fact that the testimony did not establish when the permit had been issued.

We believe that in the case *sub judice* Richardson's testimony provides the basis for a reasonable inference that he possessed the valid permit at the time he administered the test. Nothing appears to the contrary; in fact, Richardson testified in

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State v. Verbal

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detail about the simulator test he ran before testing defendant, saying that when he got a reading he knew, "according to my training," that it was within the permissible limits.

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

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

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STATE OF NORTH CAROLINA v. SIDNEY VERBAL II

No. 7926SC72

(Filed 15 May 1979)

**Contempt of Court § 4— summary proceedings—no notice to contemnor—no findings of fact—no proof beyond reasonable doubt shown**

Trial court erred in holding defendant attorney in contempt for returning to court 18 minutes late from a lunch recess since the court did not, as required by G.S. 5A-14(b), give contemnor notice of the charges against him and an opportunity to be heard, find facts supporting the summary imposition of measures in response to contempt, or apply the standard of proof beyond a reasonable doubt to his findings of fact.

APPEAL by defendant from *Smith (David I.)*, Judge. Judgment entered 15 September 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 April 1979.

*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.*

*Sidney Verbal, II, for the defendant.*

MARTIN (Robert M.), Judge.

Defendant, an attorney, was cited by the trial judge for direct contempt and sentenced after a summary proceeding to two days' imprisonment for being eighteen (18) minutes late in returning to court after a luncheon recess, while a trial in which defendant was appearing was in progress. The defendant has

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strongly contended that his behavior, if contemptuous, was not direct, but rather, indirect contempt in that the action constituting the contempt was not committed in the court's presence. He cites substantial authority in support of this contention. The State, on the other hand, contends that his action was a direct contempt and was properly dealt with in the summary proceedings held below. Much authority is cited in support of this contention also. However, we do not need to decide that question to dispose of this appeal; we turn instead to the applicable statutes (N.C. Gen. Stats. §§ 5A-13 and 5A-14) and determine that the contempt adjudication below must be reversed. (We assume, for purposes of argument, that the contempt was direct, even though we expressly decline to rule on that question; on the record before us no different result would obtain either way.)

N.C. Gen. Stats. § 5A-14(b) provides that before proceeding summarily against a criminal contemnor, the judicial official *must* "give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt."

Nothing in the record before us indicates that the alleged contemnor was given any opportunity to be heard. We think that it is implicit in this statute that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and that judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved. None of this was done in the instant case. Furthermore, the findings of the trial judge concerning the facts constituting the contempt did not indicate what, if any, standard of proof was applied; the statute (N.C. Gen. Stats. § 5A-14(b)) clearly requires that the standard should be "beyond a reasonable doubt" and we find implicit in the statute the requirement that the judicial official's findings should indicate that that standard was applied to his findings of fact.

For the reasons stated, we conclude that the order entering judgment on the summary proceedings below is fatally deficient, and cannot be sustained.

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Love v. Love

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Reversed.

Judges ARNOLD and ERWIN concur.

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O. I. LOVE v. THELMA OWENS LOVE

No. 7825DC741

(Filed 15 May 1979)

**Divorce and Alimony § 16.6— dependent spouse—possession of dwelling as alimony—sufficiency of evidence**

The trial court did not err in finding that defendant wife was a dependent spouse and in awarding her possession of the home of the parties as alimony where the evidence showed that plaintiff husband is 65 years old, cannot work because of heart problems, receives a Social Security check for \$256 each month, and lives in a trailer belonging to his niece, and that defendant is 55 years old, lives in the homeplace of the parties, works in a school cafeteria and earns an average of \$262.50 a month.

APPEAL by plaintiff from *Tate, Judge*. Judgment entered 21 March 1978 in District Court, BURKE County. Heard in the Court of Appeals 1 May 1979.

Plaintiff brought this action for absolute divorce on the grounds of separation. Defendant answered, alleging abandonment by plaintiff and counterclaimed for alimony. The jury answered the issues in favor of defendant, and the court entered judgment, awarding her alimony by granting her possession of the home of the parties for a term of five years. Plaintiff appeals. We find no error.

*John H. McMurray for plaintiff appellant.*

*Hovey, Carter & Robbins, by Sherwood J. Carter, Jr., for defendant appellee.*

MARTIN (Harry C.), Judge.

Plaintiff contends the court erred in finding he was the supporting spouse and in awarding defendant possession of the dwelling house. The evidence shows that plaintiff is sixty-five years old, cannot work because of heart problems and has not worked



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**Love v. Love**

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for years. He receives a Social Security check for \$256 each month and lives in a trailer that belongs to his niece. Mrs. Love, the defendant, is fifty-five years of age, lives in the homeplace of the parties, works at Hildebran Elementary School cafeteria where she earns \$315 a month for ten months a year. On an annual basis, this is an average of about \$262.50 a month. The homeplace is jointly owned by plaintiff and defendant, who have been married thirty-five years. Defendant has no place to live other than the homeplace.

The evidence supports the court's finding that the defendant wife is the dependent spouse, as she is substantially dependent upon the plaintiff husband for maintenance and support. Plaintiff is capable of providing that required support by allowing defendant the possession and occupancy of the dwelling. N.C. Gen. Stat. 50-16.1(3)-(4). Even though defendant has a separate income from her work at the cafeteria, the evidence still shows she is the dependent spouse. *Radford v. Radford*, 7 N.C. App. 569, 172 S.E. 2d 897 (1970). The facts found by the trial court are sufficient to sustain the conclusions of law and the order for alimony. *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971). The court may award defendant possession of the home, owned by the parties as tenants by the entireties, as alimony. *Sellars v. Sellars*, 240 N.C. 475, 82 S.E. 2d 330 (1954); N.C. Gen. Stat. 50-16.7(a).

Affirmed.

Judges PARKER and MITCHELL concur.

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**Comr. of Insurance v. Rate Bureau**

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STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND THE SHELBY MUTUAL INSURANCE COMPANY

No. 7810INS625

(Filed 5 June 1979)

**1. Insurance § 79.3— disapproval of rate filing—findings**

The Commissioner of Insurance complied with the requirement of G.S. 58-124.21(a) that he indicate in his order disapproving a rate filing "wherein and to what extent such filing is deemed to be improper" where he set out 99 findings of fact and 32 conclusions of law detailing the improprieties he found in the filing.

**2. Insurance § 79.1— rate case—burden of proof**

G.S. 58-124.21 did not transfer the burden of proof in a rate case to the Commissioner of Insurance.

**3. Insurance § 79.2— automobile insurance rate filing—challenge of unaudited data—absence of notice to Rate Bureau**

The Commissioner of Insurance did not fail to comply with G.S. 58-124.21(a) by failing to give written notice to the Rate Bureau that he intended to challenge the data in an automobile insurance rate filing as unreliable because it was unaudited where it did not appear in the filing that the data was unaudited.

**4. Insurance § 79.2— automobile insurance rate filing—unreliability of unaudited data**

A determination by the Commissioner of Insurance that unaudited data was not reliable as a basis for justifying a change in automobile insurance rates was supported by material and substantial evidence.

**5. Insurance § 79.2— automobile insurance rates—underwriting profit—consideration of investment income**

In an automobile insurance rate hearing, the Commissioner of Insurance could properly consider investment income in determining a reasonable underwriting profit margin, but the Commissioner erred in requiring that investment income be considered at a risk-free rate of return. G.S. 58-79.1.

**6. Insurance § 79.3— automobile insurance rates—differential for risks ceded to Reinsurance Facility—unfair discrimination**

Conclusion of the Commissioner of Insurance that a 10% increase in automobile insurance rates for insureds ceded to the Reinsurance Facility

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**Comr. of Insurance v. Rate Bureau**

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above the rates for voluntary business would be unfairly discriminatory was supported by the Commissioner's findings based on material and substantial evidence that there are no objective criteria for ceding risks to the Reinsurance Facility and that 62.3% of the insureds ceded to the Facility have no assessed SDIP points and have caused no claim payment to be made.

**7. Insurance § 79.3— automobile insurance rates—territorial differences—findings not supported by evidence**

Findings by the Commissioner of Insurance that projections of territorial rate differences for automobile insurance did not consider the new classification plan required by G.S. 58-30.4 and that the alleged failure to take into account the new classification plan resulted in excessive proposed rates were unsupported by the evidence.

**8. Insurance § 79.3— automobile collision rates— \$25 deductible—finding of excessiveness not supported by evidence**

Determination by the Commissioner of Insurance that the rate proposed for \$25 deductible automobile collision insurance was excessive in relation to the coverage provided was not supported by the evidence.

**9. Insurance § 79.1— automobile insurance rate hearing—appeal—order allowing amendment of filing as nullity**

Where the Rate Bureau appealed from an order of the Commissioner of Insurance in an automobile insurance rate case, the appeal removed the matter from the Commissioner, and a portion of his order allowing the Rate Bureau 60 days in which to amend its filing consistent with his findings and conclusions became a nullity.

Judge CLARK dissenting.

APPEAL by the North Carolina Rate Bureau and insurance companies from Commissioner of Insurance. Order issued 27 February 1978. Heard in the Court of Appeals 28 March 1979.

On 29 November 1977 the North Carolina Rate Bureau (Bureau) filed with the Commissioner of Insurance its proposed revised premium rates for automobile insurance, including bodily injury and property damage liability, medical payments, and physical damage insurance for non-fleet private passenger automobiles. The Bureau indicated that its calculations indicated the need for a statewide average increase of 23.2%, but in accordance with the requirements of G.S. 58-124.26 it had limited the proposed overall increase to 6%. The filing also proposed that rates for risks ceded to the North Carolina Reinsurance Facility be 10% higher than rates for risks voluntarily retained, and that a  $\pm$  5% territorial rate difference be established.

The Commissioner gave notice of public hearing, contending that the filing failed to comply with statutory requirements in a

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Comr. of Insurance v. Rate Bureau

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number of respects. After the hearing the Commissioner made findings of fact and conclusions of law and disapproved the filing. In his disapproval order he also allowed the Bureau sixty days to submit an amended filing consistent with his findings and conclusions, and ordered that the Bureau by its amended filing submit the exact data and information he had requested in the Notice of Public Hearing. From the Commissioner's disapproval order the Bureau appeals.

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

*Young, Moore, Henderson & Alvis, by Charles H. Young and R. Michael Strickland, for appellants.*

ARNOLD, Judge.

We note with disapproval that counsel for the Bureau has failed to comply with the requirements of App. R. 10(b)(1): "Each exception shall be set out immediately following the record of judicial action to which it is addressed." App. R. 10(a) makes clear that exceptions not so set out in the record cannot be made the bases of assignments of error. The necessity for this rule is most obvious in cases such as the one before us, which involves a 442-page record. It is an unnecessary waste of judicial time, and a source of possibly ineffective review, to require this Court to guess at the parts of the record to which the appellant objects.

Nevertheless, in view of the impact of the insurance rate-making process upon the citizens of the State, we have in our discretion considered this appeal on its merits.

Commissioner complied with requirements of  
G.S. 58-124.21(a)

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[1, 2] The Bureau argues that the Commissioner failed to comply with the statutory requirement that in his order disapproving a filing he indicate "wherein and to what extent such filing is deemed to be improper." G.S. 58-124.21(a). We disagree. The Commissioner in his order set out 99 findings of fact and 32 conclusions of law, detailing the improprieties he found in the filing, and we find that these are sufficient compliance with the statute. Nor do we find merit in the Bureau's argument that the enactment of G.S.

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58-124.21 has transferred the burden of proof to the Commissioner. There is no burden upon the Commissioner to disprove the filing. The burden upon him is that of being certain that material and substantial evidence exists in the record to support his findings.

G.S. 58-124.21(a) provides in part that when a filing is made "the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply" with the law. As correctly contended by the Bureau, the purpose of this provision is to provide the Bureau a reasonable opportunity to prepare and offer evidence, and to prevent surprise at the hearing.

[3] In his notice of hearing the Commissioner set forth several items, but he did not disclose that he intended to challenge the data as unreliable because it was unaudited. For this reason, the Bureau argues, the Commissioner failed to comply with the statute, and his findings and conclusions concerning the unreliability of data should be set aside.

The filing does not indicate whether the data had been audited. Assuming the Commissioner knew that the data would be unaudited, fairness in the rate-making process would require him to disclose his objections and intention to challenge the data. This Court, however, cannot assume that which is not supported by the record. Nowhere in the filing does it appear that the data was unaudited. The Commissioner complied with the requirements of G.S. 58-124.21(a).

Material and substantial evidence supports the  
Commissioner's holding that data is unreliable.

[4] The Commissioner found as fact that none of the underlying loss or expense experience upon which the filing was based had been audited; that in past unaudited filings, errors had later been found; that the accuracy of projections, here, rate level changes, depends upon the accuracy of the underlying data; and that unaudited data are not reliable as a basis for making projections. The Bureau argues that the Commissioner erred in holding the data unreliable.

The standard for review of the Commissioner's decisions is set out in G.S. 58-9.6(b). If the "substantial rights" of the ap-

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pellants have been prejudiced, this Court may reverse or modify the Commissioner's "findings, inferences, conclusions or decisions" where they are "[u]nsupported by material and substantial evidence in view of the entire record as submitted." G.S. 58-9.6(b)(5). "Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E. 2d 98, 106 (1975).

The record contains the testimony of Byron Tatum, Director of Technical Operations for the North Carolina Department of Insurance. Tatum is a certified public accountant, responsible for the audits, examinations and admissions of insurance companies in North Carolina; he qualified at the hearing as an expert in accounting and financial reporting. Tatum testified in pertinent part:

"[A]n audit is an examination not only of the document but the source data from which the document was prepared. . . . The idea is if you do enough of these things . . . you can then say . . . this report is properly prepared and properly . . . shows what it is supposed to show.

. . . .

Q. In your opinion are unaudited reports accurate and reliable?

A. No, ma'am. Unaudited reports cannot be relied upon.

Q. All right, in your opinion, then, would an unaudited statement or report be an appropriate basis on which to base future projections?

A. No, ma'am.

Q. Why?

A. Well, it gets back to the same old basis of, has it been examined. In . . . my experience with Price-Waterhouse making projections, we were never allowed to make projections on unaudited financial statements. . . . The purpose of an audit is to add the credibility to the figures that they lack when they are prepared by management or company accountants.

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Also appearing in the record is the testimony of George Gallant, an employee of Insurance Services Office (ISO), which collects insurance statistics from member companies and summarizes the information for the Bureau.

Q. . . . [D]oes ISO send auditors into any of these companies that report data to it to check their figures?

A. We do not have . . . an auditing team . . . to go out to a company, no, we do not. I think we are relying on your Insurance Department examiners . . . .

. . . .

Q. All right, you said . . . when this data comes in that it is edited?

A. Yes.

Q. Would you please explain to me the difference between editing and auditing data?

A. I would be hard put to describe it. . . . [E]diting . . . is reviewing the data for reasonableness, say, accuracy of codes.

. . . .

Mr. Robert Brooks, an employee of the National Association of Independent Insurers (NAII), which also collects and summarizes insurance statistics, testified:

. . . As each individual report is received it is logged in and entered into the computer. The . . . part that we would consider edit is that which is checked by the computer, which is to prepare totals and make sure the records are readable, verify the territory . . . and . . . numerical codes. From that is . . . prepared audit lists that individual auditors go over looking for reasonableness between classes, distribution of data and the average rates. . . .

NAII has approximately thirty people in the audit division. They are not mostly CPA's. They are basically people that we have trained . . . to review this information so that you can determine whether the material is logical and reasonable.

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Q. All right, this auditing that's done, is that an in-house audit?

A. It's an in-house audit, right.

Q. Are there any audits done where they go out?

A. No, we do not go back and re-examine our individual companies.

. . . .

The auditors check to see if the data is reasonable. . . . For instance, we determine whether or not data is reasonable by comparing the company's report for this year with its report for last year.

Q. Let me ask you . . . what do these auditors check when you said they check to make sure it's reasonable?

A. . . . [A]re all the territories there, are all the classes there, does each class have losses, do you have paid and outstanding losses, do the losses have claim counts. In other words, it's the things that make a complete historical picture.

. . .

. . . .

. . . [W]hen the picture diverges from what you would normally expect, you begin to ask questions, is this reasonable and you ask the company is this correct.

Paul Mize, General Manager of the Bureau, testified that when the Rate Bureau receives the insurance data

the exhibits are checked against . . . the companies' annual statements and . . . similar data that the companies filed for a previous year and [the Bureau] review[s] the reports for reasonableness.

With respect to in-house audit procedures . . . , each company's report is checked as to the relationships contained therein. For example, the premium tax, taxes license and fees item is checked against written premium. The relationship is checked for reasonableness because we know within what range this figure ought to be.



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Q. Would you describe for me what onsite auditing procedures the Rate Bureau . . . carries out, or what independent auditors they have hired to visit these companies and check their files?

A. None. We do not go to a company's office and make an audit of the expense experience.

. . . .

Q. . . . [T]he in-house auditing, is that audit made of only the information that is furnished to the Rate Bureau by the companies, or would they request . . . the original records kept by the company?

A. No. We have not asked for original records from any company. They are checked for reasonableness.

. . . .

. . . We have two auditors and two clerical persons in the audit staff. Neither of these auditors are [sic] certified public accountants. . . . I do not believe that they have any work experience in auditing. . . .

Considering this evidence as a whole, we find that there was material and substantial evidence before the Commissioner to support his conclusion that unaudited data is not a credible basis for justifying a proposed rate-change. It is uncontradicted that no audits, that is, examinations of source data for comparison to the reports filed, were made. Edits and in-house audits were made, but these checked only for reasonableness, not for accuracy of the data. The testimony of the witness Tatum, who qualified as an expert witness, was that unaudited reports are not considered by the accounting profession to be accurate and reliable, and that such reports are not an appropriate basis for projections. Though the Bureau considers this to be "conclusory opinion testimony," expert testimony is competent evidence, upon which the Commissioner may rely. See *State ex rel. Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). Moreover, we cannot say that opinion evidence does not constitute material and substantial evidence.

Not only was Tatum's testimony uncontradicted, he was not even cross-examined with respect to his opinion testimony concerning unaudited data. Nor does the record contain any evidence

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that in fact an audit such as Tatum described, utilizing statistical sampling techniques, would be prohibitive from the standpoints of time or cost.

Commissioner's order to use "capital asset  
pricing model" is error.

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[5] William Fairley qualified as an expert in economics and statistics, and testified as to the proper method of calculating appropriate rates of return in the insurance industry. His theory, in essence, requires that a "target rate of return" to the insurance companies be established. This is done by considering the "systematic risk" in the industry, that is, the degree to which the variability in return on an investment in that industry moves with the stock market, and adding the necessary "reward" to encourage investors to hold those securities. (For example, a stock that went down twenty percent when the market went down ten would have a high systematic risk, and would require a higher reward.) This target rate of return is then used to calculate the appropriate underwriting profit as follows:

$$\begin{array}{rcccc} \text{Target Return} & = & \text{Underwriting} & + & \text{Investment} & + & \text{Investment} \\ & & \text{Profit} & & \text{Return on} & & \text{Return on} \\ & & & & \text{Cash Flow} & & \text{Capital} \end{array}$$

or

$$\begin{array}{rcccc} \text{Underwriting} & = & \text{Target} & - & \text{Investment} & - & \text{Investment} \\ \text{Profit} & & \text{Return} & & \text{Return on} & & \text{Return on} \\ & & & & \text{Cash Flow} & & \text{Capital} \end{array}$$

The Commissioner ordered that this "capital asset pricing model" be used to calculate underwriting profit margins.

The Bureau finds this theory unacceptable partly because it requires the consideration of investment earnings on invested capital in determining appropriate premiums. However, this Court has recently decided that investment income may be considered in evaluating the reasonableness of a filing. *State ex rel. Comr. of Ins. v. N. C. Rate Bureau*, 40 N.C. App. 85, 252 S.E. 2d 811 (1979). It is thus proper for the Commissioner to consider investment earnings on capital invested by insurers in reviewing the rate making formula.

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**Comr. of Insurance v. Rate Bureau**

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The Bureau further attacks the Commissioner's conclusion that the investment income that should be considered is not actual investment income, but the hypothetical income that could be obtained on risk-free investments, which the Commissioner specifies as U. S. Treasury securities. This Court has determined that such a requirement would be contrary to the intent of the legislature as evidenced by G.S. 58-79.1, which sets out a variety of investments in which insurance companies other than life insurance companies may engage. Therefore, based on our decision in *State ex rel. Comr. of Ins. v. N. C. Rate Bureau, id.*, use of the "capital asset pricing model" as ordered by the Commissioner is foreclosed, and that part of the Commissioner's order is reversed.

Material and substantial evidence supports  
Commissioner's disapproval of higher rates  
for facility risks.

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[6] The Commissioner found as fact:

86. That the filing proposes a rate differential of 10% between Voluntary Business and Ceded Business. . . .

87. That the filing does not propose any fixed set of objective criteria for deciding which risks may be ceded to the Reinsurance Facility, and that in the absence of such criteria the decision to cede a given risk is based entirely on the subjective judgment of the individual insurer.

88. That as of June 30, 1976, there were a total of 2,733,003 exposures being underwritten for private passenger automobile liability coverage in North Carolina, and that of these 2,733,003 exposures, 547,752, representing 20.0% of the total, were ceded to the Facility.

89. That of the 547,752 ceded exposures, 475,704, representing 86.9% of the total cessions, had not caused a liability claim payment to be made by their insurer.

90. That of the 547,752 ceded exposures, 389,111, representing 71.0% of the total cessions, had not been assessed any SDIP points.

91. That of the 547,752 ceded exposures, 341,273, representing 62.3% of the total cessions, were exposures

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which had not been assessed any SDIP points and which also had not caused a liability claim payment to be made by their insurer.

92. That the cost to the insurer of acquiring and servicing a risk which is subsequently ceded to the Facility is not greater than the same costs with respect to a risk voluntarily retained, but because all such costs are charged and accounted for as a percentage of premium, ceded insureds paying a premium based on a 10% higher Facility rate would pay a higher dollar amount for acquisition and service cost, than would an insured who is not ceded.

and concluded

22. That in view of the current composition of the Facility, a 10% increase in the Facility Rate above the rates for voluntary business would be excessive and unfairly discriminatory.

23. That because acquisition and service costs are charged and accounted for as a percentage of premium, a Facility rate 10% higher than the proposed rates for insureds voluntarily retained will result in ceded risks paying disproportionately higher acquisition and service costs, and that the higher Facility rate is therefore excessive and unfairly discriminatory.

The Commissioner's Finding of Fact No. 87, "[t]hat the filing does not propose any fixed set of objective criteria for deciding which risks may be ceded to the Reinsurance Facility" cannot alone support his conclusion, since G.S. 58-248.35 provides: "Upon receipt by the company of a risk which it *does not elect* to retain, the company shall follow such procedures for ceding the risk as are established by the plan of operation." G.S. 58-248.35 (emphasis added).

We find, however, that there appears in the record material and substantial evidence to support the Commissioner's findings of fact. The figures and percentages he found are drawn directly from the Bureau's Exhibit #RB33. And based upon the finding that there are no objective criteria for cession to the Facility, and the Commissioner's finding that 62.3% of the insureds ceded to the Facility have neither assessed any SDIP points nor caused a

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claim payment to be made, we find that there is ample support for the Commissioner's conclusion that a 10% rate increase for insureds in the Facility would be unfairly discriminatory.

Findings that projections of territorial rate differences did not consider new classification plan, and that the alleged failure to consider new classification plan resulted in excessive rates are not supported.

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[7] The Bureau in its filing proposed that future premium rates vary within a range of  $\pm 5\%$  according to the "territory," or geographical area of the state, in which an insured is located. The Commissioner found that the projections of territorial rate differences did not take into consideration the new statutory classification plan and so did not reflect reasonably anticipated territorial loss experience. He concluded that this made the proposed rate changes excessive and unfairly discriminatory. He also concluded:

25. That the establishment of rate differentials for a system of geographic territories under which an insured is assigned to a particular territory on the basis of where his vehicle is principally garaged rather than where the vehicle is principally driven would result in rates which are unfairly discriminatory.

26. That the establishment of rate differentials for a system of geographic territories under which chargeable accidents are attributed to the territory in which the vehicle is principally garaged rather than to the territory in which the accident actually occurred would result in rates which are unfairly discriminatory.

27. That the establishment of rate differentials for a system of geographic territories which was established 20 years ago and has not been revised to reflect shifts in population distribution and traffic flow patterns would result in rates that are unfairly discriminatory.

28. That the establishment of rate differentials for a system of geographic territories under which insured[s] in higher-rated territories would be compelled to pay disproportionately high acquisition and service costs while insureds in

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lower-rated territories pay disproportionately low acquisition and service costs when the actual costs for acquisition and service are substantially the same for both groups would result in rates which are unfairly discriminatory.

29. That the establishment of rate differentials for a system of territories under which inner city residents are compelled to pay rates which reflect hazards created in significant part by commuters whose vehicles are garaged in other territories and are not subject to the same rate would result in rates which are unfairly discriminatory.

30. That the establishment of rate differentials for a system of geographic territories under which insureds living on the periphery of urban centers but who drive mainly outside inner city areas are nevertheless compelled to pay higher inner city rates would result in rates which are unfairly discriminatory.

The record is bare of evidence to support Conclusions 25 through 30. The minimal evidence that appears on those points supports the Bureau's position. Therefore these conclusions may not stand. The Commissioner's disapproval must be based on an affirmative showing that the proposed filing fails to comply with statutory standards. *State ex rel. Comr. of Ins. 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). And while it is the duty of the Commissioner to determine the credibility of evidence, he may not reject as untrustworthy, *for no apparent reason*, uncontradicted testimony or data submitted through competent and unimpeached witnesses. *State ex rel. Comr. of Ins. v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977).

The new classification plan required by G.S. 58-30.4 was intended to put into effect G.S. 58-30.3, ending classifications based on age or sex. By the terms of G.S. 58-124.19(4) the plan was to be implemented no later than 1 December 1977. The Bureau argues that because the instant filing was made on 29 November 1977, it was not necessary for the proposed rates to take into account the effect of the new classification plan. It is not necessary for us to decide this question, however, since the uncontradicted testimony of the witness Boison shows that the new classification plan was, to the extent possible, taken into account in this rate filing. And

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the Bureau's Exhibit #RB29, Exhibit 6, Part V, sets out by territory the anticipated percentage effect of the new classification plan. We find merit in the Bureau's argument that it could be no more precise, since no experience data had yet been generated under the new classification plan.

In addition, we find no support in the record for the Commissioner's conclusion that the Bureau's alleged failure to take into account the new classification plan resulted in excessive proposed rates. The only testimony on this point was that of Boison, who testified that the effect on rates, though negligible, was slightly negative overall.

No evidence to support Commissioner's disapproval of deductible collision rates as being excessive.

[8] The Commissioner found as fact:

67. That the proposed filing establishes certain new collision deductibles and collision comprehensive deductible relativities.

68. That the filing proposes collision insurance premiums for an average automobile as follows:

Deductible	High rated Territory	Low rated Territory
\$ 25	\$174	\$161
\$ 50	\$116	\$107
\$100	\$ 92	\$ 84
\$500	\$ 51	\$ 46

69. That in the proposed high rated territories, the proposed premium for \$25 deductible collision is 150% of the premium for \$50 deductible collision and 189% of the premium for \$100 deductible collision.

70. That in the proposed low rated territories, the proposed premium for \$25 deductible collision is 150% of the premium for \$50 deductible collision and 192% of the premium for \$100 deductible collision.

and concluded that the rate proposed for \$25 deductible collision is excessive in relation to the coverage provided. There is no

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*Comr. of Insurance v. Rate Bureau*

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evidence in the record to support this conclusion. Leroy Boison testified that the relativities are based upon experience, and that the deductibles are in fact a cost saving device for the insured, allowing him to pay a lower premium by retaining a portion of the loss himself. For lack of an evidentiary basis, the Commissioner's conclusion must fail.

Appeal by Bureau nullifies Commissioner's  
Order to submit amended filing.

[9] In his order disapproving the filing the Commissioner further ordered that the Bureau be allowed sixty days within which to file an amended filing consistent with his findings and conclusions. Inasmuch as the Bureau excepted and appealed from the Commissioner's order, the appeal removed the matter from the Commissioner to this Court, and that part of the Commissioner's order became a nullity.

Summary

In summary, that part of the Commissioner's order disapproving higher rates for voluntary and facility risks is affirmed. Accordingly, pursuant to G.S. 58-124.22(b) the escrowed premiums collected in excess of the rates in effect as of the filing (29 November 1977) must be refunded. However, that part of the order disapproving the proposed rates for \$25 deductible collision coverage is reversed, and it is ordered that the proportionate escrowed funds representing this proposed rate increase shall be remitted to the member insurers pursuant to G.S. 58-124.22(b). In addition, other portions of the Commissioner's order were also in error as previously discussed. Thus, the order of the Commissioner is

Affirmed in part and reversed in part.

Chief Judge MORRIS concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The 29 November 1977 filing on its face supports a statewide average increase of 23.2%. G.S. 58-124.26 places a cap on



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automobile insurance rate increases, limiting the increase to not "more than twelve percent (12%) from the general rate level existing at the time of the ratification of this Article, provided that such increase shall not exceed six percent (6%) on or prior to July 1, 1978." The result of the majority opinion is that any opportunity for increase, except for the proposed rate for \$25 deductible collision coverage, for the period up to July 1, 1978, is lost to the member insurers of the Rating Bureau. The opinion has based its affirmance of the Commissioner's disapproval order on, first, the failure of the Bureau to submit audited data, and, second, the fact that a 10% higher Facility rate is excessive and unfairly discriminatory.

It is my opinion that the Commissioner has waived the requirement that the data be audited. There should be no fair dispute over the right of the Rating Bureau to know the nature of the evidence on which the Commissioner relies. Due process in the rate-making procedure is provided for in G.S. 58-124.21, as follows: "At any time within 30 days from and after the date of any filing, the Commissioner *may* give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article and fixing a date for hearing. . . ." (Emphasis added.) I interpret the statute to mean that if the Commissioner is not fully satisfied with the filing and its supporting data he *may* give notice of a hearing, and that the hearing will be confined to those matters specified in the notice of hearing. An interpretation that the Commissioner *may* specify "in what respect and to what extent he contends such filing fails to comply" would give him the option of giving notice of hearing without restrictions and without notice to the Rate Bureau as to those matters in the filing which he contends fail to comply with the law. Such an interpretation would obviously violate legislative intent and due procedure.

In his notice of hearing to the Bureau the Commissioner did not specify that the filing did not comply because the data filed to support the filing was unaudited. It is clear that at the time the notice was given the Commissioner had knowledge that the data was unaudited. An audit involves formal examinations and authentication of records, and includes a final report or certification of the audit. There was nothing in the filing to indicate that

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that data was audited. The following appears in the Commissioner's appeal brief:

"Finally, the appellants contend that the Commissioner's conclusions should be rejected because the 'Notice of Hearing' fails to disclose even a hint that the data would be challenged. With respect to this contention, it is enough to say that the filing did not indicate that the data to be presented had not been audited. While it is true that past rate filings by various statutory rate bureaus did not employ audited data, these filings were made under other governing statutes and regulations. Neither the Bureau nor the Commissioner should be bound by past practices. . . ."

It is my opinion that though the Commissioner and the Bureau should not be bound by past practices, if the Commissioner wants a material change in the nature of the evidence on which he relies, then due process requires that the Bureau be given notice and an opportunity to comply or to show cause why it could not do so.

Nor do I agree with that part of the majority opinion relating higher rates for Facility risks, which concludes:

"And based upon the finding that there are no objective criteria for cession to the Facility, and the Commissioner's finding that 62.3% of the insureds ceded to the Facility have neither assessed any SDIP points nor caused a claim payment to be made, we find that there is ample support for the Commissioner's conclusion that a 10% rate increase for insureds in the Facility would be unfairly discriminatory."

I question this conclusion. Under the statute the insurer may elect to cede to the Facility, and it appears to me that the data presented establishes that rate differentials between "clean risks" and voluntary risks are sound. Rate Bureau Exhibit 19 shows a claim frequency per hundred cars for "clean risks" is about double that of the voluntary risks. Further, this seems of little importance since the data supports an 11.8% increase for voluntary business and 63.4% increase for insureds in the Facility. Any insurance rate will discriminate against some insureds;

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the question is whether there is unfair discrimination. I do not think that the Commissioner's conclusion is supported by the evidence.

Finally, assuming the majority opinion is correct in its conclusion relating to unaudited data and the increased rate for Facility risks, it is my opinion that the Bureau should be given a rehearing and allowed to present new evidence limited to these two questions or to show cause why the Bureau was unable to do so.

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STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORIST INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY v. CAROLINA ACTION, INTERVENOR

No. 7810INS1147

(Filed 5 June 1979)

APPEAL by the North Carolina Rate Bureau, *et al.* from order of the Commissioner of Insurance issued 27 September 1978. Heard in the Court of Appeals 28 March 1979.

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

*Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., and R. Michael Strickland, for respondent appellants.*

ARNOLD, Judge.

Our determination of this appeal is controlled by our decision in *State ex rel. Comr. of Ins. v. N. C. Rate Bureau* (No. 7810INS625, filed 5 June 1979), heard today. The order of the Commissioner is

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**Bank v. Belk**

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Affirmed in part and reversed in part.

Chief Judge MORRIS concurs.

Judge CLARK dissents.

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GIRARD TRUST BANK v. HENDERSON BELK, FRANK W. WILSON,  
PALMER FORD AND HENDERSON BELK ENTERPRISES, INC.

No. 7826SC621

(Filed 5 June 1979)

**1. Fraud § 12—credibility of defendant—fraudulent intent—issues of fact—summary judgment improper**

In an action to recover damages suffered by plaintiff because of defendants' allegedly fraudulent scheme to secure money from plaintiff and others, the trial court erred in entering summary judgment for defendants Henderson Belk and Henderson Belk Enterprises since the materials offered in support of and in opposition to the summary judgment motion presented a material issue of fact with respect to defendant Henderson Belk's credibility, and since summary judgment is generally inappropriate where fraudulent intent must be proved, as intent is a state of mind generally within the exclusive knowledge of the party accused and, by necessity, must be proved by circumstantial evidence.

**2. Fraud § 9—specific allegations in complaint—sufficiency**

Plaintiff's complaint contained abundant allegations of specific facts along with general allegations of defendants' state of mind sufficient to state a cause of action for fraud. G.S. 1A-1, Rule 9(b).

**3. Judgments §§ 36.2, 37.3—collateral estoppel—issues not same—res judicata—parties not same**

There was no merit to defendants' contention that adjudication of this cause of action for fraud was precluded by the dismissal of a related action in the U. S. District Court, since the doctrine of collateral estoppel was inapplicable, as the earlier dismissal for failure to prosecute did not purport to determine the existence or non-existence of fraud, and since *res judicata* was not applicable to preclude the action, as the parties were not the same in the earlier action as in the present action.

APPEAL by plaintiff from *Johnson (Clifton), Judge*. Judgment entered 16 February 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 March 1979.

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**Bank v. Belk**

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This action was instituted by Girard Trust Bank alleging that defendants participated in a scheme to secure money from the plaintiff and others by false and fraudulent means. Plaintiff prayed for actual damages of \$80,000, punitive damages of \$100,000, attorneys fees, and for civil arrest of the defendants. Defendants moved for dismissal of the complaint and for summary judgment. The motion to dismiss was denied by Judge Harry Martin 8 October 1976. Subsequently, summary judgment was entered on behalf of defendants Henderson Belk and Henderson Belk Enterprises, Inc., by Judge Clifton Johnson 16 February 1978.

Contents of the pleadings, affidavits, depositions, and interrogatories are summarized: Defendant Henderson Belk was, during the year 1973 when the alleged fraudulent transactions transpired, President of Automated Disposal Systems, Inc. (Automated) and owned 7,750 of the ten thousand shares in that corporation. During 1973, Belk also owned all of the shares of Henderson Belk Enterprises, Inc. (Enterprises), Automated's managing service. Defendant Palmer Ford was a vice-president and director of Automated. He arranged Belk's purchase of Automated stock. Ford's whereabouts are unknown. He has not communicated with Belk in at least two years. Defendant Frank W. Wilson was a vice-president and a director of Automated during the period in question. Furthermore, Wilson served as vice-president of 19 separate corporations controlled by Belk and managed the daily operations of Automated. Wilson's salary was paid by Enterprises, which functioned as a management service serving the various corporations controlled by Belk. The record indicates, however, that Automated did not compensate Enterprises for the services of Wilson. Sue C. Norman was employed, for a time by Automated and later by Enterprises, as secretary and receptionist for Enterprises and at the same time as book-keeper for Automated. She prepared the inventory control and was authorized to sign checks for Automated. Automated's corporate offices were located in the offices of Enterprises. Enterprises' assets consisted of office furniture and a vehicle. The offices are now located in the Executive Building, 623 East Trade Street, Charlotte. During 1972 and 1973, the offices were located in Belk's Barringer Hotel at 426 North Tryon Street.

Wilson went to work as an accountant for Belk in 1970. His primary responsibility with Automated was to "wind down" the

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business and dispose of its inventory. Between December of 1970 and December of 1972, Automated sold only two Disposacons. Automated was at this time licensed to manufacture, sell, and service an automated waste disposal system known as a Disposacon. The system was designed to burn large quantities of waste materials without the release of smoke and ash into the atmosphere. The Disposacons were manufactured for Automated by Fabricated Metals of San Leandro, California, and Leavesley Industries, Jacksonville, Texas. When purchased, the units were shipped directly from the manufacturer to the purchaser. In December of 1972 and January of 1973, there were apparently 14 Disposacons in existence—two installed as demonstrators in Charlotte (at businesses controlled by Henderson Belk), three completely assembled units at the Fabricated Metals plant, and nine units at Leavesley Industries in various stages of assembly. In December of 1972, approximately one-half of the units had been paid for by money advanced to Automated by Henderson Belk. Belk personally guaranteed to Leavesley Industries payment of up to \$100,000 for the balance of the cost to manufacture the nine units it was assembling.

W. David Temel, acting for Temel-Peck Enterprises, in November of 1972 entered into the agreement with Frank Wilson, acting for Automated, which eventually gave rise to this and other lawsuits. Temel agreed to purchase ten Disposacons at a price of \$13,000 per unit. Wilson denies that he had any knowledge of Temel's financing arrangements prior to preparing the first invoice. The financing was arranged by Don Weiss, a financial broker whom Wilson had known since 1970 and who had assisted Wilson in seeking financing for Automated in September of 1972. Temel-Peck's financing was arranged through several leasing companies. The arrangement was a typical lease-financed transaction wherein the "purchaser", in this case Temel-Peck, contacted the leasing companies and promised to lease the equipment, here Disposacons, if the leasing company would purchase the equipment from the seller. The lease agreement included an option to purchase the equipment at the end of the lease term. Temel-Peck contacted Trotter Leasing Corporation, plaintiff's assignor, to arrange a lease of two Disposacons. Trotter agreed and sought its own purchase financing through the plaintiff Girard Trust Bank. Trotter assigned its leases to the bank as

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security for the loan. The bank disbursed the proceeds of the loan to Automated in reliance upon the invoice price and the price indicated on the lease agreement.

Invoices for the sale of each unit were prepared for Automated by Sue Norman at Wilson's direction and according to Temel's specifications. The first invoice was prepared for a leasing arrangement with the Equilease Corporation. The invoice was prepared to indicate a purchase price of \$31,500 when, in fact, the sales price was acknowledged as being \$13,000. Wilson indicated that Temel assured him that Equilease approved of the excess purchase price indicated on the invoice which excess would, in effect, finance the installation and shipping costs of the unit. Equilease issued a check to Automated in the amount of \$31,500. Wilson retained \$13,000 and remitted the remainder to Temel-Peck. The record indicates similar transactions involving the remaining nine units. OPM Leasing Corporation sent Automated a check covering the invoice price of \$40,647. Automated forwarded all of the proceeds of that check except the \$13,000 purchase price. \$80,000 was received in payment of two invoices from American Leasing Corporation. \$40,000 was retained by Automated, \$35,000 forwarded to Temel-Peck and \$5,000 forwarded to Don Weiss at Temel's direction as a fee. Automated received \$80,000 from Domler Leasing Corporation in payment of two invoices issued by Automated, \$40,000 of which was paid to Temel-Peck and \$40,000 of which was retained by Automated. Finally, Automated received two \$40,000 checks from Funding Systems Leasing Corporation in payment of two invoices issued by Automated. One of the checks was retained, and one was endorsed over to Temel-Peck.

Turning our attention to the purchase financed by Girard Trust Bank, the record indicates that Temel had arranged for Trotter Leasing Corporation to purchase Disposacon unit numbers 007-SL and 012-SL, which he would in turn lease from Trotter. Wilson directed that each invoice should be prepared to indicate a sales price of \$40,000 per unit. Unit 012-SL was shipped to Winston-Salem but refused by Temel because of rust damage. After it had been rejected, the unit was stored behind the Cavalier Inn (formerly Barringer Inn) until it was taken to Construction Associates, a Belk company, in December of 1974. Unit 007-SL, according to Wilson, was not available for shipment until

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March or April 1973, and finally was shipped to Temel in November of 1973. The shipment was made subsequent to many inquiries by the various leasing companies concerning delivery of the machines, subsequent to Temel's letters in August of 1973 advising the leasing companies that he had not received the machines, and subsequent to the notice by Temel that Wilson should not send any more units. Automated received directly from Girard Trust Bank its check dated 23 March 1973 in payment for Unit 007-SL in the amount of \$40,000. Wilson thereafter endorsed the check over to Temel-Peck Enterprises. The check was picked up by Temel himself at Wilson's office. The check dated 27 March 1973, from Girard Trust Bank to Automated in the amount of \$40,000 in payment for Unit 012-SL was endorsed to Henderson Belk Enterprises. Wilson indicated that the money was used in partial payment of an indebtedness of \$400,000 Automated allegedly owed to Henderson Belk Enterprises.

Of the ten units purportedly purchased from Automated, only two were actually received and accepted by Temel-Peck. The only other unit shipped by August of 1973 was the unit purchased by Trotter but refused by Temel-Peck. In August of 1973, Wilson by letter had assured officials of plaintiff bank that delivery of the two units was immediately forthcoming no later than 23 August 1973. That promise was not fulfilled. Wilson denies any misconduct and maintains that despite the appearance of impropriety, he somewhere has checks to Temel for all of the invoice amounts except \$130,000 representing a purchase price of \$13,000 for each of the ten Disposacons.

The record indicates that prior to the above described transaction, W. David Temel and Henderson Belk had been involved in numerous business arrangements to which Frank Wilson was privy. Temel contacted Belk in 1971 concerning the possible purchase of Belk's motel, the Eden Rock-Blair House in Durham. The purchase was completed in the early fall of 1971. Temel-Peck thereafter purchased Belk's High Point Motor Lodge, which transaction involved a \$25,000 note executed in favor of Belk by Temel-Peck. Belk brought suit on that note 3 February 1972. Judgment was entered and satisfied in 1973. Also, in the fall of 1971, Temel-Peck leased from Belk the Cavalier Inn (formerly the Barringer Inn) in Charlotte. That lease was shortly thereafter terminated



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when Temel-Peck was unable to make lease payments. The property was returned and Belk retained the improvements made by Temel-Peck in settlement of the breached lease agreement. Henderson Belk Enterprises maintained its offices in the Cavalier Inn during the period of the lease. The record also indicates that on 21 September 1971 Henderson Belk personally guaranteed the obligations of Temel-Peck Enterprises with Northwestern Bank in the amount of \$104,043.60.

The record also indicates, as mentioned above, that Frank Wilson was acquainted with Don Weiss, Temel-Peck's financial broker, and sought his aid in the fall of 1972 to obtain financing for Automated. Weiss had suggested to Wilson that a sale-leaseback arrangement was a last resort method to finance its inventory. Wilson himself was familiar with such arrangements because of his experience working for an automobile leasing company. He recognized the lease as a more expensive form of financing than the traditional commercial financing. He knew from experience that the leasing companies traditionally await the receipt of a bill of sale or invoice before disbursing funds to cover the purchase of a leased item.

The record is inconclusive with respect to Henderson Belk's personal involvement in the "sale" of the ten Disposacons. Wilson indicated that Belk did not participate in the negotiation of the sale. He told Belk in November of 1972 that Temel-Peck had expressed interest in purchasing the Disposacons for \$13,000 each and that Temel-Peck would arrange its own financing. Wilson testified that he never showed to Belk any invoices for the units and did not tell him about the inflated invoice prices. Wilson stated that he did not report to Belk the large amount of money received by Automated, but only reported that Temel was following through on the purchase. Wilson stated that only periodically would he prepare statements to Belk showing the receipts of Automated, such statements purportedly being made only for the purpose of informing Belk of the cost of maintaining Automated in an "inactive stage".

Belk maintains that he never discussed the sale of the Disposacons with Temel, although he had numerous other business dealings with him. His deposition indicates that he had

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little to do with running Automated, but occasionally looked at the books. His testimony by deposition suggests that he was not even sure who was running the business at the time of the sale. He denies ever having seen or prepared any of the invoices. Belk furthermore indicated that he was not aware of any loans by Henderson Belk Enterprises to Automated. He contends that he had no knowledge of the nature of the transactions until the legal proceedings began, at which time he turned the matter over to his attorney.

The deposition of Sue Norman, a secretary for Henderson Belk Enterprises and the bookkeeper for Automated, indicates that the irregularity of the transaction with Temel-Peck was reported by her to Belk personally before July of 1973. Norman informed Belk that invoices were prepared to indicate sales prices far exceeding the true negotiated price. Norman quit her job in July of 1973 but returned because she understood that she was to keep Belk advised of Wilson's conduct. Between August and December she reported to Belk concerning the operation of Automated. Norman again resigned in December after learning that Belk had advised Wilson about her purpose for re-employment and her reports.

Norman also testified concerning conduct at the office. She recalled typing the numerous invoices at Wilson's direction showing the inflated purchase prices and the fact that some invoices were prepared for units already on lease with someone else. She recalls that Temel and Weiss were in the offices daily while the checks were being received for the purchase of the Disposacons. When certain payments were due, Weiss and Temel would repeatedly check by her office to ascertain whether the checks had been received. Furthermore, when calls would come from leasing companies to determine if the Disposacons had been installed, she would, at Wilson's direction, refuse to inform them of the fact that they had not been installed, although she had access to such information.

As late as 4 March 1977, Belk confirmed that Automated Disposal Systems, Inc., was still in existence, although its offices had moved to the Executive Office Building at 623 East Trade Street in Charlotte. However, at the time plaintiff filed its com-

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plaint in January of 1976 both Trotter Leasing Corporation and Temel-Peck Enterprises, Inc., had ceased operation and were without assets.

Girard Trust Bank avers that in reliance upon representations of defendant Frank Wilson, it caused the two checks for \$40,000 each to be drawn and delivered to Automated. Plaintiff further alleges that the transaction described above was a scheme to defraud plaintiff, and was perpetrated through the representations of Wilson, acting for and on behalf of Automated and its officers, that (1) the sales price of the Disposacons was \$40,000, when in fact it was only \$13,000 and (2) that the two Disposacons had been delivered and were installed, when in fact Temel advised Trotter Leasing Corporation by a letter dated 28 June 1973 that the units never had been delivered by Automated. Temel thereafter ceased lease payments. Plaintiff made demand upon Wilson on 3 August 1973 for the return of the funds obtained from Girard Trust Bank.

From entry of summary judgment dismissing defendants Henderson Belk and Henderson Belk Enterprises from this action, plaintiff appeals. Defendants cross-appeal assigning error to the denial of their motion to dismiss the complaint.

*Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick and F. Lane Williamson, for plaintiff appellant.*

*Weinstein, Sturges, Odom, Bigger, Jonas and Campbell, by T. LaFontaine Odom and L. Holmes Eleazer, Jr., for defendant appellees.*

MORRIS, Chief Judge.

Plaintiff's Appeal

Plaintiff assigns error to the entry of summary judgment dismissing defendants Belk and Henderson Belk Enterprises, Inc. Plaintiff's primary contention is "that the circumstantial evidence that Belk was a party to the fraud is overwhelming." Furthermore, plaintiff cites Temel-Peck's indebtedness to Belk as a motive for the alleged scheme, Belk's control of the corporations

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as the opportunity to perpetrate the fraud, along with the knowing acceptance of the benefits of the fraudulent transaction, failure to make an investigation of the transaction (acquiescence), and a "ratification" of the conduct as "strong indications that he knew the entire situation from its inception." Plaintiff's position, therefore, appears to be that not only do the inferences drawn from the materials submitted in opposition to the motion for summary judgment prove that Belk must have been involved in the alleged fraudulent scheme, but that his conduct of ratification and acceptance of the benefits establish his liability. *See generally* 37 C.J.S., Fraud § 61.

The elements of fraud long have been clearly enunciated by the courts in this State. In a recent decision determining that judgment on the pleadings was inappropriate in a fraud case because of the existence of material issues of fact, the Court noted:

"While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974).

Summary judgment here was apparently entered because of the trial court's opinion that as a matter of law Belk was not responsible for the alleged fraud of his agent merely because of the legal relationship between Belk as an officer and director of the corporations which Wilson served. *See Knitting Mills Co. v. Earle*, 237 N.C. 97, 74 S.E. 2d 351 (1953). However, as noted above, plaintiff's allegations indicate more than just the agency relationship. Plaintiff's averments tie Belk to the alleged scheme through inferences that he must have been involved because of his relationship with all of the parties and his potential personal benefit from the transaction. Plaintiff relies upon inferences which it maintains should be drawn from the circumstantial evidence to establish the above-mentioned elements of fraud. The

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effect of such inferences on the propriety of summary disposition of the case must be considered.

The threshold inquiry in reviewing the propriety of the entry of summary judgment concerns whether genuine issues of material fact are raised by the pleadings and papers filed in conjunction with the motion. The burden is upon the party moving for summary judgment to show, in order to be entitled to judgment, that no such questions of fact remain to be resolved. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). The movant's papers must be carefully scrutinized, while those of the opposing party are to be indulgently regarded. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). The defendant Belk's affidavit and deposition suggest that Belk was completely unaware of the nature of financing for purchase of the ten Disposacons, and that Belk at no time acted for Automated in any transaction or scheme as alleged by the plaintiff. As a matter of fact, Belk's testimony indicated that he knew absolutely nothing about Automated's business and could not testify about it without checking the records, including who ran the Company. An example:

"As to whether I had 7,750 shares of the 10,000 shares of outstanding stock and had the right to control it, I had a stock interest in it. As to whether I actually participated in the running of Automated it would be hard to answer that question. Occasionally, I did see the books. I don't think I ever wrote any checks on the company. I don't know exactly how to answer the question as to whether I ever saw any checks written on the company. As to whether I ever checked the company books I observed some of the reports. I just don't remember how often I observed the reports.

Frank Wilson probably had something to do with running Automated in 1972 and 1973. I don't think Mr. Wilson was the one that ran the company from the time he came to Charlotte until at least 1974. As to whether during the time Automated had been in Charlotte anyone other than Frank Wilson has been in charge of running the company, I'd have to check the records.

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While the company was in Charlotte it did sell some disposal machines. I'd have to check the records to tell where these machines were purchased. I did have dealings with Leavesley Industries, Incorporated. They made some of the products that ADS sold at one time. I'd have to check the records to see how this relationship began. I did talk to someone that represented the company. I don't remember the specific details, what sort of dealings I had with any representative of that company. I'd have to check to see if I brought a lawsuit suing them for a million dollars for something I claimed they did wrong to me. I'd have to check to see if I ever brought a lawsuit against Leavesley Industries, Incorporated. I think that a company probably that I had an interest in may have brought a lawsuit but I don't know exactly the way you word things how to answer them. That lawsuit is not still pending. I suppose the lawsuit you have reference to has been settled. You would have to check with my attorney to see if I just took a dismissal in that lawsuit.

ADS did make some purchases from Leavesley. They purchased some equipment. I don't know how you would describe it. It was for use in the operation of ADS's activities. I'd have to check the records to see just what they did buy. . . .

I did know a Mr. Temel. I don't exactly remember where I met him. I don't even remember when it was or what it was. I have met him. I wouldn't say I have met him on a number of occasions, no, more than one.

As to what sort of business dealings I or any of my companies had with Mr. Temel, can you be more specific? Some companies that I have had interest in have had some transactions with Mr. Temel. I'd have to check the records to see what companies. I understand that ADS was one of them.

As to how I understand it, I understand from lawsuits that were brought that it had some dealings with them. It is my testimony that I had no dealings with Mr. Temel insofar as many business relationship with ADS is concerned. It is absolutely correct that I never talked with Mr. Temel at all about any business dealings he had with ADS. I don't know for sure who represented ADS in these business dealings.

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I understand Mr. Frank Wilson had some dealings with Mr. Temel. My understanding is that Mr. Wilson on behalf of ADS sold some machines to Mr. Temel's company. I believe it is correct, that is, Temel-Peck Enterprises."

On the other hand, plaintiff produced a significant volume of evidence intended to show that Belk must have been involved in the scheme or at least ratified the fraud because of his control of Automated and his relationship with the purchaser Temel-Peck. It is, therefore, apparent that defendant Belk relies heavily upon his own deposition testimony and affidavit to support his motion for summary judgment. Because of the importance of these papers, the credibility of Belk becomes a key issue in this matter, and where credibility is a key issue, summary judgment is seldom an appropriate procedure for resolution of the matter. *See generally* 10 Wright and Miller, Federal Practice and Procedure: Civil § 2726 (1973).

[1] The issue of credibility presents an issue of fact which, if material, should be left to the trier of fact. Here, not only does the defendant Belk's testimony on deposition, when indulgently regarded in favor of plaintiff, appear inherently incredible, but inferences reasonably capable of being drawn from plaintiff's evidentiary material place doubt upon the credibility of defendant Belk's deposition testimony and affidavit. *Compare Kidd v. Early*, supra. We are of the opinion that reasonable inferences available from the plaintiff's materials and the issue of Belk's credibility present material questions of fact such as to prevent the entry of summary judgment.

In our opinion there is another basis for disapproving of the granting of summary judgment in the case. The existence of fraud necessarily involves a question concerning the existence of a fraudulent intent on the part of the party accused of such fraud. The intent of a party is a state of mind generally within the exclusive knowledge of that party and, by necessity, must be proved by circumstantial evidence. Summary judgment is generally inappropriate under such circumstances. *See generally* 10 Wright and Miller, Federal Practice and Procedure: Civil § 2730 (1973). This stance was taken by the United States Court of Appeals for the Third Circuit which concluded that summary judgment in favor of the movant in an action based upon a complex scheme of fraud

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should not be utilized to draw factual inferences in favor of the moving party and to resolve genuine issues of credibility, particularly "where intent is a substantive element of the cause of action because intent is generally to be inferred from the facts and conduct of the parties." *Associated Hardware Supply Co. v. Big Wheel Distributing Company*, 355 F. 2d 114, 121 (3d Cir. 1966). See also *Teledyne Industries, Inc. v. Eon Corp.*, 373 F. Supp. 191 (S.D.N.Y. 1974). For the above reasons, we are of the opinion that the summary judgment in favor of defendants Henderson Belk and Henderson Belk Enterprises was improvidently granted.

Defendants' Appeal

Defendants have brought forward two assignments of error on cross-appeal, both of which are directed to the trial court's denial of their motion for dismissal of the complaint under G.S. 1A-1, Rule 12(b)(6). The grounds for the assignment of error are twofold.

[2] The defendants first contend that plaintiff's allegations fail to state a claim for relief for fraud. Their reliance is based primarily on G.S. 1A-1, Rule 9(b) which provides:

“(b) *Fraud, Duress, Mistake, Condition of the Mind.*—In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”

This rule is in contrast to the notice pleading approach adopted upon the enactment of G.S. 1A-1, Rule 8(a), and is essentially a codification of our former case law with respect to pleading fraud. *In re Estate of Loftin*, 21 N.C. App. 627, 205 S.E. 2d 574 (1974), *affirmed*, 285 N.C. 717, 208 S.E. 2d 670 (1974). The purpose of the prior case law and the present G.S. 1A-1, Rule 9(b), is to require pleading of the facts upon which the plaintiff relies to establish the essential elements of fraud. As this Court found in *In re Estate of Loftin*, the facts alleged must be sufficient to support a finding of:

“The intent to deceive [*Callaway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957)]; the specific false representations that



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were made [*Fulton v. Talbert*, 255 N.C. 183, 120 S.E. 2d 410 (1961)]; that the defrauded party relied upon the misrepresentations to his detriment [*Products Corporation v. Chestnutt*, 252 N.C. 269, 113 S.E. 2d 587 (1960)]." 21 N.C. App. at 631, 205 S.E. 2d at 576.

We note that there are abundant allegations of specific facts along with general allegations of defendants' state of mind sufficient to state a cause of action for fraud. The trial court's denial of defendants' motion to dismiss was proper on this ground.

[3] Defendants finally contend that the adjudication of this cause of action was precluded by the dismissal of a related action in the United States District Court for the Western District of North Carolina entitled "*Trotter Leasing Corporation v. Automated Disposal Systems, Inc., Temel-Peck Enterprises, Inc., a/k/a Temel-Peck Enterprises Co., W. David Temel, David F. Peck, Cornelia A. Temel, David F. Peck, Caroline A. Peck, Adolfas Akelatis and Annabelle Akelatis*". That action was dismissed under the Federal Rules of Civil Procedure, Rule 41(b), for failure to prosecute. Defendants contend that, because in both actions the issue of fraud is essentially the same, the defendants in each action are essentially the same, and the plaintiff in this action is in a position of "privity" with the plaintiff in the original action, Girard Trust Bank is collaterally estopped from re-litigating the fraud issue presented in the present suit.

We note initially that the principle of collateral estoppel does not apply to this case to preclude adjudication of the fraud issues. Collateral estoppel, a doctrine closely related to that of *res judicata*, precludes re-litigation only of issues necessarily determined in a prior adjudication between the same parties and those in privity to them. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); see generally 1B Moore's Federal Practice § 0.405[1] (2d ed. 1974). Assuming, *arguendo*, the other prerequisites for establishing collateral estoppel, the judgment dismissing the action for failure to prosecute did not purport to determine the existence or non-existence of fraud. We, therefore, consider whether the action initiated against defendants was precluded under the doctrine of *res judicata* as applied in its technical sense. See *Hartford Accident Indemnity Company v. Levitt & Sons, Inc.*, 24 F.R.D. 230 (E.D. Pa. 1959).

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*Res judicata* operates to preclude a subsequent suit on the same cause of action between the same parties or their privies once final judgment has been entered in the initial action. *King v. Grindstaff, supra*. Plaintiff concedes that the dismissal of this action under Federal Rule 41(b) for failure to prosecute is a final judgment. See *Kotakis v. Elgin, Joliet & Eastern Railway Co.*, 520 F. 2d 570 (7th Cir. 1975); see generally 1B Moore's Federal Practice § 0.409[1], n.n. 34 and 35 (2d ed. 1974). We must, therefore, determine whether the remaining requirements for establishing *res judicata* exist to preclude plaintiff's action. We take note of the general principle that the application of *res judicata* must be narrowly construed and cannot be left to "uncertain inference". *Gunter v. Winders*, 253 N.C. 782, 785, 117 S.E. 2d 787, 789 (1961).

A plea of *res judicata* is effective to preclude a subsequent action which is based on the same cause of action and between the same parties and privies. See *King v. Grindstaff, supra*. Plaintiff contends both that its suit is based on a different cause of action from the initial suit and that the parties to the suits are not the same. We agree that the parties are not the same and that, therefore, *res judicata* does not apply to preclude the action.

The concept of the identity of parties and their privies encompasses the requirement of mutuality of the estoppel by judgment.

"Thus, a party to the subsequent action, who was not a party to the former action and, therefore, is not estopped by the judgment therein, cannot assert that judgment as an estoppel against his opponent, even though the opponent was a party to the action in which the judgment was rendered." *Kayler v. Gallimore*, 269 N.C. 405, 407, 152 S.E. 2d 518, 520 (1967); see generally 1B Moore's Federal Practice § 0.412[1] (2d ed. 1974).

We cannot say that defendants Henderson Belk and Henderson Belk Enterprises, Inc., would have been bound by a judgment in the prior case. First, it is obvious that Henderson Belk Enterprises, Inc., was not a party to the prior suit nor was it an agent, officer, director, or shareholder of the defendant Automated. We have been cited to no authority which would support a finding that Henderson Belk Enterprises, Inc., would be bound by a judg-

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ment against Automated solely because of the existence of common ownership between the two corporations. This leaves us with the question whether Henderson Belk, personally, would have been bound by a judgment rendered in favor of the plaintiff in the initial action.

The allegations in the initial action alleged fraudulent representations by Automated, and, in contrast to the action *sub judice*, contained no allegations of involvement by the individual defendant Belk. In determining whether a judgment against a corporate entity binds one who controls the corporation, the late Justice Parker of our Supreme Court in *Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E. 2d 132, 134-35 (1960), observed:

“A corporation is an entity distinct from its shareholders, and the corporate entity is distinct, although all of its stock is owned by a single individual or corporation. 13 Am. Jur., Corporations, Sec. 6. To the same effect N.C.G.S. 55-3.1. F. L. Taylor has only a contingent derivative right of succession of property interest, with the other stockholders, from the Troy Lumber Company so far as the present suit for damages is concerned. The admission that F. L. Taylor is the controlling stockholder of Troy Lumber Company, is chairman of its board of directors, its President, and has complete charge of its operations and business, is insufficient to establish the identity or privity between him and the corporation for the purpose of *res judicata*.”

The prior action initiated by Trotter Leasing Corporation alleged no fraudulent conduct on the part of Belk individually; and, in the absence of allegations and proof of actual fraudulent conduct by a corporate shareholder, officer, or director, or ratification and adoption of such conduct, an officer, director, or stockholder generally may not be held liable for the acts of the corporation. *Cf. Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968); *see generally* 19 C.J.S., Corporations § 850; 19 Am. Jur. 2d, Corporations § 1384.

The denial of defendants' motion to dismiss the complaint is affirmed, and the entry of summary judgment in favor of defendants is reversed.

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Affirmed in part; reversed in part.

Judges CLARK and ARNOLD concur.

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LUELLA S. HOLT v. DAVID R. HOLT II

No. 7828DC722

(Filed 5 June 1979)

**1. Process § 9; Constitutional Law § 26.6— action against nonresident—foreign divorce decree—no personal jurisdiction**

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations of a separation agreement incorporated into a Missouri divorce decree and to attach property owned by defendant in North Carolina, the courts of this State did not obtain jurisdiction over the person of the nonresident defendant under the Full Faith and Credit Clause of the United States Constitution by the enforcement of a valid *in personam* judgment of one state in the courts of another state, since jurisdiction over defendant could be obtained under this theory only if plaintiff first obtained a judgment in the Missouri courts that defendant is in arrears for a sum certain on the ordered payments and then brought suit in North Carolina on such judgment.

**2. Process § 9.1; Courts § 2.2; Constitutional Law § 26.6— action against nonresident—foreign divorce decree—realty in N. C.—minimum contacts with case—quasi in rem jurisdiction**

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations due under a separation agreement incorporated into a Missouri divorce decree and to attach realty owned by defendant in North Carolina, defendant's North Carolina realty had sufficient "minimum contacts" with the case to give the courts of this State *quasi in rem* jurisdiction by constructive service where (1) defendant purchased the North Carolina realty and executed deeds of trust thereon shortly after the Missouri decree was entered and began failing to make the ordered payments the next month, thereby electing to expend a portion of his income on payments for the realty rather than making payments under the Missouri decree, and (2) the claim by plaintiff to the North Carolina realty is a part of "the source of the underlying controversy between the plaintiff and defendant" since one of the purposes of the original action was to determine property rights between the parties and that continues to be the purpose of the North Carolina action.

Judge CLARK dissenting.

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**Holt v. Holt**

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APPEAL by defendant from *Allen (C. Walter), Judge*. Order entered 29 June 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals 26 April 1979.

Plaintiff filed a complaint praying that North Carolina accord full faith and credit to a divorce judgment entered in the State of Missouri. She also prayed for an award of accrued alimony and child support with interest, a judgment for \$10,400 for certain alleged debts and obligations under a separation agreement, an order for future alimony and child support payments, security for such obligations, an injunction to prevent defendant from disposing of North Carolina real property, and attorney's fees and costs.

Plaintiff alleged that she is a resident of Missouri and defendant is a resident of Alabama but owns real property in North Carolina which could be used to satisfy the divorce judgment.

The separation agreement between plaintiff and defendant, in which defendant, *inter alia*, agreed to pay \$150 per month alimony, and \$150 per month child support for each of the three children, states that the agreement should be "presented to the Court for approval and referred to in the [divorce] decree but it shall not be set forth in full in the decree." The divorce decree states that the separation agreement "is not unconscionable and that the same should be approved and set out in the decree." It orders that, "the separation agreement and property settlement . . . be and the same is hereby approved and ordered set forth in the decree."

Plaintiff filed a notice of *lis pendens* and procured an order of attachment pursuant to G.S. 1-440.2 and 1-440.3(1) against defendant's North Carolina real property.

Defendant filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2) on the ground that the court lacked jurisdiction over the person of defendant. The trial court denied the motion and defendant appealed.

*Shuford, Frue & Best, by Ronald K. Payne, for plaintiff appellee.*

*Stephen L. Barden III for defendant appellant.*

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CARLTON, Judge.

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; *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). However, G.S. 1-277(b) provides in part that an interested party "shall have the right of *immediate appeal* from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." (Emphasis added.) Hence, the question for determination on this appeal is whether the trial court properly denied defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2) on the ground that the court lacked jurisdiction over the person of defendant.

The contentions of the parties in their briefs evolve around two theories under which they perceive jurisdiction might be asserted over the defendant: (1) under the Full Faith and Credit Clause of the United States Constitution, by the enforcement of a valid *in personam* judgment of one state in the courts of another state, and (2) by jurisdiction *quasi in rem* acquired by constructive service where defendant's property has "minimum contacts" with the case.

[1] In contending that jurisdiction was properly exercised over the defendant under the first theory noted above, plaintiff relies primarily on a statement and a footnote by the United States Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186, 210, 97 S.Ct. 2569, 2583, 53 L.Ed. 2d 683, 702 (1977):

Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States.

In a footnote to that statement, the Court added:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to

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realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter. . . .

We do not believe this dictum of the Supreme Court embraces the facts disclosed by the record before us. To proceed under this principle, we think it would be essential for plaintiff to first obtain a judgment in the Missouri courts that defendant is in arrears for a sum certain on the ordered payments. From that subsequent judgment, North Carolina courts could then take proper notice that defendant is a "debtor" of plaintiff and the action would lie under this theory. The present posture of the case, however, discloses that defendant is at most only an *obligor* of plaintiff.

In light of this portion of our holding rejecting the argument that jurisdiction might be obtained over the defendant under the first theory noted above, we deem it unnecessary to discuss the question of whether the Missouri decree is entitled to full faith and credit in North Carolina. This is the matter dealt with most extensively in the briefs of both parties. Under the rejected first theory, a resolution of that question would have been essential. The question of full faith and credit is also the ultimate question to be determined in this lawsuit. For that reason, the parties would undoubtedly prefer that we deal with that question here. We think it would be improper for us to do so. It is our function in the judicial process to review matters first decided by the trial courts. The trial court's order, without any findings of fact or conclusions of law, merely denied the defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2). Indeed, absent a request by a party to do so, the trial court was not required to make findings of fact or conclusions of law in ruling on the motion. G.S. 1A-1, Rule 52(a)(2).

Since the trial court did not make findings of fact or conclusions of law in its order, we assume that it ruled only that the District Court of Buncombe County had jurisdiction over the person of the defendant so that his Rule 12(b)(2) motion should be denied. We do not believe that we should interpret the trial court's order to rule that the Missouri decree is entitled to full faith and credit in North Carolina. Again, that is the ultimate and crucial question to be answered in this lawsuit. We think it would

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disrupt the judicial process for us to address this question here as suggested by the briefs of the parties. To do so would mean that we would be doing what appellate courts are not in the business of doing: We would be *initially* determining questions which must first make their way through the trial courts. For example, in urging that North Carolina should not accord full faith and credit to the Missouri decree, defendant argues that the portion of the decree relating to alimony and other debts is not enforceable because it is merely contractual and that the portion of the decree relating to child support is subject to annulment by the Missouri courts. These are obviously questions which must be considered first at the trial level and we do not interpret the trial court's order denying the defendant's Rule 12(b)(2) motion to embrace them.

[2] Nor do we believe that G.S. 1-277(b), allowing immediate appeal from an adverse ruling as to jurisdiction of the court over the person or property of the defendant, was enacted as a means of allowing litigants to seek advisory opinions from the appellate courts before necessary questions are resolved by the trial courts. That statute simply allows a defendant, in an action of this nature, a means of immediate appellate determination as to whether the trial court has jurisdiction so that it can then proceed to answer the questions raised by the lawsuit. We therefore decline to rule on the ultimate questions pertaining to full faith and credit of the Missouri decree and turn now to the remaining question we consider raised by this appeal: Was jurisdiction *quasi in rem*, acquired by constructive service on the basis of defendant's property having "minimum contacts" with the case, properly obtained over the defendant?

Though we reach a different result, we think this case is controlled by Shaffer, *supra*, applied by this Court in *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E. 2d 164 (1978). In *Balcon*, the plaintiff was a Maryland corporation. It was neither domesticated nor did business in North Carolina. Defendant was an individual resident of Maryland who owned real property in North Carolina. Plaintiff brought suit on account and began ancillary proceeding for attachment of defendant's real property pursuant to G.S. 1-440.1(b). Judge Clark, writing for this Court, stated:

The plaintiff and defendant were nonresidents of this State, and the action arose in Maryland. Defendant owned



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real estate in Chowan County; his ownership of this realty did not give the court jurisdiction over the defendant's person. The basis of the court's jurisdiction must rest on plaintiff's proceeding to attach defendant's realty under G.S. 1-440.1. The realty had no relation to the account which is the subject matter of the action. The attachment is a *quasi in rem* proceeding, instituted by plaintiff for the purpose of bringing the realty of the nonresident defendant under the jurisdiction of, and subject to the judgment of, the court. The attachment proceeding is ancillary and does not give the court *in personam* jurisdiction over the defendant. But G.S. 1-75.8(4) gives the court jurisdiction *quasi in rem* when "the defendant has property within this State which has been attached or has a debtor within the State who has been garnished.

The opening sentence of G.S. 1-75.8 is as follows: "A court of this State having jurisdiction of the subject matter *may* exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. . . ." (Emphasis added.) Thus, it appears that the exercise of such jurisdiction is a matter for the discretion of the court. See Anno. 90 A.L.R. 2d 1109; 20 Am. Jur. 2d, Courts, §§ 93, 172; 21 C.J.S., Courts, § 77(b), pp. 116-118. It is clear, however, in the case before us that the trial court found that it did not have jurisdiction, and not that it in its discretion refused to exercise it.

The foregoing statute and the case law relating to *in rem* jurisdiction has been based on the decisions in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), which for a hundred years has provided the conceptual framework for jurisdictional matters in the United States. *Pennoyer* asserted that jurisdiction was defined by two principles: (1) that every state possesses exclusive jurisdiction and sovereignty over persons and property *within* its territory, and (2) that a state cannot exercise direct jurisdiction over persons or property *without* its territory. The decision recognized that the states must comply with the standards of due process but perceived the requirements for jurisdiction over property as conceptually distinct from those applicable to personal jurisdiction. The mere presence of property was sufficient for *in rem* jurisdiction, whereas the presence of the defendant's person

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within the state was essential for *in personam* jurisdiction. These bifurcated jurisdictional standards have been maintained over the years, with the state courts exercising jurisdiction based on the presence of property in actions *in rem* and *quasi in rem* and exercising personal jurisdiction based on the presence of the person.

The concept of *in personam* jurisdiction has been adjusted by the courts during the past century to meet the needs of a mobile society by judicially circumventing the presence of the person as the basis for jurisdiction with the fictions of implied consent and constructive presence, based on activities in the state, i.e., operating a motor vehicle or doing business.

But the fiction-eroded standards for *in personam* jurisdiction were supported two decades ago by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945), which held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he is not present within the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Recently, in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (June 1977), the Supreme Court held for the first time that the standards of fairness, reasonableness and substantial justice and the minimum contacts required by *International Shoe* should govern actions *in rem* as well as *in personam*. The court suggested that all of the circumstances relating to the controversy should be considered in determining reasonableness.

In *Shaffer*, the asserted basis of jurisdiction was the statutory presence of defendants' property in Delaware, by statute the situs for ownership of stock in a Delaware corporation. The action was a stockholder's derivative suit by a nonresident against nonresident officers and directors of a Delaware corporation for breach of corporate duties. In the case *sub judice* the basis of jurisdiction was real property. Where real property has some relation to the controversy, the interest of the State in realty within its borders, and the

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defendant's substantial relationship with the forum should support jurisdiction. But in the case before us the controversy had no relation to the realty, and *Shaffer* clearly held that jurisdiction could not be based on the mere presence of property. We interpret *Shaffer* as controlling the case *sub judice* if *Shaffer* has retroactive effect.

. . . .

G.S. 1-75.8(4) provides that jurisdiction *in rem* or *quasi in rem* may be invoked "When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section." Clearly this statute does not meet the due process standards required by the *Shaffer* decisions and is unconstitutional. But G.S. 1-75.8(5) extends *in rem* and *quasi in rem* jurisdiction to any action "in which *in rem* or *quasi in rem* jurisdiction may be constitutionally exercised." This statute supports such jurisdiction over the property within the state of a nonresident if due process standards are met. *Id.* at 324-327, 244 S.E. 2d at 166-167.

In holding that the proper due process standard for a determination of jurisdiction over the interests of persons is the "minimum contacts" standard elucidated in *International Shoe*, the United States Supreme Court made these statements in *Shaffer* which we deem pertinent to the facts disclosed by the record before us:

This . . . does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its

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borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.

. . . .

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an *in personam* suit." Restatement § 66, Comment a. *Id.* at 207, 210, 97 S.Ct. at 2582, 2583, 53 L.Ed. 2d at 700, 701.

In applying the principles first set out in *International Shoe*, extended in *Shaffer*, and applied by this Court in *Balcon*, to the facts disclosed by the record before us, we hold that the defendant and his North Carolina property do have "minimum contacts" to the controversy to the extent that due process standards have been met in obtaining jurisdiction over the defendant. As in *Balcon*, both plaintiff and defendant here are nonresidents of this State and defendant owns real estate within the State. In both cases, the basis of the court's jurisdiction must rest on plaintiff's proceeding to attach defendant's realty under G.S. 1-440.1 in order to give the court jurisdiction *quasi in rem* pursuant to G.S. 1-75.8(4). Here, however, we believe that the controversy *does* have "some relation" to the North Carolina real estate owned by defendant. Granted, there is no direct relation between the parties' separation agreement and divorce decree entered in Missouri and the real property owned by the defendant in North Carolina. However, one of the *original purposes* of this action was that of determining property rights between these parties at the time of their separation and subsequent divorce and that *continues* to be the purpose of the action filed in North Carolina. The record discloses several facts which lead us to find a relationship between defendant's North Carolina property and the controversy:

1. The Missouri decree was entered on 10 March 1975 and the defendant allegedly purchased the property in Buncombe County on 4 April 1975. In other words, just 25 days after being ordered to begin making substantial payments to plaintiff, defend-

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ant came to North Carolina and purchased property alleged to be worth approximately \$70,000. The plaintiff alleges that two deeds of trust were executed by defendant on the North Carolina property and that defendant has failed to make payments pursuant to the divorce decree since May 1975. Since the record discloses that defendant is a resident of Alabama, and that he began failing to make the ordered payments the very month following the purchase of the North Carolina property, we must conclude that he has elected to expend at least a portion of his income on making payments on North Carolina real estate on which he does not reside in lieu of making payments under the Missouri decree for the support of his wife and children.

2. Another contact between defendant, North Carolina real estate and this controversy took place *at the time* the separation agreement was entered into by the parties and subsequently incorporated into the divorce decree. The record discloses that defendant agreed, in the separation agreement, to deed to plaintiff three undeveloped lots owned by the parties at Montreat, North Carolina. Moreover, pursuant to the separation agreement, the defendant was to be entitled to keep and retain as his separate property a house owned by the parties jointly at Montreat, North Carolina. While the parties owned property in Missouri, Florida and North Carolina, it is obvious that their contacts with North Carolina were extensive. The separation agreement spells out in detail the personal property in the Montreat house to be assigned to the plaintiff and certain furniture and furnishings to be assigned to the defendant. We therefore must disagree with the statement of the defendant in his motion to dismiss that "[he] has had no contacts with the state of North Carolina in any way relating to the cause of action of this case. . . ."

In applying the facts disclosed by this record to the statements enunciated in *Shaffer* quoted above, we think that the claim by the plaintiff to the North Carolina property is certainly a part of "the source of the underlying controversy between the plaintiff and the defendant." In addition to terminating the marital relationship, the "underlying controversy" between these parties was obviously that of determining their respective property rights. We think that defendant's purchase of the North Carolina property was so close in time to entry of the Missouri decree attempting to effect a settlement of property rights be-

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tween the parties that "minimum contacts" between the controversy and North Carolina were clearly established.

With respect to the second quoted statement from *Shaffer* above, we concede that plaintiff has not alleged that defendant removed any assets to North Carolina in order to avoid payment of his obligations. Nor do we impugn such a motive to defendant. However, not allowing plaintiff to obtain jurisdiction over defendant (who left the state of his domicile less than one month after being ordered to make such payments to his wife and children, purchased real estate in North Carolina and incurred financial obligations as a result thereof) could clearly result in defendant being allowed to avoid the court ordered payments by purchasing North Carolina real estate. We do not think that the principles established in *Shaffer* and *Balcon* intended such a result. Clearly, the cause of action here was a direct and foreseeable outgrowth of defendant's contacts with this state.

In *Balcon* the real estate had absolutely no relation to the controversy nor had any previous relationship been established by the parties to the controversy and the State of North Carolina. In *Shaffer*, the Supreme Court stated, "appellants have simply had nothing to do with the State of Delaware." *Id.* at 216, 97 S.Ct. at 2586, 53 L.Ed. 2d at 705. For the reasons stated above, we think the facts of the case *sub judice* are clearly distinguishable from those in *Balcon* and *Shaffer* and that the result must be different. *See* the concurring opinions in *Shaffer, supra*.

We are advertent to the clear holding in *Shaffer* that presence of the *res* alone is not sufficient to confer jurisdiction on a nonresident defendant. We agree that the mere presence of defendant's property in North Carolina, in an action of this nature, should not confer jurisdiction on him. The several other factors noted above must be added to the realty's presence in North Carolina to establish the required contacts.

We find no clear formula from our review of state and federal appellate decisions. We think all decisions evolve ultimately into a test of reasonableness, fairness and justice in light of all circumstances surrounding the action. As stated by our Supreme Court in *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963):

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Whether the type of activity conducted within the State is adequate to satisfy the requirements depends upon the facts of the particular case. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 492. It seems, according to the most recent decisions of the United States Supreme Court, that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. (Citations omitted.)

In summary, we think the parties established the "minimum contacts" with North Carolina as contemplated by *International Shoe*, such that jurisdiction over the person of the defendant could be obtained by constructive service. Surely, on the facts before us, "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe, supra*, 326 U.S. at 316 quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 61 S.Ct. 339 (1940). See also *Kulko v. California Superior Court*, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957); *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979).

Hence, we hold that the interests of the State in realty within its borders and the defendant's substantial relationships with the forum support the trial court's order that it had jurisdiction over the person of the defendant.

We have examined the defendant's remaining assignment of error and find it devoid of merit.

The order of the court below is

Affirmed.

Judge VAUGHN concurs.

Judge CLARK dissenting.

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Judge CLARK dissenting.

The circumstances relating to the controversy between plaintiff and defendant and the realty which defendant purchased in this State after the separation agreement and the support judgment entered in Missouri do not provide sufficient "minimum contacts" to meet the due process standards required by *Shaffer v. Heitner, supra*. The obligation of the defendant to plaintiff should be determined by a court of competent jurisdiction and its judgment enforced in this State under the Full Faith and Credit Clause by proceeding *in rem* against defendant's realty.

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CHEMICAL BANK v. HENDERSON BELK

No. 7826SC580

(Filed 5 June 1979)

**1. Mortgages and Deeds of Trust § 6— language in note and deed of trust— incorporation by reference**

Where a note and deed of trust cross-refer to each other and incorporate each other by reference, and only one of the documents clearly indicates the purchase money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction.

**2. Mortgages and Deeds of Trust § 32.1— anti-deficiency judgment statute—no waiver of protection**

The protection of the anti-deficiency judgment statute, G.S. 45-21.38, cannot be waived since that statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived or which purchasers could be compelled to waive as a prerequisite for obtaining financing.

**3. Mortgages and Deeds of Trust § 32.1— anti-deficiency judgment statute—no estoppel to assert**

Execution of an "estoppel certificate" by defendant did not deprive him of his right to assert G.S. 45-21.38 in his defense to a deficiency proceeding, since a purchaser cannot, by his action or by contract, deny to himself the protection afforded him by the legislature in its enactment of the anti-deficiency statute; moreover, even if the certificate did operate as an estoppel so as to bar defendant's assertion of the statute, plaintiff could not base a claim of estoppel thereon, since the certificate was never transferred to successive assignees and therefore was never assigned to plaintiff, and since there was no evidence of record to indicate that plaintiff in any way knew of the certificate or had any reliance upon it.



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**4. Mortgages and Deeds of Trust § 32.1— purchase of property by defendant guarantor—obligations merged—protection of anti-deficiency statute**

Defendant's guaranty of the obligations of a corporation under a lease/purchase agreement did not remove him from the protection of the anti-deficiency statute and make him liable for the entire face amount of a note, since the option to purchase was assigned to defendant personally; defendant exercised it, taking title to the property in himself and personally signing the note and deed of trust; and all of the obligations and promises merged in defendant who became an ordinary purchaser who financed his acquisition of the property by a purchase money note and deed of trust.

APPEAL by defendant and cross-appeal by plaintiff from *Thornburg, Judge*. Judgment entered 22 February 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1979.

Plaintiff brought this civil action for declaratory judgment, pursuant to G.S. § 1-253 *et seq.*, seeking a declaration of its rights and liabilities under G.S. § 45-21.38, which statute purports to abolish deficiency judgments on a mortgage where that mortgage represented a portion of the purchase price of the security. Plaintiff is the current holder of a note, secured by a deed of trust, executed by defendant as the balance purchase money on the sale and conveyance of certain real proeprty in Charlotte, North Carolina.

On 9 February 1968 Charlotte Venture Corporation, a New York corporation and subsidiary of Realty Equities Corporation also of New York, leased the Barringer Hotel (later named the Cavalier Inn) to the Belk Hotel Corporation with an option to purchase. Defendant Henderson Belk was the president and sole stockholder of Belk Hotel Corporation. Charlotte Venture Corporation assigned its lessor's interest in the lease on 11 September 1968 as security for a loan from Nyhaco Credit Corporation, Ltd., a Canadian corporation with offices in New York City.

Belk personally guaranteed the performance of the lease by the Belk Corporation through the terms of a written guarantee agreement. The lease guarantee provided:

Whereas, the lessor has refused to enter into the said lease unless the guarantor guarantee said Lease in the manner hereinafter set forth,

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Now, therefore, to induce the lessor to enter into said lease . . . the guarantor hereby agrees:

1. (a) The guarantor unconditionally guarantees to the lessor and the successors and assigns of the lessor the full and punctual performance and observance, by the lessee, of all the terms, covenants and conditions of said lease on the lessee's part to be kept, performed and observed.

At the time the lease was signed, Belk delivered to Charlotte Venture a letter agreeing to provide to it certification from his accountant that he had a net worth in excess of \$5,000,000 or Charlotte Venture could cancel the lease.

Belk Hotel Corporation fell into arrears on its lease payments. To avoid legal action it was decided that the option to purchase should be exercised. On 31 January 1970, Charlotte Venture Corporation contracted to sell the Barringer Hotel to Belk Hotel Corporation with Henderson Belk personally guaranteeing the transaction. The contract was prepared by Charlotte Venture. It provided for its assignment from Belk Hotel Corporation to Henderson Belk, individually. The purchase agreement provided, *inter alia*, that:

(1) Henderson Belk, individually, joined in the Purchase Agreement for the purpose of guaranteeing its performance by Belk Corporation and the payment of the Note for the balance of the purchase price.

(2) The Purchaser reserved the right to assign the Purchase Agreement to another corporation or to Henderson Belk, individually. "However, in all respects the above guarantee, and agreement to guarantee, shall remain in full force and effect."

A rider was attached to the purchase agreement which provided, in paragraph 2, the following:

2. As a condition for the acceptance of the purchase money note and mortgage by the Seller herein, it is agreed that Henderson Belk, the guarantor of said indebtedness, shall deliver to the Seller, at the closing of the transaction, a letter from Mr. Nat Howard, Certified Public Accountant, on the staff of Belk Stores Services, Inc., that shall contain the same terms with reference to the net worth of Henderson Belk,

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as of the date of closing of this transaction, as were contained in letter to such effect that was delivered by Henderson Belk to the Seller at the time the lease by and between the parties was entered into, dated February 9, 1968.

The sale of the Barringer Hotel property was consummated on 10 March 1970, between Charlotte Venture Corporation (vendor) and Henderson Belk, individually (vendee). The transaction was structured thusly: Belk Hotel Corporation assigned its contract of sale with Charlotte Venture to Henderson Belk individually on 10 March 1970. Nyhaco Credit Corporation on the same date assigned the lease wherein Belk Hotel Corporation was lessee back to Charlotte Venture. Charlotte Venture also on the same date assigned the lease to Henderson Belk. Charlotte Venture then deeded the hotel property to Henderson Belk, in return for which Belk paid a consideration of \$1,850,000.00 in the form of \$100,000 cash and the balance in a note for \$1,750,000 secured by a deed of trust on the hotel property.

The contract called for the \$1,750,000 non-cash balance to be paid by "the execution of notes and deeds of trust evidencing a balance purchase money mortgage . . ." Sol Levine of Charlotte, North Carolina, and attorney for Charlotte Venture prepared the note and deed of trust. The note was in the standard form of a negotiable promissory note and referred to the deed of trust securing payment as follows:

This Note is secured by a deed of trust of even date herewith to Sol Levine, Trustee conveying real estate in Mecklenburg County, North Carolina.

The deed of trust stated on its face that it was "for balance purchase money" in the sum of \$1,750,000. Levine was named as trustee.

Henderson Belk executed an "Estoppel Certificate and Certificate of Compliance" to Nyhaco Credit Corporation, Ltd., as part of the transaction 10 March 1970 whereby Charlotte Venture assigned to Nyhaco its interest in the Belk note and deed of trust as security for a loan made to Charlotte Venture by Nyhaco. The estoppel certificate stated that:

. . . in order to induce Nyhaco Credit Corporation, Ltd., to take an assignment of said purchase money first Deed of

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Trust and Note secured thereby and thus to enable the assignment of the purchase money first Deed of Trust and Note to be made to and accepted by Nyhaco Credit Corporation, Ltd., (Henderson Belk) does hereby certify to Nyhaco Credit Corporation, Ltd., for a valuable consideration by the undersigned received:

\* \* \*

3. There are no defenses, counterclaims or offsets to the above mentioned deed of trust or to the Note secured thereby.

On 12 August 1970, Nyhaco assigned the note and deed of trust to Realty Equities Westchester Corporation who, like Charlotte Venture, was a subsidiary of Realty Equities Corporation. On 19 August 1970, Realty Equities Westchester Corporation assigned the note to Royal National Bank as security for a loan to Realty Equities Corporation. On 31 December 1970, Realty Equities Westchester, its parent, Realty Equities Corporation, and Royal National Bank entered into an agreement by which Realty Equities Westchester, denominated as the "owner and holder of the note," agreed to sell to Royal National the Belk note and deed of trust for \$1,400,000 with the proceeds being applied to reduce the parent's, Realty Equities Corporation, outstanding indebtedness to Royal National.

On 15 May 1972 Royal National Bank merged with Security National Bank of New York with the assets of Royal National Bank merged into those of Security National. William R. Hadley, senior vice-president of Security National Bank (later a vice-president of Chemical Bank), was in charge of the Belk note and deed of trust and was aware they had been given for balance of purchase price on real estate.

Belk was continuously delinquent on the payment of the note and received frequent notices from the holder that payments were due thereon. The last payment was made by Belk on 22 May 1974. From the period of 22 May 1974, through January of 1975, Belk received delinquency notices that the payments were due. In addition, he received telegrams calling upon him to make payment. He did not respond to the telegrams. He was apprised weekly of the situation. No efforts were made by him to contact

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Security Bank or to cure the default. Belk Corporation did not have in its account sufficient funds to pay the delinquency. No efforts were made by Belk to obtain funds to make this payment.

Security Bank sent a telegram to Belk on 19 July 1974, demanding that payments be made on the May, June and July arrearages. Belk never responded to these telegrams.

On 31 December 1974, Security National engaged the services of Henry N. Pharr, II, a Charlotte attorney, for the purpose of instituting foreclosure proceedings against Belk who was at that time delinquent in its payments on the note. Pharr was substituted as trustee in place of Sol Levine.

On 15 January 1975 Pharr, without prior notice to Belk, instituted foreclosure proceedings by posting notice of sale at the courthouse on 15 January 1975 and caused legal ads to be run in the Charlotte Observer beginning 19 January 1975. The sale was set for 17 February 1975.

On 19 January 1975 substantially all the assets and liabilities of Security National Bank were sold to plaintiff, Chemical Bank, in a bulk transfer pursuant to an emergency declared by the U. S. Comptroller of Currency.

The transfer from Security to Chemical involved over a billion dollars in assets with an apparent net book value of \$120,000,000 to \$140,000,000. Chemical Bank paid approximately \$50,000,000 for these assets. The Belk note and deed of trust were placed on the books and records of Chemical Bank at a value of approximately \$750,000.

On 23 January 1975, a representative of Belk tendered a deed to the hotel property to Chemical. It was refused. On 1 February 1975 Belk closed the hotel in the face of continued publication of foreclosure in the newspaper, plaintiff's refusal of defendant's tender of deed and plaintiff's refusal to answer defendant's inquiry as to what should be done with the hotel business operating on the premises.

On the sale date, 17 February 1975, the trustee postponed the sale for one week under instructions from Chemical, alleging as grounds the opportunity for additional bidders to examine the property and secure a better sales price. The trustee petitioned and secured a court order for this postponement.

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On 24 February 1975, the second scheduled sale date, the trustee withdrew the property from sale without offering it for bids and without inquiring of the persons present if any were interested in bidding on the property. No court order was obtained for this action.

Defendant contended in the trial court that plaintiff was barred from suing on the note because of the initiation of foreclosure proceedings (constituting an election of remedies) and because of G.S. § 45-21.38. Defendant also contended that plaintiff had wrongfully, willfully, recklessly and without regard for the defendant's rights under the deed of trust instituted foreclosure proceedings and thereby damaging defendant and entitling him to recover from the plaintiff. Plaintiff contended that G.S. § 45-21.38 did not apply for several reasons (citing theories of waiver, estoppel, guaranty) and further argued that it had not made an election of remedies by instituting foreclosure proceedings and that the institution and withdrawal of foreclosure proceedings was not wrongful or in any way detrimental to defendant.

Upon the foregoing facts and contentions, the trial court, by order dated 22 February 1978, made the following declarations and conclusions of law:

1. The plaintiff has a legal interest in the Note and Deed of Trust and standing to bring this action.

2. The plaintiff's complaint constitutes a proper claim for declaratory judgment and the court has jurisdiction to render a declaratory judgment with respect to the questions set forth in the complaint.

3. The court declares as a matter of law the following:

- (a) G.S. Sec. 45-21.38 of the North Carolina General Statutes does not apply to the Note and Deed of Trust.

- (b) The plaintiff is entitled to bring an action against the defendant to obtain judgment on the Note, which action and judgment would not constitute an election of remedies that would prevent the plaintiff from simultaneously or subsequently foreclosing the Hotel under the Deed of Trust.

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(c) The plaintiff has not completed a foreclosure sale of the Hotel under the Deed of Trust through the commencement of the foreclosure proceeding by Security Bank and the plaintiff's subsequent withdrawal of that proceeding. The plaintiff has not elected its remedies through the commencement and withdrawal of the foreclosure proceeding, and it is not thereby precluded from suing on the Note and simultaneously or subsequently foreclosing the Hotel under the Deed of Trust.

The court then denied defendant's motion to dismiss, declared the rights of the parties to be as set out above, and denied all parties' motions for summary judgment without prejudice. As the allegations and prayers for relief of plaintiff's complaint, and defendant's responses to same, had been made tentatively and *in limine* pending the outcome of the declaratory judgment proceeding, both parties were given additional time to replead the action, and to reassert such motions for summary judgment as would be proper to the posture of the action. From this order, defendant appeals, assigning error.

*Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Mark R. Bernstein, Fred T. Lowrance, and J. William Porter, for the plaintiff.*

*Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, by Maurice A. Weinstein, T. LaFontine Odom, and L. Holmes Eleazer, Jr., for the defendant.*

MARTIN (Robert M.), Judge.

We note at the outset that, according to an addendum to the record filed by the parties, the property in question has been sold by mutual consent of the parties, mootng any discussion of foreclosure on these facts. We also have noted the opinion of our Supreme Court in *Ross Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), reversing the ruling of this Court in the same case at 37 N.C. App. 33, 245 S.E. 2d 404 (1978). Under *Ross Realty*, it is clear that where a mortgage or deed of trust is executed by a vendee to secure to the vendor the balance of the purchase price of real property, the vendor is limited, in the event of default by the vendee, to the security and may not sue upon the note. Accordingly, in the case before us, if the note sued upon is

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determined to be a purchase money note, plaintiff's recovery will be limited to the proceeds identifiable under the sale of the hotel property. Therefore, the principal question for our review is whether the trial judge ruled correctly when he determined that G.S. § 45-21.38 did not apply to the instant transaction. We conclude that he did not rule correctly and reverse the order entered below.

Plaintiff vigorously contends that the anti-deficiency statute is not applicable to this transaction for several reasons. First, plaintiff argues that the note executed by defendant was not marked as a "purchase money note" and therefore does not conform to the statutory prerequisites for asserting G.S. § 45-21.38 as a defense. Second, plaintiff contends that its rights are as those of a holder in due course, and that therefore no defenses to the note may be asserted against it. And third, plaintiff contends that defendant, through his actions, has waived the protection of the statute and is estopped from asserting it as a defense.

Defendant controverts all of these assertions by plaintiff, contending that the note was adequately identified as a purchase money note, that no holder in due course status may be found to exist on plaintiff's part, and that he has not waived or by his conduct estopped himself from asserting the benefits and protection of the anti-deficiency statute; he argues further that the very nature of N.C. Gen. Stats. § 45-21.38 prevents any waiver or estoppel from effectively acting to remove him from its protective umbra. Defendant also contends that the second proviso of the statute (which makes a seller liable for any deficiency judgment recovered against a purchaser where the instruments evidencing and securing the debt were prepared under the seller's supervision, the instruments secured what in fact was a purchase money obligation, and the identifying notation of "Purchase Money" was not included on the face of the instruments) will make plaintiff liable for any deficiency in any event, even if the note is determined not to be a purchase money note, since the seller (Charlotte Venture Corp.) caused to be prepared all of the instruments pertinent to the transaction now before us and the protection of the second proviso of the statute is applicable to the assignees of the seller.

[1] It is a long-standing rule governing related written instruments executed contemporaneously that they are to be con-



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sidered as one instrument and are to be read and construed as such to determine the intent of the parties, provided the instruments are not contradictory. This rule is applicable to notes and deeds of trust. *See generally* 11 Am. Jur. 2d Bills and Notes, § 70; 55 Am. Jur. 2d Mortgages, § 176. This proposition has been supported in North Carolina. *See Frye v. Crooks*, 258 N.C. 199, 128 S.E. 2d 257 (1962) (holding that cross-reference from note to deed of trust and vice versa were sufficient to incorporate due date from deed of trust into note); *Gambill v. Bare*, 32 N.C. App. 597, 232 S.E. 2d 870, *rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977) (suggesting that purchase money nature of debt may be shown on either note or deed of trust). In view of the liberality of interpretation that our Supreme Court has indicated to be appropriate in effecting the Legislature's intent in enacting N.C. Gen. Stats. § 45-21.38, we hold that where a note and deed of trust cross-refer to each other, and incorporate each other by reference, and only one of the documents clearly indicates the purchase money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction. Therefore, nothing present or absent from the face of the note now before us will serve to block the applicability of N.C. Gen. Stats. § 45-21.38 to it.

Having thus determined that the provisions of N.C. Gen. Stats. § 45-21.38 are applicable to the note, we must determine if any of the actions or conduct of the defendant will serve to remove him from its protection. Plaintiff has contended that, even should the statute otherwise be found applicable, application of it to the specific facts before us would be improper, citing theories of waiver, estoppel and guaranty. We do not agree and find, for the reasons stated below, that defendant has not removed himself from the protective umbra of the anti-deficiency judgment statute.

[2] We are of the opinion that the benefits of this statute cannot be waived. As interpreted by our Supreme Court in *Ross Realty*, it effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to satisfy the indebtedness secured. The protection it offers is afforded to all purchasers of realty who secure any part of the purchase price with a deed of trust on the realty they are purchasing. We are persuaded that

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this protection was enacted as an expression of public policy by the 1933 General Assembly. Considering the depressed state of the economy at that time, and also looking to the chaos which could have occurred upon the wholesale foreclosure of deeds of trust followed by executions upon deficiency judgments, leaving a potentially substantial group of purchasers without their land or adequate general assets to subsist, we have no difficulty in concluding that the protection of the anti-deficiency judgment statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived (or which purchasers could be compelled to waive as a prerequisite for obtaining financing). We are buttressed in our conclusion by our Supreme Court's analysis of the intent of N.C. Gen. Stats. § 45-21.38 in *Ross Realty*, and also by our careful study of an article quoted in that opinion, Currie and Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 Duke Law Journal 1. As to waiver of benefits conferred by statutes designed to protect public interests, the law is well settled. Ordinarily, effect will not be given to an attempted waiver of a protective public policy by an individual. "A waiver is not . . . allowed to transgress public policy or morals." *Memorial Hospital v. Wilmington*, 237 N.C. 179, 190, 74 S.E. 2d 749, 757 (1953). Also see generally 28 Am. Jur. 2d *Estoppel and Waiver* §§ 161 and 164; 3 *Powell on Real Property*, § 474 at 696.55. *Ector v. Osborne*, 179 N.C. 667, 103 S.E. 388 (1920), cited by plaintiff, is wholly distinguishable on its facts and is simply not applicable. Waiver by implication is not looked upon with favor by the courts; in fact, every reasonable intendment will be indulged against the waiver of fundamental rights, the courts never presuming acquiescence in their loss. See 28 Am. Jur. 2d *Estoppel and Waiver*, § 173; c.f. *Bunn v. Braswell*, 139 N.C. 135, 51 S.E. 927 (1905). We find no express waiver of the statute's protection anywhere in the record; nor do we find any facts of record sufficient to imply such a waiver. Even if an attempted waiver could be said to exist, however, it would be void notwithstanding the form it was in because we conclude that the allowance of any waiver would defeat the legislative purpose of N.C. Gen. Stats. § 45-21.38 and would attempt, by private action of parties, to confer upon the courts that jurisdiction over the question that was expressly taken away by the enactment of the statute. See *Bullington v. Angel*, 220 N.C. 18, 16 S.E. 2d 411 (1941). We therefore

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sustain defendant's exceptions to this portion of the trial court's order.

[3] For many of the same reasons that the statute's protection may not be waived, the doctrine of estoppel will not deprive defendant of his right to assert N.C. Gen. Stats. § 45-21.38 in his defense to a deficiency proceeding. Were a purchaser able, either by his action or by contract, to deny to himself the protection afforded him by the legislature, it would be to allow by indirection that which was directly forbidden. Plaintiff contends that the "estoppel certificate" executed by defendant to Nyhaco denies him the privilege of asserting *any* defense to the note. That certificate provided, in pertinent part, that "there [were] no defenses, counterclaims or offsets to the above mentioned deed of trust or note secured thereby [the purchase money note and deed of trust being the same which are the crux of this litigation]." It was signed by Henderson Belk personally. The instrument twice refers to the "purchase money deed of trust and note." As to many possible defenses which might ordinarily be asserted to a suit on a note, no doubt this certificate would be an efficacious bar. However, in order to avoid the frustration of the intent of the legislature in enacting the anti-deficiency statute as it has been heretofore construed by our courts, we hold that such a writing will not operate as an estoppel so as to bar its assertion.

Additionally, there appear no grounds of record upon which to base a claim of estoppel in favor of plaintiff in any event. The certificate referred to clearly gave notice as to the purchase money nature of the transaction. Unlike the note and deed of trust, the certificate was never transferred to the successive assignees, stopping in the chain of assignments at Nyhaco. There is absolutely no evidence of record to indicate that plaintiff in any way knew of the certificate or had any reliance upon it. It has always been the law of this State that an essential element of provable estoppel is the "reliance upon the conduct of the party sought to be estopped." *Hawkins v. Finance Co.*, 238 N.C. 174, 178, 77 S.E. 2d 669, 672 (1953). Plaintiff's answers to interrogatories submitted by defendant show that plaintiff was simply unaware of the existence of the certificate at the time it acquired the note and deed of trust executed by defendant. We find no authority for the proposition that such an estoppel in favor of the holder of the note would be transferred to successive purchasers

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of the note; the authority cited by plaintiff (derived chiefly from cases involving covenants and questions of title to real property in a chain of conveyances) is not applicable. Accordingly, we conclude that no estoppel operates to preclude defendant from asserting the defense of the anti-deficiency statute.

[4] Finally, we consider whether defendant's guaranty of the obligations of Belk Hotel Corporation under the lease/purchase agreement will take him out from under the protection of the anti-deficiency statute, making him liable for the entire face amount of the note. A guaranty is defined as the promise of one person (or entity) to answer for the debt of another. So long as the Belk Hotel Corporation retained the rights and interests under its agreement with Charlotte Venture, Belk's guaranty would operate to make him personally liable for the obligation of the corporation, and his promise to pay would be independent of and in addition to the promises made by Belk Hotel Corp. See *Southern National Bank of North Carolina v. Pockock*, 29 N.C. App. 52, 223 S.E. 2d 518; *certiorari denied* 290 N.C. 94, 225 S.E. 2d 324 (1976). However, when the option to purchase was assigned to Belk personally and he exercised it, taking title to the hotel property in himself and personally signing the note and deed of trust, there was no longer any "other" whose obligation was being guaranteed; all of the obligations and promises merged in defendant who became an ordinary purchaser of realty who financed his acquisition of the property by a purchase money note and deed of trust. Defendant, having executed the note and proffered security for it, had made all the "guaranty" of the indebtedness he was able or required to do. Although the lease and option to purchase agreement contained language that would hold defendant to his guaranty contract even though the lease and option agreement were assigned, logically that language would contemplate only assignments to persons or corporations other than defendant, since, as stated above, the extent to which an individual can "guarantee" his own obligation is defined by the ordinary rules applicable to vendor and purchaser. Therefore, N.C. Gen. Stats. § 45-21.38 remains applicable. (Arguably, defendant could have asserted the statute in defense to a suit on the guaranty even if he had not taken title and executed the note personally, in that Belk Hotel Corporation (or any other person) as purchaser would have the same rights under the statute as he does and

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even a guarantor could likely assert that defense. *See Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)).

Defendant's appeal from the denial of his motion for summary judgment on his tenth defense and counterclaim, asking for a set-off equivalent to any deficiency determined to be recoverable by plaintiff (pursuant to the second proviso of N.C. Gen. Stats. § 45-21.38, which provides:

. . . further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.)

is made moot by our holding above, and we therefore do not consider it.

Plaintiff's cross-appeal from the denial of its motion for summary judgment on defendant's eleventh defense and counterclaim (which sought recovery for plaintiff's wrongful termination of foreclosure of the hotel property) and defendant's appeal from denial of his motion for summary judgment on the same defense and counterclaim are interlocutory and are therefore dismissed. *See Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970).

The order of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges MITCHELL and WEBB concur.

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STATE OF NORTH CAROLINA v. ARTHUR LUTHER MAY

No. 7920SC84

(Filed 5 June 1979)

**1. Searches and Seizures § 23— probable cause for search warrant**

An officer's affidavit was sufficient to establish probable cause for the issuance of a warrant to search defendant's grocery store for stolen items where the affidavit stated that the officer observed two individuals loading boxes of frozen meat into their car behind defendant's grocery at night and that the officer thereafter determined that the meat had been stolen that morning during a break-in of a residence.

**2. Criminal Law § 34.6— other crimes—competency to show guilty knowledge**

In this prosecution for feloniously receiving stolen goods, testimony by one of the thieves that he had been to defendant's store at least 50 times to sell him merchandise was competent to show that defendant knew or had reasonable grounds to believe that the goods he received on the occasion in question had been stolen.

**3. Receiving Stolen Goods § 5.1— sufficiency of evidence**

The evidence was sufficient for the jury in a prosecution for feloniously receiving stolen goods where one of the thieves testified that he and another stole guns, meat, jewelry and other items and delivered them to defendant, that defendant many times had purchased merchandise with no questions asked, and that defendant had observed conduct of the thief obviously indicating a desire to avoid the police and legitimate customers in defendant's store, and where officers testified that a stolen gun was found under defendant's bed and stolen meat was found in a locked ice box on his premises.

**4. Criminal Law § 114.2— failure to recapitulate evidence—subordinate feature—absence of request**

In a prosecution for receiving stolen goods in which the State presented overwhelming evidence that a stolen gun was found beneath defendant's bed, including identification testimony by the owner of the gun, the trial court did not express an opinion on the evidence in failing to summarize testimony by one of the thieves on cross-examination by defendant that he took all of the stolen guns when he left defendant's store, it having been incumbent on defendant to request an instruction on this subordinate feature of the evidence if he desired such an instruction.

**5. Receiving Stolen Goods § 6— instructions—awareness of receipt of property**

In a prosecution for feloniously receiving stolen goods, including a quantity of meat, the trial court's mandate to the jury was sufficient without requiring the jury to find that defendant knew the thief had left the meat on his premises, since it is implicit that in order to receive property, knowing or having reasonable grounds to know it was stolen, one must be aware that he has actually received the property, and since all the evidence tended to show that defendant knew he had the meat.

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**6. Receiving Stolen Goods § 1— elements—ownership of stolen goods**

Proof of ownership of the stolen property is not an essential element of the crime of receiving stolen goods.

**7. Criminal Law § 122.2— instructions urging verdict—no coercion of verdict**

The trial judge did not coerce a verdict when he encouraged the jury to reconcile its differences while carefully admonishing the jurors not to surrender their conscientious convictions.

APPEAL by defendant from *Mills, Judge*. Judgment entered 12 September 1978 in Superior Court, STANLY County. Heard in the Court of Appeals 25 April 1979.

Defendant was tried and convicted upon an indictment charging him with feloniously receiving one shotgun and other personal property including three packages of meat, having a value of less than \$200, knowing or having reasonable grounds to believe the property to have been feloniously stolen as the result of a felonious breaking and entering with intent to commit larceny. Judgment was entered sentencing defendant for a period of not less than six months nor more than ten years.

The evidence tends to show the occurrence of the following sequence of events: On 27 April 1978 around 9:30 a.m., David Lawson and Mike Fidler drove to the Millingport section of Stanly County to break into a house. They drove to the residence of Mr. and Mrs. Joe H. Vick and entered the house by forcing open a sliding glass door with a tire tool. Lawson testified to taking a .410 gauge single-barrel automatic shotgun, two rifles, a police scanner, jewelry, and packages of frozen meat packaged in brown paper and labeled "Thompson & Son". As soon as the items were loaded into the trunk of Lawson's car, he proceeded to the Lakeview Grocery on Centergrove Road near Kannapolis. Defendant was proprietor of that store and maintained a residence in the rear portion of the building. Lawson took the goods to defendant because of a previous arrangement wherein defendant agreed to buy merchandise with no questions asked and regardless of from where it came.

Lawson entered the store, waited until a customer left, and informed defendant that he had some rifles to sell. Lawson and Fidler brought the items into the store and defendant agreed to pay \$200 for everything. However, before defendant could pay

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Lawson, a police car drove by the store. Lawson left in his car after telling defendant that he would return for the money. Lawson and Fidler drove off in their car to get rid of the jewelry. When they started to return to the store, they were stopped briefly by the police and released. They finally returned at 4:30 p.m. intending to reclaim everything but the meat. Again they returned at 8:30 p.m., this time in Fidler's automobile, to get the frozen meat. As Lawson and Fidler were loading the meat into their car, they were "picked-up" by Detective Yow of the Kansas City Police Department.

Detective Yow found Lawson and Fidler in possession of two boxes containing frozen meat labeled "Thompson & Son". Lawson and Fidler both were taken to the police department where Yow discovered that the meat had come from a break-in in Stanly County. After meeting with detectives from the Stanly County Sheriff's Department, Yow secured a search warrant and returned to the defendant's business around 11:00 p.m. accompanied by the detectives from Stanly County. The warrant was read, and the premises were searched. A .410 gauge shotgun, fitting the description of one of the stolen guns, was retrieved from beneath defendant's bed. Three packages of meat labeled "Thompson & Son" were located in a locked ice chest sitting just outside the front door of defendant's store.

Defendant appeals from the entry of judgment on the jury verdict of guilty as charged and assigns error to rulings and instructions of the trial court.

*Attorney General Edmisten, by Associate Attorney Benjamin G. Alford, for the State.*

*Robert M. Davis for defendant appellant.*

MORRIS, Chief Judge.

Defendant presents five arguments in support of his nine assignments of error. We will address each assignment of error in the order in which they are discussed by the parties in their briefs.

[1] The validity of the search warrant, which was the means of retrieving the .410 gauge shotgun and the frozen meat from defendant's store, has been challenged on the grounds that the af-



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fidavit and application for the search warrant failed to establish probable cause for the issuance of the warrant. The application provides in part as follows:

"On April 27, 1978 at 3:15 P.M., I, Det. Lt. I. T. Yow received information that Otto May, owner of Lakeview Grocery in Kannapolis, N.C. was receiving stolen merchandise. I have received information for the past 3 years of this same nature."

Defendant correctly cites *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972), as authority that the above information could not properly serve as a basis for a finding of probable cause to issue a search warrant. See also *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). The basis for rejecting such hearsay information was established in the decisions *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). Those cases require that when information contained in an affidavit comes from an unidentified informant, underlying facts and circumstances which support the informant's reliability and credibility must be set forth in the application. However, this Court has held that such information contained in the affidavit does not render the entire application invalid if, in fact, there are other factual matters contained in the application which alone would support a finding of probable cause. *State v. McLeod*, 36 N.C. App. 469, 244 S.E. 2d 716 (1978), cert. denied, 295 N.C. 555, 248 S.E. 2d 733 (1978). This Court's opinion, expressed by Judge Mitchell, noted that under such circumstances the so-called second prong of the *Aguilar* test was not applicable. He stated:

"Even though the affidavit contained some information which may have come from an unidentified informant, we think the credibility of the informant or the reliability of such information need only be shown when it is necessary that such hearsay be relied upon in finding the requisite probable cause." 36 N.C. App. at 474, 244 S.E. 2d at 719.

Therefore, we must determine whether the remaining information provided in the application is sufficient to establish probable cause for the search.

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That portion of the application for the search warrant outlining the facts to establish probable cause appears in the record as follows:

"The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: On April 27, 1978 around 8:30 P.M., Sgt. L. G. Heintz and myself, Lt. I. T. Yow of the Kannapolis Police Department was checking the Lakeview Grocery on Center Grove Rd., in Kannapolis, N.C. As we pulled into the parking lot of the grocery I, Lt. Yow, observed a 1972 Chevrolet, 2S, color Grey with a black stripe down the middle of the top of the car, bearing N.C. tag #EDE-32, parked at the rear of the west side of the building. The two white males outside of the car were observed by Heintz and myself, Yow. Sgt. Heintz backed up and we talked with a John Michael Fiddler and a David Lawson who were trying to put two boxes in the car. The boxes were full of frozen meat, the meat was identified by Det. Roger Lowder, Det. Loy Ingold and Det. Mike Lowder of the Stanly County Sheriff Department in Albemarle, N.C. as being stolen from a house breaking and entering and larceny occurring in Stanly County, N.C., the victim being Joe H. Vick of Rt. 3 Albemarle, N.C. in the Millingport area of Stanly County, N.C. between 8AM and 5 PM on April 27, 1978. The meat identified by the Stanly County Detectives bore the markings of Thompson and Son Processing of Albemarle, N.C. #763.

On April 27, 1978 at 3:15 P.M., I, Det. Lt. I. T. Yow received information that Otto May, owner of Lakeview Grocery in Kannapolis, N.C. was receiving stolen merchandise. I have received information for the past 3 years of this same nature."

In our opinion, the facts within Detective Yow's knowledge, in the absence of the reference to information he had received suggesting that defendant had been receiving stolen goods for the past three years, are sufficient to establish probable cause for the issuance of the search warrant. It is firmly established "that only the probability, not a prima facie showing, of criminal activity is the standard of probable cause." *Spinelli v. United States*, 393 U.S. at 419, 89 S.Ct. 584, 21 L.Ed. 2d at 645. Moreover, this Court noted in quoting the United States Supreme Court in *Aguilar v. Texas*, *supra*, that:

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"[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' . . . and will sustain the judicial determination so long as 'there was substantial basis for [a magistrate] to conclude that [the items for which the search was authorized] were probably present. . . .'" *State v. McLeod*, 36 N.C. App. at 473, 244 S.E. 2d at 719.

Officer Yow personally observed two individuals loading merchandise into their car behind a closed grocery at night. There is no dispute that he was justified in apprehending those individuals under such circumstances. He thereafter determined that the merchandise was recently stolen from a residence in Stanly County. The circumstances strongly suggested that the meat had come from the grocery. The meat was still frozen. A grocery commonly has freezers. There was no mention of any other vehicles in the vicinity from which the meat could have been transferred. Furthermore, Detective Yow also learned from the Stanly County Sheriff's Department that a quantity of such meat with the same distinguishing wrapping had been taken in the Stanly County break-in. These facts taken together amply support the conclusion that it was probable that other stolen frozen meat, and probably some of the other items taken in the same break-in, could be found in the grocery. We emphasize that the application of the probable cause standard must be practical and not abstract. This also constitutes the position of the United States Supreme Court, which has stated:

"If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United*

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*States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. 2d 684, 689 (1965).

[2] Defendant next assigns error to the admission, over objection, of certain testimony. In his brief, defendant argues that the testimony of David Lawson that he had been to defendant's store at least 50 times to sell him merchandise was incompetent and immaterial. We disagree. The rule and its exceptions with respect to the admissibility of evidence of previous crimes which are brought out in the State's case in chief is well established, although sometimes difficult of application. The classic explanation of the rule and its exceptions is found in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), and need not be further elaborated. The evidence elicited from the witness Lawson falls within the following exception:

"3. Where guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused." 240 N.C. at 175, 81 S.E. 2d at 367.

The fact that Lawson and others had previously sold merchandise to defendant, the intimation clearly being that such goods were stolen, was clearly relevant to prove that defendant knew or had reasonable grounds to believe that the goods he received from Lawson and Fidler had been stolen. Such guilty knowledge is one of the essential elements of the crime of receiving stolen goods, G.S. 14-71, the lack of which defendant tried to prove in the cross-examination of the witness Lawson. The evidence that defendant on numerous occasions purchased merchandise, as Lawson stated, with no questions asked and regardless of from where it came tends to indicate that defendant had established a pattern of purchasing stolen goods and had at least reasonable grounds to believe the goods he received from Lawson were stolen. Similar evidence was held to have been properly admitted under substantially similar circumstances in *State v. Newton*, 25 N.C. App. 277, 212 S.E. 2d 700 (1975). We so hold here.

[3] Defendant produced no evidence in his behalf, moved for dismissal of the action at the close of the evidence, and assigns er-

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ror to the trial court's denial of that motion. On appeal, defendant explains the basis for that motion: (1) That the evidence obtained by the search should have been excluded, (2) that there was no evidence defendant purchased the items, and in fact Lawson took back most of the merchandise, and (3) that there was no evidence defendant knew that Lawson had left any meat around the building.

We need not elaborate on the well-established rule that, in reviewing the denial of a motion to dismiss a criminal action, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978). There must be, however, substantial evidence of each element of the offense charged. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). The essential elements of the offense of receiving stolen goods in violation of G.S. 14-71 are: (a) the stealing of the goods by someone other than the accused, (b) that the accused received the goods knowing or having reasonable grounds to believe the same to have been feloniously taken, and (3) continued possession or concealment with a dishonest purpose. *Cf. State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 92 S.Ct. 2409, 32 L.Ed. 2d 674 (1972) (decided prior to 1975 amendment). The evidence, taken in the light most favorable to the State, establishes each essential element. The confessed thief's testimony concerning the larceny of the goods and delivery of the goods to the defendant sufficiently establishes the first element of the crime. The testimony that defendant many times had purchased merchandise with no questions asked, in addition to defendant's observation of the thief's conduct obviously indicating a desire to avoid the police and legitimate customers, is sufficient to take the question of guilty knowledge to the jury. And finally, the discovery of the fruits of the break-in recovered from beneath defendant's bed and within a locked ice box on his premises, pursuant to a valid search, is sufficient evidence of the third essential element of the crime to go to the jury. The trial court properly denied the motion to dismiss.

[4] Defendant next assigns error to portions of the jury instructions. He first contends that the trial court expressed an opinion upon defendant's guilt, in violation of G.S. 15A-1232, by failing to summarize evidence elicited by defendant on cross-examination

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attempting to cast doubt upon the identification of the gun found beneath defendant's bed. He contends that the trial judge's instructions improperly presumed that the gun found under defendant's bed had been stolen in the break-in in Stanly County. However, the only evidence elicited by defendant which placed any doubt upon the identification of the gun was the witness Lawson's testimony that when he went back to the store he took all of the guns he had left there, that it was his intention not to leave anything. This testimony was in the face of overwhelming identification testimony by the owner of the stolen gun and the officers who found the gun beneath defendant's bed. If defendant was concerned with having this subordinate feature of the evidence emphasized to the jury, it was incumbent upon him to bring it to the trial judge's attention before the jury was sent to deliberate on the case. The trial judge is only required to state the evidence to the extent necessary to apply the law to the evidence. G.S. 15A-1232. Failure to bring the objection to the trial judge's attention will be deemed a waiver of that objection. *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234 (1976), *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). This assignment of error is overruled.

In support of his assignment of error No. 6, defendant argues that the trial court inaccurately summarized the evidence, that he failed to mention that the witness Lawson's credibility had been attacked due to his admission that he previously had perjured himself, and that the court again presumed the gun found beneath defendant's bed was the stolen gun. First, it is clear from the record that the court's summary was accurate. The court stated "that the meat and shotguns were left with Mr. May for a purchase price of some \$200.00." This fact is uncontradicted in the evidence. Defendant characterizes the court's statement as an indication that \$200 was actually exchanged. There is no basis for this position in the record. Defendant again objects to the trial court's failure to bring out subordinate features of the case which he wanted emphasized. It suffices to say, in light of our previous discussion, that defendant failed properly to request the judge to do so.

For similar reasons we find no merit in defendant's seventh assignment of error which assigns error to other portions of the charge.

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[5, 6] Assignment of error No. 8 is directed to the mandate to the jury. We find that the instruction accurately states the law. Defendant's contention that the instruction fails to require the jury to find that defendant knew Lawson had left the meat, or that the items found were the same items stolen from the Vick residence, cannot be sustained. It is implicit that in order to receive property, knowing or having reasonable grounds to believe that it was stolen, one must be aware that he actually has received property. It has been said that "[r]eceiving' necessarily implies consenting to receive". *State v. Wynne*, 118 N.C. 1206, 1207, 24 S.E. 216, 217 (1896). The evidence presents no inference other than the fact that defendant knew he had the meat. The officers, in searching the premises, had to obtain a key from the defendant for access to the freezer. Again, if defendant had wanted a special instruction on this aspect of the case, he was required to tender a request for such an instruction. *See State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). Defendant also argues that the court erred in failing to require the jury to find that the allegedly stolen property belonged to the Vicks, the victims of the break-in. There is, however, no such requirement. Proof of ownership of the stolen property is not an essential element of the crime of receiving stolen goods.

[7] Finally, defendant argues that the trial court coerced the jury into reaching a verdict. We cannot agree. The instruction appears in the record as follows:

"COURT: Now, before the recess I let you go for lunch. You all indicated that you were not able to reach an agreement. Now, I presume that you ladies and gentlemen realize what a disagreement is. It means, of course, that it will be some more time of the court to be consumed in the trial of this action. Now, I don't want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions. You have heard the evidence in the case. A mistrial, of course, will mean that another jury will have to be selected to hear the case and evidence again. The court recognizes the fact that there are sometimes reasons why jurors cannot agree. The court wants to emphasize the fact that it is your duty to do whatever you can to reason the matter over together as reasonable men

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and women and to reconcile your differences if such is possible without the surrender of conscientious convictions and to reach a verdict. Now, I will let you resume your deliberations and see if you can."

The trial judge encouraged the jury to reconcile its differences while carefully admonishing them not to surrender their conscientious convictions. Although the jury thereafter returned in less than 20 minutes with a guilty verdict, based upon the record before us, we do not find any coercion by the trial judge. Compare the approved instructions found in *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977), and cases cited therein.

For the foregoing reasons, we find in defendant's trial

No error.

Judges HEDRICK and WEBB concur.

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STATE OF NORTH CAROLINA v. DAVID WILLIAM CHAMBERS, JAMES C. HICKS, JR., BILLY DUNN

No. 793SC22

(Filed 5 June 1979)

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

Officers had probable cause to believe that one defendant's car contained marijuana and a warrantless search of the car was proper where the officers knew that one defendant dealt in large quantities of marijuana; an undercover agent had witnessed a sale of marijuana by one defendant two and one-half months earlier; and just prior to the search in question, the officers observed defendants engaged in what any reasonably intelligent narcotics officer, under all the circumstances, would recognize as suspicious behavior and would believe to be another drug transfer.

Judge MARTIN (Harry C.) concurring.

APPEAL by the State of North Carolina from *Reid, Judge*. Order entered 18 August 1978 in Superior Court, PITT County. Heard in the Court of Appeals 3 April 1979.



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Defendants were indicted on charges of felonious possession of more than one ounce of marijuana. Prior to trial, all three defendants moved to suppress the evidence of the marijuana. At the suppression hearing, Detective Weatherington testified that in February, 1978, a confidential source told him that defendant Chambers was dealing in large quantities of marijuana and was using a gray Ford pickup. He frequented a residence at 113 East Ninth Street that was occupied by his girl friend. The informant called Chambers in Weatherington's presence and arranged for the purchase of a quarter pound of Columbian marijuana for \$100.00. Later that day, the informant met with Chambers who was driving a gray Ford pickup truck registered in his name. The informant got into Chambers' vehicle, and the informant later gave Weatherington a plastic bag containing marijuana. Weatherington observed this transaction but did not arrest Chambers.

On 18 April 1978, around 5:00 p.m., Weatherington saw Chambers drive the same truck into a service station lot. Chambers left his truck and met with defendant Dunn. Dunn removed a small object from his pocket and showed it to Chambers. Dunn got into his car and drove across the service station lot into an automobile agency parking lot. Dunn and defendant Hicks got out of the car and drove off with Chambers in his truck. Weatherington followed the truck but lost it in traffic.

Shortly after 10:00 that evening, Weatherington received a call at his office reporting that the truck was in front of the 113 East Ninth Street residence. Three men were seen leaving the residence and getting into the truck. The truck drove off and was later observed as it returned to the parking lot around 11:40 p.m. Detective Garrison, who was at the scene, testified that he saw the defendants remove a large dark-colored bag from the rear of the Chambers truck and put it into the trunk of the car. The officers went up to the defendants and Weatherington asked Dunn for permission to search the car. Dunn said that the car belonged to his mother and refused. Weatherington then told him that he believed marijuana was in the car and that he was going to conduct an emergency search. None of the defendants were arrested at this time. Dunn gave the car keys to Weatherington who unlocked the trunk and found the plastic bag containing almost ten pounds of marijuana. He also found a pistol in the glove compartment.

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On cross-examination, Weatherington testified that the parking lot was a mile and a half from the Pitt County Courthouse and that the magistrate was on duty twenty-four hours a day. None of the defendants tried to run or to resist the officers. He would have attempted to restrain them had they tried to flee. Weatherington had not received information about Dunn and Hicks from his informant and had not heard from his informant since February. He had no other information that a drug deal was in progress on that day.

The court made findings of fact substantially in accord with the evidence. The court concluded that Dunn's car was searched as it sat parked in a private lot under the control of the police officers. There was no opportunity for flight by the defendants or the removal of evidence. The court concluded that there was no probable cause for the search because any evidence of criminal activity on the part of Chambers occurred more than two months prior to the search and there was no information which would give rise to more than mere speculation or conjecture that Chambers was engaged in criminal activity. There was, therefore, no underlying factual basis for the search other than suspicion. The court also found that there were no exigent circumstances making it necessary to search the car without a warrant. The officers had control of the vehicle and ample time to obtain a warrant. Furthermore, the court found that Chambers had standing to contest the search of Dunn's car because of the allegation that Chambers had possession of the marijuana. The court, therefore, concluded that the motions to suppress should be granted. From this judgment, the State appealed.

*Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.*

*Williamson, Herrin & Stokes, by Milton C. Williamson and Mickey A. Herrin, for defendant appellee, Chambers; Dixon & Horne, by Phillip R. Dixon, for defendant appellee, Hicks; Blount, Crisp & Savage, by Nelson B. Crisp, for defendant appellee, Dunn.*

VAUGHN, Judge.

The issue presented in this case is whether the trial court erred in holding that the warrantless search of defendant Dunn's

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automobile was unconstitutional and, therefore, erred in granting the defendants' motions to suppress the evidence seized in the search. The general rule is that a valid search warrant must be obtained for every search or seizure. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). Nevertheless, there are certain exceptions. A search warrant is not required when the search is incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752 (1969); *State v. Allen*, *supra*. A warrant is also not required when the items seized are in plain view of an officer who is in a place where he has a legal right to be. *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977). Finally, a warrant is not required when officers have probable cause to search a vehicle and exigent circumstances make it impractical to obtain a warrant. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925); *State v. Allen*, *supra*. Since the defendants were not under arrest at the time of this search, and since the bag of marijuana was not in plain view, the only justification for this warrantless search would be that it was made with probable cause under exigent circumstances. We must determine, therefore, whether this exception to the search warrant requirement is applicable in this case.

The probable cause with exigent circumstances exception was first enunciated in *Carroll v. United States*, *supra*. In *Carroll*, officers stopped a vehicle on a highway running between Grand Rapids and Detroit, Michigan. Detroit was known as a major source of illegal liquors. Two and one-half months earlier, these officers attempted to purchase illegal liquor from the defendants. They met with the defendants to arrange the purchase but the defendants never delivered the merchandise. The officers did, however, notice the car defendants were driving. A few days later, they saw the defendants driving this same car on the highway between Grand Rapids and Detroit. They followed the car but the defendants got away. Over two months later they again saw the car on this same highway. The officers stopped the car and their search revealed illegal liquor. The Supreme Court upheld the validity of this search stating that

“if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is

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subject to seizure and destruction, the search and seizure are valid." *Carroll v. United States*, *supra*, at 149.

The Court made a distinction between goods subject to forfeiture stored in a dwelling house and like goods concealed in a movable vehicle where they could quickly be placed out of reach. In the latter situation, vehicles may be searched and goods seized without a warrant in circumstances which would require a warrant if a dwelling were to be searched. *See Chambers v. Maroney*, *supra*.

We first consider whether the officers in this case had probable cause to conduct the search of Dunn's car. In *Carroll*, the Supreme Court stated that probable cause exists "[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." (Citations omitted.) *Carroll v. United States*, *supra*, at 161. The Court noted that Detroit was a major supply area for illegal liquor, the officers were regularly patrolling that highway, they knew or had convincing evidence to make them believe that defendants were engaged in selling illegal liquor, and they had seen defendants in the same car on the highway over two months before the search in question. They held these facts and circumstances sufficient to find probable cause.

A situation similar to that in *Carroll* occurred in *Brinegar v. United States*, 338 U.S. 160 (1949) where defendant's car was searched and illegally imported liquor was found. The officers knew defendant had a reputation for hauling liquor, they knew he had been arrested five months earlier for hauling liquor and they had seen him load it on two other occasions. At the time of the search, defendant was driving on a highway between a known supply area and a likely market. Again, the Court held that these facts were sufficient to support a finding of probable cause. *See also United States v. Pretzinger*, 542 F. 2d 517 (9th Cir. 1976).

Our Supreme Court has held that observation of certain types of non-transparent containers, generally used to hold contraband, is one factor affording probable cause that the vehicle carrying such a container is transporting contraband. In *State v. Simmons*, 278 N.C. 468, 180 S.E. 2d 97 (1971), two deputy sheriffs, pursuant to a phone call, located defendant's car parked in an alley. While standing on the sidewalk, one of the deputies saw a

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cardboard carton containing plastic jugs sitting on the seat of defendant's car and two jugs sitting on the floor. He could not see the contents of the jugs. Both deputies testified that non-taxpaid liquor was often transported in this type of jug. The deputies seized the jugs without a warrant and found that they did contain non-taxpaid liquor. Defendant contended that since the contents of the jugs could not be seen, the deputies had no probable cause to believe that the jugs contained the contraband. The Court disagreed and held that the presence of the containers, known to be of the type regularly used to transport non-taxpaid liquor, could be one of the circumstances providing probable cause to believe that the vehicle involved was transporting non-taxpaid liquor.

In the present case, the facts and circumstances known to the officers at the time of the search provided probable cause for them to believe that Dunn's car contained marijuana. Weatherington knew that Chambers was dealing in large quantities of marijuana. Two and one-half months earlier, Weatherington witnessed a sale between Chambers and an informant in which a quarter of a pound of marijuana in a plastic bag was purchased. At that sale, Chambers was driving a gray Ford pickup truck. Just prior to the search in question, the officers observed Chambers engaged in what any reasonably intelligent narcotics officer, under all the circumstances, would recognize as suspicious behavior. They saw Chambers, a known drug dealer, drive to the lot of a gasoline service station in the same truck he had used in earlier drug sales. Chambers conducted no business with the station but was met, as if by design, by Dunn who emerged from a parked vehicle and allowed Chambers to inspect what he had been carrying in his right hip pocket. Hicks waited in the Dunn car. Some agreement having obviously been reached, both vehicles were then moved to the parking lot of an automobile agency. No business was conducted with the automobile agency. The Dunn car was left there, and the trio then departed in the same truck previously used by Chambers in his drug traffic. Weatherington attempted to follow but lost the trail. The Chambers truck was subsequently located, as expected, at the 113 East Ninth Street residence frequented by Chambers. The truck was then observed as it left that address and returned at nearly midnight to the automobile agency where the trio had left the

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Dunn vehicle. The officers then watched as defendants transferred the large dark bag from the back of the Chambers truck to the trunk of the Dunn vehicle. Certainly these circumstances were such as to give a person, however prudent and cautious, probable cause to believe that he had just witnessed another drug transfer by Chambers and thus justify an inspection of the bag he had just seen placed in the car trunk.

We now consider whether there were exigent circumstances making it permissible to search the car before obtaining a warrant. Defendants contend that since a magistrate was only a mile and a half away, Weatherington had the car keys, there were several officers present, the defendants did not attempt to flee, and the car was parked in an automobile agency parking lot instead of on the highway, the officers should have held the car and obtained a search warrant. In *Chambers v. Maroney, supra*, the Supreme Court stated

“For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.” *Chambers v. Maroney, supra*, at 52.

Thus, that the officers could have seized and held the car and then obtained a warrant, does not invalidate this search. The course the officers elected to follow was reasonable under the Fourth Amendment. *See also State v. Allen, supra*. Furthermore, it is of little consequence that the car was parked in an automobile agency lot instead of on a public street. In *Cardwell v. Lewis*, 417 U.S. 583 (1974), the seized vehicle was parked in a public parking lot. The defendant had been arrested and the police held the car keys and parking stub. Nevertheless, the Court saw no legal significance in these facts to distinguish the situation from *Chambers*. *See also Texas v. White*, 423 U.S. 67 (1975); *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). Although Dunn's car was not on the street immediately prior to the search, this does not mean that it would not be driven off if the police had left to obtain a search warrant.

We are not unaware of the decision of the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), but conclude that

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the case is distinguishable. In *Coolidge*, the police had long suspected that an inspection of the car would provide evidence of defendant's guilt. Defendant had had ample time to destroy any incriminating evidence. The car had been regularly parked in defendant's driveway, was not then being used for any illegal purpose, and defendant could not have gained access to the car after the police arrived. There was no indication that the defendant was about to flee. In summary, there were no circumstances justifying an immediate warrantless search. In the instant case, the marijuana had just been placed in the automobile and the driver was present. The officers' opportunity to inspect the bag in the trunk of the car was a fleeting one. It is obvious that it would have been lost unless they had either seized the automobile pending the issuance of a warrant or conducted an immediate search. The immediate search was reasonable; therefore, the judge erred when he allowed defendants' motions to suppress the evidence.

Having concluded that the search was proper, we need not consider the standing of Chambers and Hicks to contest the search of the Dunn vehicle. See *Rakas v. Illinois*, 99 S.Ct. 421 (1978).

The order allowing the motions to suppress is reversed. The cases are remanded for trial.

Reversed and remanded.

Judges ERWIN and MARTIN (Harry C.) concur.

Judge MARTIN (Harry C.) concurring.

I concur in the scholarly opinion of Judge Vaughn, writing for the Court. In addition, I find the trial court erred in sustaining the motions to suppress, for the reason that neither Chambers nor Hicks had any standing to question the validity of the search of the Chevrolet car in the possession of Dunn and belonging to his mother. They had no legitimate expectation of privacy with respect to the Dunn automobile. *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576 (1967). Chambers and Hicks have not asserted any property nor possessory interest in the Dunn car, and by their plea of not guilty deny any interest in the contraband seized. Fourth Amendment rights are personal rights which

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may not be asserted vicariously. *Alderman v. United States*, 394 U.S. 165, 22 L.Ed. 2d 176 (1969); *State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682 (1979).

The authorities on this subject have been recently analyzed in *Rakas v. Illinois*, --- U.S. ---, 58 L.Ed. 2d 387 (1978). North Carolina has long followed the results reached in *Rakas*. See *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506, cert. denied, 384 U.S. 1020 (1965); *State v. Jennings*, 16 N.C. App. 205, 192 S.E. 2d 46 (1972).

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STATE OF NORTH CAROLINA v. HERMAN LEE DICKENS

No. 797SC117

(Filed 5 June 1979)

**1. Criminal Law § 23.1— acceptance of guilty plea—duty of court**

G.S. 15A-1022(c) does not place a mandatory burden on trial courts to hear evidence and rule on its sufficiency to prove defendant guilty of the crime charged before accepting a guilty plea.

**2. Criminal Law § 23.1— acceptance of guilty plea—factual basis—sources of information**

The sources of information enumerated in G.S. 15A-1022(c) for determining whether there is a factual basis for a plea of guilty are not exclusive, it being the intent of the legislature for trial judges to have access to whatever information might properly be brought to their attention in making such determination.

**3. Criminal Law § 23.4— refusal to allow withdrawal of guilty plea**

The trial court did not abuse its discretion in refusing to permit defendant to withdraw his guilty plea after it had been accepted and sentence had been imposed.

Judge VAUGHN concurring.

Judge CLARK dissenting.

APPEAL by defendant from *Brown, Judge*. Judgment entered 27 November 1978 in Superior Court, NASH County. Heard in the Court of Appeals 1 May 1979.



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*State v. Dickens*

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Defendant was arraigned on eight separate counts of drawing and issuing a worthless check in violation of G.S. 14-107. Four of the warrants upon which the defendant was arraigned alleged that he had issued checks in amounts exceeding \$50 and the remaining four warrants alleged worthless checks in amounts less than \$50.

On 27 November 1978, the defendant, through court-appointed counsel, entered pleas of guilty to each of the charges. Before accepting the defendant's pleas of guilty, the trial court addressed the defendant to determine if his pleas of guilty were freely, voluntarily, and understandingly made. From the answers provided by the defendant to the questions enumerated on the "Transcript of plea, AOC-L, Form 290," the court made findings that there was a factual basis for the entry of the defendant's plea; that the defendant was satisfied with his counsel; and that defendant's pleas were the informed choice of defendant and made freely, voluntarily, and understandingly. The trial court concluded that defendant's pleas of guilty should be accepted by the court and ordered that the record indicate that defendant's guilty pleas were accepted. The court then entered judgment on the guilty pleas and sentenced the defendant to four consecutive six month terms; six months for each count alleging the issuance of a worthless check in an amount in excess of \$50. In addition, the court consolidated the four counts of issuing a worthless check in amounts of less than \$50 for judgment and sentenced the defendant to an active prison term of 30 days to run concurrent with the four six-month terms previously imposed.

On 28 November 1978, the defendant returned to open court and "in his own person" moved the court for leave to withdraw his pleas of guilty. Defendant argued that his previous pleas of guilty were entered by him on the understanding that his punishment would be the payment of a fine and restitution in the amounts of the several checks.

The following exchange then took place between Judge Brown and the defendant:

COURT: I understand you want to say something to the court?

DEFENDANT: I want to withdraw my guilty plea. I was told I was going to be allowed to make restitution.

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COURT: I asked you if you had agreed to plead as part of a plea bargain and you told me you had not.

DEFENDANT: I was told by Mr. Evans and he talked with Mr. Williams, and that was the other time, that I was going to be allowed to make restitution.

COURT: I also asked you, "Has anyone made you any promises or threatened you in any way to cause you to enter this plea? You answered that, "No."

DEFENDANT: I answered all questions no, sir, but I was told to answer those questions no, and definitely I would not have entered a plea of guilty if I had been aware of what was happening.

COURT: Your motion to withdraw your pleas of guilty is denied.

DEFENDANT: I give notice of appeal to the Court of Appeals.

COURT: All right, sir, who is going to represent you?

DEFENDANT: I don't know, sir, I don't have a lawyer and I am not in position to get one.

COURT: You mean you were willing to pay these checks off but you are not able to hire a lawyer to represent you on appeal.

DEFENDANT: Yes, sir, I was willing. My company was going to pay the checks off to keep me at work.

COURT: But your company is not willing to pay for your lawyer?

DEFENDANT: Well, right now I don't have a lawyer.

COURT: I will let him fill out an affidavit. I set a \$4,000.00 appearance bond. Let him fill out an affidavit and I will decide whether or not to appoint a lawyer.

Thereafter, the trial court appointed counsel for defendant who perfected this case on appeal.

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*State v. Dickens*

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*Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill and Deputy Attorney General William W. Melvin, for the State.*

*Ralph G. Willey III for defendant appellant.*

CARLTON, Judge.

The defendant's sole argument on appeal is that the trial court did not comply with subsection (c) of G.S. 15A-1022 before accepting his guilty pleas. That subsection provides as follows:

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the pre-sentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

[1] Defendant argues that this new subsection, not formerly required by case law, places a new and mandatory burden on our trial courts to hear evidence, and rule on its sufficiency to prove the defendant guilty of the crime charged, before accepting guilty pleas. He argues that it is necessary that the trial court discover "the motivation behind the plea." He further argues that the actual facts of the case must be heard by the trial court in order for it to be convinced that the defendant has committed the crime to which he is pleading guilty and that the plea is not tendered out of fear or promise of leniency. We do not think our legislature intended to place such an onerous burden on our trial courts. Indeed, we do not believe that anyone would seriously contend that our trial courts should begin providing a full trial on the merits for defendants who elect to enter pleas of guilty.

[2] Defendant argues that the record before us does not support the trial court's conclusion that there was a factual basis for the guilty pleas entered by the defendant. He refers to the five enumerated sources of information mentioned in G.S. 15A-1022(c),

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State v. Dickens

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stated above, and argues that this record contains no statement of facts by the prosecutor, defendant, defense counsel, or other witnesses or sources to support the court's finding of a factual basis for defendant's pleas. However, we note that the enumerated sources are not exclusive. That subsection specifically provides that the determination "may be based upon information including *but not limited to*" the five enumerated sources. Clearly, our legislature intended for trial judges to have access to whatever information might be properly brought to their attention in reaching this determination. Moreover, much of the information referred to in the enumerated items in the statute would not normally be included in a record. Indeed, much of it would not be recorded by the court reporter, nor should it be. We also find that much of the information received in the "transcript of plea" would be helpful to the trial judge in determining that there is a factual basis for the plea of guilty. We reject defendant's interpretation of this statute.

[3] The withdrawal of a guilty plea after its acceptance by the court and the imposition of sentence "is not a matter of right and a motion to be allowed to so retract is addressed to the sound discretion of the court." *State v. Crandall*, 225 N.C. 148, 150, 33 S.E. 2d 861, 862 (1945). "This is especially true when it appears that the plea was understandingly and intelligently made." *Padgett v. United States*, 252 F. Supp. 772 at 775, (E.D.N.C. 1965). Here, we hold that the trial court did not abuse its discretion. Defendant obviously understood the charges against him and all of his constitutional rights were fully afforded him.

This is another ridiculous example of the abuse of the power of appeal by an indigent defendant in a criminal case. The record before us shows affirmatively that defendant, who was represented by counsel, fully understood the charges against him, the nature and effect of his pleas of guilty, and the maximum sentences that might be lawfully imposed upon him if he entered such pleas, and that he entered the pleas of guilty to the offenses charged voluntarily, without threats or inducements or promises, and with a full understanding of the effect and possible consequences of such pleas of guilty. Following substantial sums expended on his behalf at the trial court level, defendant now has added to the taxpayers' burden by putting them to the expense of paying for the cost of the transcript of the trial proceedings, the

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cost of mimeographing the record and the brief filed for defendant, and the cost of paying a fee to the defendant's lawyer for his services on appeal in a situation in which there is absolutely no merit.

In the proceedings below, we find

No error.

Judge VAUGHN concurring.

Judge CLARK dissenting.

Judge VAUGHN concurring.

I concur in the disposition of this case as it relates to the merits of the issues addressed.

I have different thoughts, however, on whether defendant had the right to appeal. The motion to withdraw the guilty pleas was not made until the day after judgment was entered and commitment issued. Under former G.S. 15-180.2, there was no right of appeal from a plea of guilty. No such right is granted under the present provisions of G.S. 7A-27. G.S. 15A-1444(e) presently provides:

"Except as provided in G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari."

The Official Commentary to the foregoing recites:

"Subsection (e) carries forward the provisions of G.S. 15-180.2, a 1973 statute, which provide (d) only discretionary review when a defendant has plead guilty or entered a plea of no contest. The exception relates to review of determinations on motions to suppress vital evidence."

In my view, the exception allowing an appeal "when a motion to withdraw a plea of guilty or no contest has been denied" should be limited to those cases where the motion to withdraw

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the plea has been made prior to judgment as, for example, might be provided for under G.S. 15A-1024. If this notion is not correct, there is no longer any practical limitation on appeals after pleas of guilty because any defendant who is dissatisfied with the judgment entered pursuant to his plea can simply move to withdraw the plea and appeal if it is denied. I conclude that defendant should have petitioned for review by writ of certiorari or, perhaps, moved for appropriate relief under the provisions of Article 89 of Chapter 15A of the General Statutes.

Judge CLARK dissenting.

Withdrawal of a guilty plea should be permitted and the judgment of conviction set aside if the plea was improperly taken, if the defendant received ineffective assistance of counsel, or if the plea bargain was broken.

The plea was improperly taken if the trial court accepted the plea without first determining that there was a factual basis for the plea as required by G.S. 15A-1022(c). This statutory requirement is similar to Rule 11 of the Federal Rules of Criminal Procedure and probably was inspired by the decision in *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed. 2d 162, 91 S.Ct. 160 (1970), which denied a writ of habeas corpus based on the defendant's contention that his guilty plea was involuntary, emphasizing the fact that the trial judge heard strongly damaging evidence against the accused before accepting the plea. The factual basis for the court's determination should be in the trial record and, where the issue is properly raised, included in the record on appeal. In the case before us the record on appeal reveals that defendant was convicted after trial on all charges in the District Court. In my opinion this was a factual basis for the plea and supported the adjudication of the trial court.

Defendant's motion for withdrawal of his guilty plea was based on his allegation that there was a plea bargain and that he was instructed by counsel how to answer the questions asked by the trial judge. The Transcript of Plea includes the following:

"10. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the courts have approved plea bargaining and if there is one, you may

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advise me truthfully without fear of incurring my disapproval.

Answer: N/A

11. (If applicable) The District Attorney and your counsel have informed the court that these are all the terms and conditions of your plea: \_\_\_\_\_

(a) Is this correct? Answer \_\_\_\_\_

(b) Do you accept this arrangement?

Answer \_\_\_\_\_”

The defendant's motion to withdraw his plea was perfunctorily denied without hearing. In my opinion the trial court erred in failing to conduct a hearing to determine whether withdrawal of the guilty plea should be permitted, and I would remand for that purpose. See *Edmondson v. State*, 33 N.C. App. 746, 236 S.E. 2d 397 (1977).

From many years of experience as a trial judge, I am aware that only in rare cases is there merit in a defendant's claim after sentence that his plea of guilty was not knowingly and voluntarily made. Nevertheless, the importance of protecting the innocent and insuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts.

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BETTY KEZIAH SMITH v. DOUGLAS RALPH STATON AND COY MUCKLE SMITH

No. 7820SC470

(Filed 5 June 1979)

**1. Automobiles §§ 70, 75.2— truck blocking highway— warning to motorists— contributory negligence in striking truck— directed verdict improper**

In an action to recover for injuries sustained by plaintiff when she collided with defendants' logging truck, the trial court erred in directing verdict for defendants where the evidence presented questions for the jury as to (1) whether defendants used due care under the circumstances to give adequate warning to plaintiff and to other persons using the highway that their logging truck was completely blocking the roadway and (2) whether, in the exercise of

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due care, plaintiff could or should have seen the logging truck earlier and in time to avoid the collision.

**2. Pleadings § 37.1; Trial § 21.1— directed verdict—evidence considered in passing on motion**

It is not necessary that any portion of the pleadings be introduced in evidence in order that allegations of new matter in defendant's answer favorable to the plaintiff may be considered in passing on defendant's motion for a directed verdict.

APPEAL by plaintiff from *Walker (Hal H.), Judge*. Judgment entered 23 February 1978 in Superior Court, UNION County. Heard in the Court of Appeals 1 March 1979.

This is an action to recover damages for personal injuries received by plaintiff when the pickup truck she was driving collided with an International logging truck owned by defendant Smith and operated by his employee, the defendant Staton. The accident occurred in the dark at about 6:25 p.m. on 18 December 1975 on N.C. Highway #205 in Union County. At that point the highway is a two-lane paved road running generally in a north-south direction, with one lane for northbound and one lane for southbound traffic. The posted speed limit was 55 miles per hour. At the point of collision the road ran through a wooded section where defendants were engaged in a logging operation on land on the west side of the road. In plaintiff's complaint as originally filed, she alleged that as she drove southwardly along the highway the International truck being operated by defendant Staton "suddenly and without warning drove into the highway from the logging area located to the west of said highway and directly into the path of the vehicle being operated by the plaintiff, thereby causing a collision." She alleged that the collision and her resulting injuries were proximately caused by defendant Staton's negligence in entering the public highway from a private driveway without yielding the right-of-way to traffic traveling on the highway and in failing to give warning of his intention to enter the roadway.

Defendants answered, denying negligence on their part and pleading plaintiff's contributory negligence as a defense. As the factual basis for their plea of contributory negligence, defendants in their answer alleged:

1. On December 18, 1975, the defendant Smith and the defendant Staton, his employee, were engaged, along with



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Bill Smith, the son of defendant Smith, in a logging operation on the west side of North Carolina Highway #205 in Union County, about a mile north of New Salem, North Carolina.

2. At about 6:25 p.m., while it was dark, these defendants were preparing to drive a loaded log-hauling truck of the defendant Smith onto the highway from where it was located off the west side of the highway. Because the driveway through which the log truck would pass onto the highway was narrow and because the truck was long, the log truck could not be driven onto the highway in one continuous movement, but had to be pulled forward into the highway and then backed up before it could be turned to proceed south along the highway. Because this procedure would take more than a few seconds to accomplish and so as to give warning to southbound motorists, Bill Smith positioned a Ford pickup truck at the west edge of the highway, facing south, about 180 feet north of where the log truck would be entering the highway, and left the lights burning on the Ford pickup, including the emergency flashers. Bill Smith then positioned himself in the highway with a lighted flashlight to signal southbound motorists and to attract their attention to the activity of the log truck.

3. When the Ford pickup and Bill Smith had been so positioned, defendant Staton drove the log truck, with headlights and taillights burning, onto and across the highway and was preparing to back it up, when Betty Keziah Smith, who was driving Jerry Lee Smith's Chevrolet pickup, in which Jerry Lee Smith and Timothy Lee Smith were passengers, at a high rate of speed south on N.C. Highway #205, ignored the warnings of the flashing lights on the Ford pickup and the flashlight being waved by Bill Smith, and drove the Chevrolet pickup at an undiminished rate of speed past the Ford pickup, caused Bill Smith to have to leap to the side of the road to avoid being struck by the Chevrolet pickup, and crashed the front of the Chevrolet pickup into the side of the log truck.

At trial, except for the doctor who testified as to plaintiff's injuries, plaintiff was the only witness. She testified that immediately prior to the collision she was driving her husband's

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pickup truck in the right-hand lane of the highway going south, with her husband and young son as passengers. It was dark and the headlights on her vehicle were on. As she entered a curve to her right she saw a pickup truck parked off the road on her right headed north. It had its parking lights on but they were not flashing. Passing the parked pickup truck, plaintiff next observed a truck, which she described as a grain truck, standing partially in her lane of travel but headed north and without any lights on. She drove her vehicle to the left approximately in the middle of the road to pass the grain truck. At the time she saw "the pickup truck or grain truck," she saw a fire in the field on the right-hand side of the road "along about the same place along the road as where the grain truck was." There were three people standing around the fire, but she didn't recognize who they were. When she had gone "not very far" past the grain truck, "probably just a matter of two or three feet," she saw the logging truck standing all the way across the road headed east. It was completely stopped when she saw it. She did not see any lights on the logging truck. The front of plaintiff's pickup truck hit the left hand door of the logging truck, the collision causing her injuries.

Plaintiff testified her vehicle was going 35 miles per hour when she first saw the logging truck, that "it happened so fast" she "really [didn't] know" what she did, but she thought she raised her right leg to hit the brake. She "really [didn't] know" whether she got her brakes on before she hit the log truck.

Plaintiff testified that the parked pickup truck was 400 to 450 feet from the logging truck, the grain truck was 100 to 150 feet from the pickup truck, and "that would mean the grain truck was about 300 feet from the logging truck," but she did not know how to judge distances.

At the close of plaintiff's evidence, the defendant moved for a directed verdict on the grounds that the evidence failed to show any actionable negligence on the part of the defendants and showed that the plaintiff was contributorily negligent as a matter of law. During oral argument of this motion, the plaintiff moved the court to be allowed to amend her complaint to conform with the evidence. This motion was granted, and the allegations of plaintiff's complaint were amended by adding *inter alia* the following allegation concerning the negligence of defendant Staton:

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(d) He stopped the vehicle he was operating in a position blocking the main traveled portion of the highway without taking proper precaution to give proper warning to motorists upon said highway when he knew, or in exercise of reasonable care should have known, that the blocking of said highway would be dangerous to oncoming traffic.

After granting plaintiff's motion to amend, the trial court allowed defendant's motion for a directed verdict. From judgment dismissing her claim with prejudice, the plaintiff appeals.

*James R. Carpenter for the plaintiff appellant.*

*Golding, Crews, Meekins, Gordon & Gray by James P. Crews for the defendant appellee.*

PARKER, Judge.

Plaintiff assigns error to the granting of defendant's motion for a directed verdict. We find error in this regard and reverse.

The following statement of law, which has been quoted with approval by our Supreme Court in *Bass v. McLamb*, 268 N.C. 395, 150 S.E. 2d 856 (1966), *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19 (1966), and *Chandler v. Bottling Co.*, 257 N.C. 245, 125 S.E. 2d 584 (1962), is particularly applicable to the facts of the present case:

The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. \* \* \* 60 C.J.S. Motor Vehicles, § 325, pp. 779, 780.

(See 60A C.J.S., Motor Vehicles, § 335(1), pp. 394-95.)

It is true, as defendants point out, that plaintiff's evidence fails to disclose how long the logging truck had been standing

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blocking the highway when the collision occurred, why it was there, and what opportunity defendants had had to give warning of its presence. In passing on a defendant's motion for a directed verdict, however, the court must examine not only the evidence but also the admissions and such allegations of new matter in defendant's pleadings as are favorable to the plaintiff. As pointed out by Lake, J., speaking for our Supreme Court in *Champion v. Waller*, 268 N.C. 426, 150 S.E. 2d 783 (1966):

It is elementary that in passing upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true, and must be interpreted in the light most favorable to him, and all reasonable inferences in his favor must be drawn therefrom. *Bowling v. Oxford*, 267 N.C. 552, 148 S.E. 2d 624

Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence. *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16; Stansbury, North Carolina Evidence, § 177. The same is true of allegations of new matter in a further answer, which new matter is favorable to the plaintiff. In passing upon a motion for judgment of non-suit, all such allegations in the answer are taken to be true and are to be considered along with the evidence.

268 N.C. at 428, 150 S.E. 2d at 785.

In the present case defendants admitted in their answer the allegations in plaintiff's complaint that they "were engaged in a logging operation and were clearing some land alongside of North Carolina Highway #205," that defendant Staton was the operator of the International truck which was owned by defendant Smith, and that defendant Staton was the employee of defendant Smith and was operating the truck as his agent and employee. In their further answer, in which they alleged specific facts as a basis of their plea of contributory negligence, defendants went further and alleged in detail the facts as to how and why the logging truck got to the position it was in when the accident occurred.

When plaintiff's evidence is examined in the light most favorable to her and is supplemented by the admissions and allegations favorable to her in defendants' answer, we find it suf-

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ficient to support a finding that defendant Staton, acting as defendant Smith's employee, deliberately drove defendant Smith's logging truck at night across the highway, completely blocking both lanes of travel; that he did this "[b]ecause the driveway through which the log truck would pass onto the highway was narrow and because the truck was long, the log truck could not be driven onto the highway in one continuous movement, but had to be pulled forward into the highway and then backed up before it could be turned to proceed south along the highway;" that defendants were aware that "this procedure would take more than a few seconds to accomplish" and that it was necessary to give warning to southbound motorists, such as the plaintiff; that in order to give such warning they "positioned a Ford pickup truck at the west edge of the highway, facing south, about 180 feet north of where the log truck would be entering the highway, and left the lights burning on the Ford pickup;" that when plaintiff approached the scene driving her vehicle in the right-hand south-bound lane at approximately 35 miles per hour, a vehicle described by her as a "grain truck" was parked, partially in the south-bound lane, between the Ford pickup and defendants' logging truck; that the logging truck was at that time standing still directly across and completely blocking the road and with its lights directed away from oncoming south-bound traffic; and that plaintiff was confronted in the darkness so suddenly with defendants' stationary logging truck blocking the road that she was unable to avoid hitting it.

[1] In our opinion the foregoing facts, if found by the jury, present a question for the jury to determine whether defendants used due care under the circumstances to give adequate warning to the plaintiff and to other persons using the highway that their logging truck was completely blocking the roadway. This is not the case, as was presented in *Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967), where defendant's vehicle stalled on the highway, thereby creating a sudden emergency without fault on the part of the defendants. Here, defendants admitted in their answer that they knew before they brought their truck upon the highway that it would completely block the roadway for an appreciable period of time and that it was necessary for them to take steps to warn others using the highway of the danger thereby created. In our opinion whether the steps taken by the defendants in this case were compatible with the standard of due care was for the

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jury to determine. We hold that the foregoing facts would warrant a jury finding that defendants were negligent in failing to give plaintiff adequate warning of the presence of their logging truck on the highway and that such negligence on the part of the defendants was a proximate cause of plaintiff's injuries.

The evidence in this case, when supplemented by such of the allegations in defendants' answer as are favorable to plaintiff, and when both evidence and defendants' allegations are examined in the light most favorable to the plaintiff, also fails to show contributory negligence on the part of the plaintiff as a matter of law. In the light most favorable to plaintiff, the evidence and defendants' allegations favorable to her would support a jury finding that plaintiff, driving her vehicle 35 miles per hour in a 55 mile per hour speed zone, was suddenly confronted by defendants' truck standing across and completely blocking the highway at a point only 180 feet away from the Ford pickup truck which defendants had parked on the west side of the highway with its lights on to give approaching traffic warning of the danger which the presence of the logging truck on the highway presented. At 35 miles per hour plaintiff's vehicle would travel the intervening 180 feet in approximately 3½ seconds. During a part of that time she was required to steer her vehicle around the grain truck which was parked partially blocking her lane of travel. Whether, in the exercise of due care, she could or should have seen the logging truck earlier and in time to avoid the collision presented a question for the jury. Contributory negligence on the part of the plaintiff has not been shown as a matter of law.

[2] The record on appeal in this case does not indicate that any portion of defendants' answer was introduced in evidence. We are, of course, advertent to decisions of our Supreme Court, such as *Edwards v. Hamill*, 266 N.C. 304, 145 S.E. 2d 884 (1966), which held that unless introduced in evidence, allegations of new matter in a defendant's answer, as distinguished from admissions of specific allegations in the complaint, cannot be considered in passing upon the motion for nonsuit. On authority of *Champion v. Waller*, *supra*, decided subsequent to the decision of *Edwards v. Hamill*, we hold that it is not necessary that any portion of the pleadings be introduced in evidence in order that allegations of new matter in defendant's answer favorable to the plaintiff may be considered in passing on the defendant's motion for a directed

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verdict. See 2 Stansbury's N.C. Evidence, Brandis Rev. § 177; 44 N.C.L. Rev. 919 (1966); 45 N.C.L. Rev. 840-42 (1967).

Defendants, as a cross assignment of error, assign error to the court's allowing plaintiff to amend her complaint. In this connection defendants contend that plaintiff's evidence failed to support the allegations in the amendment. Even so, the allegations in the amendment are consistent with those portions of the allegations of new matter in defendants' answer which are favorable to the plaintiff. The trial court's allowance of the amendment was proper pursuant to the discretionary power given it by G.S. 1A-1, Rule 15(a) because the allegations in the amendment concern the blocking of the road by defendants' truck, which is admitted in the answer, and the adequacy of the warning given, which is an issue raised in the answer. We find no error in the allowance of the amendment.

The order allowing defendants' motion for a directed verdict is

Reversed.

Judges HEDRICK and CARLTON concur.

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 CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MAY 1979

CEDAR WORKS v. LUMBER CO. No. 781SC563	Gates (72SP20) (72SP12)	Affirmed
HOMEOWNERS' ASSOC. v. LAING No. 785DC688	New Hanover (78CVD85)	Reversed
JACOBS v. SEALS No. 788DC728	Wayne (77CVD138)	No Error
POPE v. POPE No. 7818DC682	Guilford (77CVD757)	Affirmed
STATE v. BOONE No. 797SC116	Nash (77CRS10762)	Dismissed
STATE v. BYRD No. 7926SC97	Mecklenburg (78CRS126854)	No Error
STATE v. FAUST No. 7919SC164	Rowan (78CRS10932)	No Error
STATE v. FIDLER No. 7920SC152	Stanly (78CRS3250)	No Error
STATE v. FOX No. 795SC75	New Hanover (78CR18577)	No Error
STATE v. FULK No. 7922SC33	Davidson (78CR1404)	Vacated and Remanded
STATE v. HOKE No. 7927SC103	Gaston (78CRS10802)	No Error
STATE v. HORTON No. 7929SC6	Rutherford (77CR4076) (77CR4077)	No Error
STATE v. QUINN No. 798SC136	Wayne (78CR8871)	No Error
STATE v. RIVENS No. 7919SC90	Rowan (78CR8929)	New Trial
STATE v. SANDERS No. 7910SC114	Wake (77CRS57340) (77CRS57341)	No Error
STATE v. TURNER No. 7912SC130	Cumberland (77CRS23079)	New Trial
WILSON v. WILSON No. 785DC738	New Hanover (78CVD00155)	Affirmed



FILED 5 JUNE 1979

BOARD OF TRANSPORTATION v. ANNAS No. 7825SC730	Caldwell (76CVS337)	Affirmed
BROWN v. BRYANT No. 7813DC740	Columbus (77CVS204)	Affirmed
FORRESTER v. CLIPPARD No. 7827SC554	Lincoln (75CVS339)	Affirmed
HILL v. HILL No. 7821DC776	Forsyth (70CVD4777)	Affirmed
IN RE GELLER No. 7910DC81	Wake (78SP580)	Reversed
IN RE GOODNIGHT No. 7819DC45	Rowan (74J104) (74J105) (74J83)	Affirmed
IN RE WILLIAMS No. 7810SC783	Wake (78CVS1411)	Affirmed
KAYSER-ROTH CORP. v. CITY OF GREENSBORO No. 7818SC521	Guilford (77CVS3071)	Affirmed
LUKAWECZ v. LUKAWECZ No. 784DC733	Onslow (77CVD315)	Affirmed
STEEL AND WIRE CORP. v. SPECIALTY TOOL CO. No. 7818DC732	Guilford (78CVD265)	Reversed and Remanded
STATE v. BELL No. 7914SC186	Durham (77CRS20690)	No Error
STATE v. BURSTION No. 787SC1145	Edgecombe (78CRS5923)	No Error
STATE v. GUIRGUIS No. 7912SC153	Cumberland (78CRS0888) (78CRS0889) (78CRS0890)	No Error
STATE v. JUSTICE No. 7826SC946	Mecklenburg (78CRS108585)	No Error
STATE v. LEONHARDT No. 7927SC100	Gaston (78CRS17010)	No Error
STATE v. LONG No. 7911SC162	Johnston (73CRS5621) (73CRS5622)	Affirmed

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STATE v. MOCK No. 7922SC134	Davie (78CRS1491)	No Error
STATE v. MOORE No. 7918SC137	Guilford (76CRS15727) (76CRS14430)	Affirmed Vacated and Remanded
STATE v. NEILSEN No. 7916SC198	Robeson (78CR17900)	Dismissed
STATE v. SELLERS No. 799SC83	Person (78CRS3109) (78CRS3108)	No Error
STATE v. TYNDALL No. 798SC135	Lenoir (77CRS11052) (78CRS2373)	No Error
STATE v. YOUNG No. 7921SC35	Forsyth (78CRS34238)	No Error
WATSON v. POWELL No. 786SC798	Bertie (76SP108)	Affirmed

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**Fashion Exhibitors v. Gunter**

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CAROLINA VIRGINIA FASHION EXHIBITORS, INC., A CORPORATION v. WILLIAM L. GUNTER AND ROBERT B. RUSSELL, GENERAL PARTNERS TRADING AND DOING BUSINESS UNDER THE NAME OF CHARLOTTE DEVELOPMENT ASSOCIATES, A LIMITED PARTNERSHIP

No. 7826SC743

(Filed 5 June 1979)

**Arbitration § 7— correction of arbitration award by court—evident miscalculation—imperfection in matter of form**

The provision of G.S. 1-567.14(a)(1) allowing courts to modify or correct an arbitration award for "evident miscalculation of figures" refers only to mathematical errors committed by arbitrators which are patently clear to the reviewing court and does not permit the court to substitute its interpretation of the evidence for that of the arbitrators. Nor does the provision of G.S. 1-567.14(a)(3) which allows courts to modify or correct an award which is "imperfect in a matter of form" permit the court to substitute its interpretation of the evidence for that of the arbitrators.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 5 April 1978 directing parties to comply with order confirming award of arbitrators dated 31 March 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1979.

The plaintiff instituted this action on 23 August 1972 for a declaration of its rights and duties as a tenant under an agreement to lease dated 23 September 1970, contemplating the construction of a building upon certain premises located in Charlotte. The plaintiff (tenant) began occupancy of the leased space on or before 1 January 1972. The building is known as the Carolina Trade Mart at 531 South College Street, Charlotte, North Carolina.

A dispute arose between the parties as to the proper construction of certain portions of the lease agreement and plaintiff commenced this action for a declaratory judgment. The parties settled a portion of the dispute and, on 2 August 1974, entered into a stipulation by which the remaining issues in dispute were submitted to arbitration. Pursuant to the stipulation, each party selected an arbitrator and the two arbitrators selected a third arbitrator.

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*Fashion Exhibitors v. Gunter*

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After various hearings at which the parties submitted both documentary and testimonial evidence, together with written statements of their contentions, the arbitrators on 20 November 1974 notified the parties by mail of their decision by signing and mailing to counsel for each party a copy of the questions submitted with the questions answered and signed by each of the arbitrators. Thereafter, defendants appealed the arbitrators' award to the Superior Court of Mecklenburg County. The superior court confirmed the arbitration award and defendants appealed to this Court and petitioned the Supreme Court for discretionary review prior to determination of the cause by this Court. The Supreme Court allowed the petition and heard the case on appeal. For reasons not relevant to the case now at bar, the Supreme Court vacated and remanded the judgment of the superior court. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976). For a full understanding of this controversy, reference is made to that opinion of our Supreme Court.

On remand, new arbitrators were appointed and they conducted new hearings, hearing testimony and receiving exhibits from both parties.

The pertinent portions of the agreement to lease for purposes of this decision are as follows:

Paragraph four provides in part:

CVFE agrees to pay CDA as rent during the term of this lease the sum of Three and seventy/100 (\$3.70) Dollars per square foot of permanent show room space (plus or minus 2% to allow for design flexibility) per year in equal monthly installments payable the first of January, 1972 or on the effective date of this lease, whichever is later, and thereafter monthly in advance. In addition to said rental, CVFE agrees to pay to CDA or to its designate that proportion of (all ad valorem taxes on the land above described and any improvements thereon, all charges for public utility services thereto, and) all premiums for fire and extended coverage, public liability insurance and such multiperil coverage as CDA deems necessary in connection with the use of said land and the improvements thereon, which the total square feet of gross heated area occupied by it bears to the total square feet of gross heated area in all of the improvements con-

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**Fashion Exhibitors v. Gunter**

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structed on said land, said additional payments to be made during the term of this lease and any renewal thereof.

Paragraph nine of the lease provides in part:

In addition to the rental and pro-rate share of taxes, public utility charges and insurance premiums above provided for, CVFE further agrees to pay to CDA or its designate, all costs of building maintenance (exclusive of exterior walls and roof) on a basis which allocates to CVFE all of such costs attributable to its use of the building, including its use of areas used in common with others . . . . It is the intent of this agreement to lease that CVFE pay its proportional part of all expenses incurred in maintaining in good order and repair the entire premises with the exception of the parking areas, the roof, and the exterior walls of the building, including, without limitation, the air conditioning and heating systems, elevators, machinery, plumbing, wiring and all equipment used in connection with the building . . . .

In the second award of arbitrators, the new arbitrators found, in part, that plaintiff was required by the lease to pay  $\frac{2}{3}$  of all ad valorem taxes, all charges for public utility services, all premiums for fire and extended coverage and public liability insurance and multiperil coverage as defendants deemed necessary and  $\frac{2}{3}$  of all maintenance expenses reasonably necessary to preserve and maintain in good order and repair the building as it has been constructed and the grounds forming a part of the premises, including salaries of the maintenance engineer and the assistant maintenance engineer. The arbitrators' awards spelled out precisely the allowable items under the category of "maintenance expense."

On 2 December 1977 plaintiff filed an application for modification, correction and vacation of the arbitrators' award arguing, *inter alia*, that there was an "evident miscalculation of figures" pursuant to G.S. 1-567.14(a)(1) and that a portion of the award was "imperfect in a matter of form" pursuant to G.S. 1-567.14(a)(3).

On 8 December 1977, the arbitrators denied plaintiff's application.

On 31 March 1978 the trial court concluded that the second arbitrators had "determined each question stipulated by the par-

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ties for their decision" and that it was "without authority to change their [a]ward in the absence of any statutory grounds for so doing."

On 5 April 1978, the trial court entered a judgment providing that the 31 March 1978 order confirming the award of the arbitrators constituted a judgment of the court and a final judgment within the meaning of G.S. 1-567.15 and directed the parties to comply with the terms of the award of arbitrators.

From the foregoing judgment, plaintiff appealed.

*Harkey, Faggart, Coira & Fletcher, by Henry Lee Harkey and Francis M. Fletcher, Jr., and Farris, Mallard & Underwood, by Ray S. Farris, for plaintiff appellant.*

*Jones, Hewson & Woolard, by Harry C. Hewson, for defendant appellees.*

CARLTON, Judge.

In its brief, plaintiff brings forward two "questions involved" from the four assignments of error in the record. The remaining assignments of error are deemed abandoned. Rule 28, N.C. Rules of Appellate Procedure.

Plaintiff contends that the trial court erred in failing to set aside and direct a modification of the arbitrators' award under G.S. 1-567.14(a)(1) in that there was an "evident miscalculation of figures" in paragraph four of the award, and under G.S. 1-567.14(a)(3) in that paragraph six of the award was "imperfect in a matter of form." We think that plaintiffs have misconstrued prevailing case and statutory law with respect to proper trial court and appellate court review of awards submitted to arbitration pursuant to Article 45A, Chapter 1, General Statutes of North Carolina. Plaintiff's brief is devoted exclusively to arguments about the arbitrators' interpretation of the evidence before them and alleged misconception of their legal responsibilities. For reasons stated hereinbelow, such arguments were irrelevant before the trial court and remain so before this Court.

The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that parties to an arbitration will not generally be heard to impeach the regularity or

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fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. *See* 6 C.J.S., Arbitration, § 149, *et seq.*, p. 397. The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. 5 Am. Jur. 2d, Arbitration and Award, § 167, *et seq.*, p. 643.

Of particular importance to this action is the rule that judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute. 6 C.J.S., Arbitration, § 162, p. 427.

The Uniform Arbitration Act was enacted by our legislature and is codified in Article 45A, Chapter 1 of the General Statutes. The pertinent provisions of G.S. 1-567.14, upon which plaintiff relies, provide as follows:

(a) [T]he court shall modify or correct the award where:

(1) There was an evident miscalculation of figures . . .

.....

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

Plaintiff argues that there was "an evident miscalculation of figures" in paragraph four of the award which provides as follows:

The plaintiff is required and obligated to pay to the defendants two thirds of all ad valorem taxes on the land described in the agreement to lease and the presently existing improvements thereon, all charges for public utility services thereto, and all premiums for fire and extended

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coverages, public liability insurance and such multiperil coverage as defendants deem necessary in connection with the use of said land and the presently existing improvements thereon.

Plaintiff further argues that paragraph six of the award is "imperfect in a matter of form." It provides, in pertinent part, as follows:

This portion of the award is concerned with the interpretation of paragraph 9 of the agreement to lease and its application to matters at issue referred to in the complaint and in evidence presented . . . .

The practice of the parties indicates they interpreted paragraph 9, as applied to the building as erected and being used, to require the plaintiff to pay two thirds of the maintenance costs to be shared. No issue is presented as to this interpretation.

. . . .

As applied to the situation in this case we award and declare *maintenance expense* to be the costs reasonably necessary to preserve and maintain in good order and repair the building as it has been constructed, added to, modified and altered, and the grounds forming a part of the premises as they have been shaped and landscaped. The building includes, without limitation, the air conditioning and heating systems, elevators, machinery, plumbing, wiring and all equipment used in connection with the building.

. . . .

Applying our interpretation of paragraph 9, to the particular prayers for relief of plaintiff designated e., f, and g, we award as follows:

The plaintiff is required to pay two thirds of that portion, and only that portion, of the cost of the following items fairly allocable to "shared maintenance expense":

e. The salaries of the maintenance engineer and the assistant maintenance engineer.



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- f. The administrative expense in connection with the office of defendants' manager located in the building.
- g. 1. The purchase or rental of any tools to actually perform maintenance work.
2. The purchase or rental of uniforms or wearing apparel for maintenance employees.
3. The purchase or rental of tools, equipment, materials, or signs to be utilized for the upkeep of grounds.
4. Labor costs attributable to the maintenance of the ground.
5. Mileage and delivery charges.

With respect to paragraph four of the award, we find that plaintiff has shown no "evident miscalculation of figures" as contemplated by G.S. 1-567.14(a)(1). Plaintiff's attempt in the trial court and here amounts to an argument that the arbitrators reached the *wrong result* in determining that it was liable for two thirds of ad valorem taxes, utilities and insurance. It argues, for example, that the arbitrators applied a mistaken denominator and numerator in establishing an improper formula to reach their result. It refers to matters from the evidence relating to a determination of the square footage of the total premises and the portion occupied by it. Such arguments do not show a *miscalculation* of figures; they attempt to show a *misinterpretation* of the evidence by the arbitrators. Pursuant to the rules stated above, these are not proper considerations for courts reviewing arbitration awards. In providing that awards could be modified or corrected for "evident miscalculation of figures," we think our legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. G.S. 1-567.14(a)(1) is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently. Such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration process.

With respect to paragraph six we find that plaintiff has not shown this portion of the award to be "imperfect in a matter of

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form" as contemplated by G.S. 1-567.14(a)(3). Here, again, plaintiff attempts to have the reviewing courts interpret the evidence differently from the arbitrators. It argues, essentially, that the evidence does not support the arbitrators' award that plaintiff should pay two thirds of maintenance expenses, what maintenance expenses are properly allowable, and how the parties interpreted their own contract. It refers to numerous matters of evidence to support its argument. Again, such review of the evidence is not our function, nor was it the function of the trial court. Plaintiff also argues that the arbitrators "abrogated their responsibility" with respect to this question in the controversy. Hence, the award is "imperfect as a matter of form." However, the record disclosed that the parties stipulated that the arbitrators would provide "an interpretation of the meaning of paragraph 9 of the Agreement as it applies to the matters referred to in the Complaint." Paragraph nine of the Agreement to Lease is the portion of the controversy addressed by paragraph six of the award. Plaintiff here, therefore, is arguing not with the *form* of the award, but with the result. The arbitrators did what they were requested to do: They interpreted this portion of the lease. Plaintiff disagrees with their interpretation and in essence requests that we substitute our interpretation for that of the arbitrators. This we are not allowed, nor inclined, to do.

With respect to both portions of the award in question here, we note that subsection (b) of G.S. 1-567.14 provides that when the court does modify and correct an award for the reasons allowed in subsection (a), it shall do so to effectuate "the intent" of the arbitrators. Clearly, the legislative intent is that only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts. Courts are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators. Here, we find the intent of the arbitrators to be crystal clear and none of the statutory grounds for modification, correction or vacation of the award have been shown. We are therefore not prone to disturb the arbitrators' decision.

We find these established North Carolina rules especially pertinent to the case at bar:

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If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration, instead of ending would tend to increase litigation. *Poe & Sons, Inc. v. University*, 248 N.C. 617 at 625, 104 S.E. 2d 189, 195 (1958) quoting *Patton v. Garrett*, 116 N.C. 847, 21 S.E. 679 (1895).

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

**Affirmed.**

Judges VAUGHN and CLARK concur.

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STATE OF NORTH CAROLINA v. JOHN JASON CRONIN

No. 791SC49

(Filed 5 June 1979)

**1. False Pretense § 1— elements**

The essential elements of the crime of obtaining property by false pretense are: (1) the knowing and designed use of any kind of false pretense of any fact whatsoever, (2) to obtain or attempt to obtain anything of value, (3) from any person whomsoever within this State, (4) with intent to cheat or defraud any person whomsoever of such thing of value. G.S. 14-100.

**2. False Pretense § 2.1— sufficiency of indictment**

A bill of indictment was sufficient to charge defendant with obtaining property by false pretense where it alleged that defendant knowingly and designedly used a false pretense in dealing with the Bank of Currituck, a banking corporation, in Currituck County, that defendant knowingly and designedly used that false pretense to obtain \$5,704.54 from the Bank of Currituck and that he did so "with intent then and there to defraud."

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**3. False Pretense § 3.1— obtaining loan through false pretense—sufficiency of evidence**

In a prosecution for obtaining property by false pretense, evidence was sufficient to be submitted to the jury where it tended to show that defendant applied for and received a loan from a bank purportedly to buy a new mobile home with a retail value of \$10,850; defendant did in fact buy a new mobile home with part of the proceeds of the loan, but the mobile home had been extensively damaged by fire and had a value of only \$2,620; and such evidence would support a reasonable inference that defendant employed a false pretense with the intent to defraud the bank of the proceeds of the loan with full knowledge that, absent such false pretense, the bank would not part with those proceeds.

**4. False Pretense § 3.2— jury instructions—purpose of obtaining something of value**

In a prosecution for obtaining property by false pretense, defendant is entitled to a new trial where the court failed to instruct the jury that the false pretense must, among other things, be made for the purpose of obtaining or attempting to obtain anything of value, and such error was not cured when the court required that the false pretense must have been made "with intent to deceive," since a finding that defendant acted with the intent to deceive would not necessarily include a finding that he did so for the purpose of obtaining or attempting to obtain anything of value.

APPEAL by defendant from *Small, Judge*. Judgment entered 6 October 1978 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 24 April 1979.

The defendant was charged with the felony of obtaining property by false pretenses in violation of G.S. 14-100. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of four years, the defendant appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

*Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.*

*Aldridge, Seawell & Khoury, by G. Irvin Aldridge and Daniel D. Khoury, for defendant appellant.*

MITCHELL, Judge.

The defendant has brought forward on appeal four assignments of error. Each of those assignments involves ques-

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tions concerning the essential elements of the crime of obtaining property by false pretenses. G.S. 14-100. To evaluate those assignments in an orderly manner, we will, therefore, first examine and discuss the essential elements of that crime.

The crime of obtaining property by false pretenses has existed as a statutory crime in North Carolina since 1811. *See* 1811 N.C. Sess. Laws Ch. 814 § 2. Since that time, the elements of the crime have been set forth in many cases. *See, e.g., State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947); *State v. Johnson*, 195 N.C. 506, 142 S.E. 775 (1928); *State v. Phifer*, 65 N.C. 321 (1871). Each of those cases indicated in some manner that it was necessary for the State to prove as an essential element of the crime that the victim was deceived by a false pretense and that something of value was obtained as a result of the deception created by such false pretense. Under the law in effect at the time such opinions were rendered, those were indeed essential elements of the crime. However, a recent revision of G.S. 14-100 by the General Assembly has rendered those elements no longer essential and has eliminated the necessity of proving their existence in order that a conviction for obtaining property by false pretenses may be sustained.

In 1975, G.S. 14-100 was substantially revised by the General Assembly. 1975 N.C. Sess. Laws Ch. 783. By its action, the General Assembly dictated that, effective 1 October 1975, G.S. 14-100 was to be applied as follows:

If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony. . . .

Although the statute as revised is similar to the former statute, there are two important differences. First, the revised statute creates an offense when the false pretense "is of a past or subsisting fact or of a future fulfillment or event." Formerly, the statute had created an offense only when the false pretense was

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of a past or subsisting fact. Now, the statute truly provides for "any kind of false pretense whatsoever" and makes criminal false pretenses relating to past, present or future facts.

The second important difference is that the former statute was violated only when the defendant obtained something of value as a result of his false pretense, whereas the revised statute provides that the crime of obtaining property by false pretenses has been committed when the defendant attempts to obtain something of value by virtue of a false pretense. Proof that the victim parted with something of value by virtue of his belief in the deception created by the false pretense is no longer required. This interpretation of the statute is technically in conflict with its title—"Obtaining property by false pretenses"—but the intent to the legislature as clearly expressed in the language of the statute must control over its title or caption. Appeal of Forsyth County, 285 N.C. 64, 203 S.E. 2d 51 (1974); *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956).

[1] In light of the 1975 amendment to G.S. 14-100, we find that the essential elements of the crime of obtaining property by false pretenses are as follows: (1) the knowing and designed use of any kind of false pretense of any fact whatsoever, (2) to obtain or attempt to obtain anything of value, (3) from any person whomsoever within this State, (4) with the intent to cheat or defraud any person whomsoever of such thing of value. We caution both Bench and Bar that those cases setting forth the essential elements of the crime of obtaining property by false pretenses as that crime existed prior to the amendment of 1 October 1975 no longer constitute reliable or binding interpretations of G.S. 14-100, as that statute has been significantly altered by the 1975 amendment.

Although our Supreme Court has recently set forth the elements of G.S. 14-100 in *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630 (1979), and *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, --- U.S. ---, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978), as has this Court in *State v. Rogers*, 30 N.C. App. 298, 226 S.E. 2d 829, *cert. denied*, 290 N.C. 781, 229 S.E. 2d 35 (1976), those cases dealt with situations involving criminal acts committed prior to 1 October 1975 and do not constitute binding precedent with regard

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to the elements of the crime of obtaining property by false pretenses as that crime is now defined in G.S. 14-100 as revised in 1975.

We further note that our recent case of *State v. Hines*, 36 N.C. App. 33, 243 S.E. 2d 782 (1978), indicated that G.S. 14-100 does not require proof that a defendant attempted to or did obtain something of value "without compensation" in order that a violation might be shown. We did not undertake in *Hines*, however, to set forth the elements of the crime proscribed by G.S. 14-100 as revised in 1975.

[2] We turn now to the specific assignments of error brought forward on appeal by the defendant in the present case. The defendant first assigns as error the trial court's failure to dismiss the charges against him. In support of this assignment, the defendant contends that the bill of indictment does not assert facts supporting every essential element of the crime of obtaining property by false pretenses. The defendant could have challenged the sufficiency of the bill of indictment to charge an offense by making a motion to dismiss pursuant to G.S. 15A-954(a)(10). That motion might properly have been made at any time. G.S. 15A-952(d). However, the defendant did not make a motion to dismiss at any time for failure of the pleadings to charge an offense. Nonetheless, we have chosen to review the bill of indictment.

Every bill of indictment must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient prevision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

G.S. 15A-924(a)(5). The bill of indictment in the present case charges that on or about 31 March 1978 the defendant knowingly and designedly used a false pretense in dealing with the Bank of Currituck, a banking corporation, in Currituck County, that the defendant knowingly and designedly used that false pretense to obtain \$5,704.54 from the Bank of Currituck and that he did so "with intent then and there to defraud." Those allegations sup-

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port every essential element of the crime of obtaining property by false pretense as it now exists and the bill of indictment is valid.

[3] The defendant next assigns as error the failure of the trial court to grant his motion for judgment as in the case of nonsuit. A motion for judgment as in the case of nonsuit should be denied if the State has presented substantial evidence that the crime charged has been committed and that the defendant is the person who committed that crime. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). We must, therefore, examine the evidence introduced to determine whether the State met its burden.

The State's evidence tended to show that the defendant went to see Sam T. Moore, Jr., the Executive Vice-President and Chief Executive Officer of the Bank of Currituck, at his office in Moyock, North Carolina. At that time, the defendant told Mr. Moore that he was interested in purchasing a new mobile home and wanted to know if the bank would loan him \$7,500 to \$8,000 toward the purchase of a \$10,000 to \$12,000 mobile home. Mr. Moore responded by telling the defendant that he felt the bank would not be able to lend the defendant that much money. The defendant then told Mr. Moore that he had \$5,000 to use as a down payment if the bank would finance the balance. Mr. Moore then indicated that he would consider making the loan and gave the defendant a credit application to complete.

The defendant returned to Mr. Moore's office in Moyock on 31 March 1978 with the completed credit application. According to information contained in that application, the defendant wanted to use the proceeds of the proposed loan to purchase a "12x70 1977 Doral (3 Bed 2 bath) Beautiful House (Mobile Home)." The defendant told Mr. Moore that the suggested retail value of that mobile home was \$10,850. After a brief discussion, Mr. Moore agreed to a loan to the defendant of \$4,900 for the purchase of the mobile home, plus \$500 to pay off an existing debt of the defendant with the bank. The defendant then signed a note for \$5,704.54 which included a charge for credit life insurance. The note indicated that it was secured by a security interest in a "1978 Mansefield Mobile Home—Doral Model ID # H-3513." After the note had been signed, the defendant obtained a cashier's check for \$4,900 from the bank.



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Daniel W. Chandler, III, of Deltona Mobile Home company testified that the defendant had approached him during the middle of March of 1978 to discuss the purchase of a mobile home. The mobile home that the defendant was interested in buying was a new 1977 Marshfield Doral 12' x 70', 3 bedroom, 2 bath mobile home bearing the serial number H-3513. That mobile home had been extensively damaged by fire. The defendant told Chandler that he wanted to repair the mobile home for resale. At the conclusion of their discussion, the defendant agreed to purchase the mobile home for \$2,620.

The defendant returned to Deltona Mobile Homes on 1 April 1978. The defendant used a cashier's check in the amount of \$4,900 and drawn on the Bank of Currituck to purchase the mobile home for the agreed upon purchase price. Mr. Chandler then arranged to have the balance representing the difference between the amount of the cashier's check and the purchase price returned to the defendant.

We find that the evidence presented by the State was substantial and supported a reasonable inference that the defendant knowingly and designedly employed a false pretense to obtain the proceeds of a loan from a corporate person within this State. We further find that the evidence supported a reasonable inference that the defendant did so with the intent to defraud that corporate person of the proceeds of the loan with full knowledge that, absent such false pretense, the corporate person would not part with those proceeds. Therefore, the State introduced substantial evidence tending to show that the crime charged was committed by the defendant. The trial court correctly ruled that the State's evidence was sufficient to overcome the defendant's motion for judgment as in the case of nonsuit.

[4] The defendant next assigns as error the trial court's instructions to the jury. Throughout its instructions to the jury, the trial court defined the offense of obtaining property by false pretenses substantially in accord with the elements of that offense as they existed prior to the 1975 revision of G.S. 14-100. When viewed in the context of the instructions in their entirety and of the particular facts in this case, this failure to apply the statute as amended ordinarily would have constituted error favorable to the defendant. This is true because the former G.S. 14-100 contained more essential elements than the revised version of the statute.

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However, in stating the elements of the crime as it now exists under the statute, the trial court at one point inadvertently failed to instruct the jury that the false pretense must, among other things, be made for the purpose of obtaining or attempting to obtain anything of value. *State v. Hadlock*, 34 N.C. App. 226, 237 S.E. 2d 748 (1977). The trial court's instructions were, therefore, conflicting upon a material point. There must be a new trial since the jury cannot be supposed to have been able to distinguish between the correct and the incorrect instructions. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974).

The State would contend that the omission of the element requiring that the defendant's false pretense be for the purpose of obtaining or attempting to obtain anything of value was cured when the court required that the false pretense must have been made "with intent to deceive." We do not find this argument compelling. When a person acts with the intent to deceive, he acts with the intent to cause someone to believe something that is false. See Webster's Third New International Dictionary 584 (1971). When, however, a person acts with the intent to cheat or defraud, he acts with the additional intent "to deprive of something valuable by the use of deceit or fraud" or "to take or withhold from (one) some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception." *Id.* at 381 and 593. Therefore, a finding that the defendant acted with the intent to deceive would not necessarily include a finding that he did so for the purpose of obtaining or attempting to obtain anything of value.

We recognize that in certain cases decided prior to the 1975 revision of G.S. 14-100, the intent required to support a conviction was at times stated in terms of an intent to "deceive." *E.g.*, *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947). In other cases, however, it was required that the defendant's false representation be "made with intent to defraud." *E.g.*, *State v. Carlson*, 171 N.C. 818, 824, 89 S.E. 30, 33 (1916); *State v. Whedbee*, 152 N.C. 770, 774, 67 S.E. 60, 62 (1910). It is sufficient for us to state that, in light of substantial revision of G.S. 14-100 effective 1 October 1975, trial courts would be well-advised to adhere strictly to the current elements of an offense under G.S. 14-100 as previously set forth in this opinion when instructing juries with regard to those elements or otherwise applying that statute.

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The defendant has presented an additional assignment of error. We need not consider it, however, as it is not likely to recur at a subsequent trial.

For the reasons previously set forth, we order a

New trial.

Judges PARKER and MARTIN (Harry C.) concur.

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## STATE OF NORTH CAROLINA v. CHARLES JOHNSON

No. 786SC1115

(Filed 5 June 1979)

**1. Constitutional Law § 53—speedy trial—delay between mistrial and retrial**

Defendant was not denied his constitutional right to a speedy trial by the delay between a mistrial in September 1975 and his retrial in April 1978 where the record shows that the delay was primarily for the convenience of defense counsel.

**2. Criminal Law § 128.2; Jury § 9—substitution of juror—alleged contribution to hung jury—absence of evidence**

Defendant's contention that the court's allegedly improper substitution of Juror No. 13 for Juror No. 12 in his prior trial because Juror No. 12 had been contacted by defendant's family contributed to the "hung" jury in that case and that the court's declaration of a mistrial was, therefore, erroneous is conjectural and unsupported by the evidence. Furthermore, any errors in the first trial must be deemed harmless since defendant received a new trial.

**3. Criminal Law § 128.2— inquiry as to fruitfulness of further deliberation—mistrial because of hung jury**

The trial court did not abuse its discretion in making inquiry of the jury as to whether further deliberation would be fruitful or in declaring a mistrial because of a "hung" jury when the jury foreman stated that he did not believe the jury would be able to agree upon further deliberation.

**4. Criminal Law §§ 102.5, 128.2— improper questions to character witness—mistrial**

The possible prejudicial effect in this murder trial of the private prosecutor's two improper questions to defendant's character witness as to whether he knew defendant had been convicted in Halifax County 21 times could not be cured by the trial court's instruction that they be disregarded, and the court should have granted defendant's motion for a mistrial, where the evidence of defendant's guilt was not overwhelming, and it appears the questions were not asked out of ignorance of the established rules of evidence.

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State v. Johnson

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APPEAL by defendant from *Rouse, Judge*. Judgment entered 28 April 1978 in Superior Court, HALIFAX County. Heard in the Court of Appeals 26 March 1979.

Defendant was indicted and tried for the first-degree murder of Milton Richardson on or about 23 April 1975. The case was originally tried at the September 1975 Session of Criminal Court in Halifax County. However, because the jury in that case was unable to reach a unanimous verdict with respect to defendant's guilt or innocence, a mistrial was declared by the trial court. The case was eventually called for retrial 24 April 1978. That trial resulted in defendant's being convicted of second-degree murder, and he was sentenced to a term of not less than 28 years nor more than 30 years in the State Prison. Defendant appeals, assigning as error the denial of two pretrial motions and the denial of his motion for a mistrial.

Facts necessary for decision are summarized in the opinion below.

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

*Josey, McCoy & Hanudel, by C. Kitchin Josey, for defendant appellant.*

MORRIS, Chief Judge.

[1] Defendant's first assignment of error is directed to the trial court's denial of his motion to dismiss for failure of the prosecution to grant to defendant a speedy trial. Defendant does not rely upon the recently enacted Speedy Trial Act, G.S. 15A-701 *et seq.*, but his contention is based upon the constitutionally guaranteed right to a speedy trial. The "[i]nterrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay." *State v. Smith*, 289 N.C. 143, 148, 221 S.E. 2d 247, 250 (1976). The burden is upon the defendant who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *Id.* Defendant has fallen far short of sustaining his burden. The record indicates conclusively, and the trial court so found, that the delay from the

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declaration of a mistrial in defendant's first trial until the trial was calendared for the January 1978 session of court was primarily for the convenience of the defense counsel. Defendant has not excepted to that finding of the trial court. The record indicates that during the delay one of the defense attorneys had been incapacitated from February 1976 until January 1977 and that he had requested a delay. Furthermore, defendant's other counsel served as a State Legislator, and for the convenience of counsel, the district attorney delayed all of his cases while the legislature was in session. The record is entirely devoid of any indication that the delay was arbitrary and oppressive or the result of deliberate prosecution efforts to hamper the defense. This assignment of error is overruled.

Defendant next contends that the trial court erred in denying his motion to dismiss the action on the grounds that the second trial would subject defendant to double jeopardy. He contends that, because the trial court improperly granted, on its own motion and without defendant's consent, the mistrial in the former case, defendant may not be brought to trial again on the same charges. The circumstances surrounding the mistrial in the first action are summarized as follows: Defendant was on trial during the September 1975 session of court. At the conclusion of Judge Cowper's charge to the jury, he excused Juror No. 12 and substituted alternate Juror No. 13 when it was brought to his attention that Juror No. 12 had been contacted by a member of defendant's family. With the jury present, the trial court placed the following statement in the record after a conference with the juror at the bench:

"COURT: Take this. At the end of the Judge's charge to the jury the Court, in its discretion released Juror No. 12, Columbus Jefferson, for the reason that he had indicated to the Court that he had been contacted by a member of the defendant's family. The Court does not feel that the juror is prejudiced in any way, but that it might be best to substitute No. 13, Richard Hawkins, Jr. to replace No. 12 and be seated as a regular juror."

The jury retired at 3:14 p.m. and returned to the courtroom at 9:00 p.m. at the request of the court. The following exchange appears in the record:

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"COURT: Please answer me. Members of the jury, you obviously have not been able to agree on a verdict, is that correct?"

FOREMAN: Yes, sir.

COURT: Will you tell me how you stand without telling me which way you stand? How do you stand?

FOREMAN: Ten to two.

COURT: Do you feel that you will be able to agree on a verdict?"

FOREMAN: I don't think so, Your Honor.

COURT: I don't want to punish you, and if you honestly feel that you are unable to agree on a verdict, I will withdraw a juror, Juror No. 12, and declare a mistrial and I appreciate your efforts in this matter. The case will have to be tried again in another court and I will declare a mistrial. I will not make you stay any longer.

Court adjourned."

[2] Defendant argues at length concerning the alleged errors the trial court committed in the *first* trial by substituting Juror No. 13 for Juror No. 12 allegedly without justification, and in stating the reason for that substitution before the jury. It is apparently defendant's position that this improper substitution contributed to the "hung" jury and prevented defendant's acquittal of all charges. Defendant argues that justice did not require the replacement of Juror No. 12, since the judge found he was not prejudiced in any way. Therefore, he contends, the declaration of a mistrial was not based on a physical necessity or necessity to do justice and was improperly granted. *See State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977). Although counsel's argument is quite inventive, and such resourcefulness is not unappreciated, it is conjectural and unsupported by the evidence. Furthermore, any errors committed at the first trial must be deemed harmless in light of the fact that defendant did receive a new trial.

[3] Therefore, the sole remaining question with respect to defendant's plea of former jeopardy is whether the mistrial granted upon the trial court's own motion because of the "hung" jury was

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proper. The defendant contends that it was an abuse of discretion for the court not to make further inquiry concerning whether further deliberation would be fruitful. This argument was answered directly by our Supreme Court in *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971). We quote:

“When the jurors declare their inability to agree, it must be left to the trial judge, in the exercise of his judicial discretion, to decide whether he will then declare a mistrial or require them to deliberate further. *State v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340. This is always a delicate question. Either releasing the jury ‘too soon’ or holding it ‘too long’ will bring charges of an abuse of discretion. ‘But, after all, they [the trial judges] have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.’ *United States v. Perez*, *supra* at 580, 6 L.Ed. at 165.

After a jury has declared its inability to reach a verdict, the action of the trial judge in declaring a mistrial is reviewable only in case of gross abuse of discretion, and the burden is upon defendant to show such abuse. . . .” 279 N.C. at 486, 183 S.E. 2d at 643. See also *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

Defendant has demonstrated no gross abuse of discretion. This assignment of error is overruled.

[4] Defendant’s remaining assignment of error is addressed to the trial court’s denial of defendant’s motion for a mistrial in the second trial because of improper questions propounded by the private prosecutor to a character witness produced by defendant. Arthur Lee Wollet, who had known defendant all his life and for whom defendant had worked as a service station attendant, testified that defendant has a good reputation in the community in which he lives. On cross-examination of the witness, the following appears in the record:

“Q. If it came to your attention, Mr. Wollet, as a fact that Mr. Charles Johnson, who you have just given a good reputation

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in the community in which he lives, has been convicted of twenty-one crimes in Halifax County, would you still say that he had . . .

MR. CLARK: Object.

MR. MARTIN: Please let me finish, Your Honor.

COURT: Objection sustained.

Q. Do you know that he has been convicted in Halifax County twenty-one times?

MR. CLARK: Objection, move for a mistrial.

COURT: Objection sustained.

COURT: Ladies and gentlemen, I will let you retire to the jury room.

COURT: Objection sustained. Let the records show the Court admonished counsel not to ask similar questions again.

MR. JOSEY: We move for a mistrial, Your Honor.

COURT: Motion for a mistrial is denied. Let the jury come back, please.

EXCEPTION NO. 6

COURT: Ladies and gentlemen of the jury, the Court has just sustained the objection made to the questions or comments of counsel. The Court has just sustained an objection to the question or questions or statements by counsel for the State. I want to instruct the jury that you must disregard those questions and you must disregard the statements of counsel for which I sustained the objection. The statements or questions of counsel are not evidence in the case and they are not to be considered by the jury as evidence in the case, and you are to completely dismiss them from your mind and do not consider questions of counsel where the objections are sustained and specifically the last two questions asked by counsel for the State to which I sustained the objection. You may continue your cross examination."

Defendant contends that the question twice asked of the witness concerning the defendant's previous alleged convictions



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not only was objectionable and incompetent, it placed before the jury matters so prejudicial that the attempt to cure the error could not have removed the statements from the jurors' minds. Furthermore, defendant asserts that the prosecuting attorney intentionally violated his professional duty to avoid placing before the jury incompetent and prejudicial matters not legally admissible in evidence.

The rule is well established in North Carolina that a character witness may not be questioned concerning particular acts of misconduct by the defendant, nor may he be asked whether he would consider a person guilty of such misconduct to have good character. *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975). Although the rule is apparently contrary to the majority rule in this country, it is said that the rule is a good one due to the relative lack of value of such evidence compared to the likelihood of its introduction for the improper purpose of having it considered as substantive evidence of the misconduct itself. *See generally* 1 Stansbury's N.C. Evidence § 115 (Brandis rev. 1973). Because the witness properly was not permitted to respond to the question, the issue before this Court is whether it was error for the trial court not to grant a mistrial once the comments of the prosecutor were already before the jury. Whether instructions can cure the prejudicial effect of such errors must depend primarily on the nature of the evidence and the particular circumstances of each case. *State v. Hunt, supra*; *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948). In resolving this question, we must keep in mind that "our system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are [persons] of character and sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938)." *State v. Crowder*, 285 N.C. at 49, 203 S.E. 2d at 43.

Based upon the particular circumstances of this case, we are of the opinion that the possible prejudicial effect of the prosecuting attorney's comments could not be cured by the trial court's instructions that they be disregarded. The evidence in this case is not so overwhelming as to render the prejudicial effect insignificant. *Compare State v. Crowder, supra*. This is apparent

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from the fact that the first trial resulted in a "hung" jury and from the conflicting evidence in the present case. Additionally, private prosecutor asked the court, after defendant's objection, to let him finish, but the court sustained the objection. After the court sustained defendant's objection, the private prosecutor, in the face of the sustaining of the objection, again asked the witness whether he knew defendant had been convicted in Halifax County 21 times. The phraseology was, in all material aspects, identical to that used in the question to which objection had *just* been sustained. In this case, it would appear that the improper questions propounded by the prosecuting attorney, in this instance a private prosecutor with broad experience both as a trial lawyer and a trial judge, were not made out of ignorance of the established rules of evidence in this State. If the second question was asked before the court sustained the objection, which can certainly happen in the course of a hotly contested trial, the record does not so indicate. Finally, the questions by the prosecutor were not asked on cross-examination of defendant when such facts were admissible, defendant having testified that he had been convicted only of damage to personal property, assault, and assault on a female.

In our opinion, although the able trial judge quickly responded with an attempt to nullify the impact of the improper questions of the private prosecutor, the particular facts of this case compel us to grant defendant a

New trial.

Judges CLARK and ARNOLD concur.

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**Hedrick v. Southland Corp.**

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LOUISE HEDRICK, WIDOW, ISAAC EARL HEDRICK, DECEASED, EMPLOYEE,  
PLAINTIFF v. SOUTHLAND CORPORATION, T/A 7-ELEVEN FOOD STORES  
EMPLOYER AND THE TRAVELERS INSURANCE COMPANY, CARRIER,  
DEFENDANTS

No. 7810IC569

(Filed 5 June 1979)

**1. Master and Servant § 93.2— workmen's compensation—plaintiff's social security file—medical records—admissibility**

In a proceeding before the Industrial Commission to determine if plaintiff was entitled to receive lifetime compensation payments for the death of her husband because she was disabled at the time of his death, no prejudicial error occurred by reason of the introduction of plaintiff's social security file containing medical reports, since it presented plaintiff's medical background and corroborated her testimony and the testimony of her children, and there was ample evidence, aside from the medical records, upon which the Commission could have based its findings of disability.

**2. Master and Servant § 94.1— workmen's compensation—conclusion that plaintiff disabled—sufficiency of evidence**

Evidence that plaintiff was a chronic alcoholic and that she suffered from various other medical problems was sufficient to support the Industrial Commission's conclusion that plaintiff was unable to support herself by reason of physical and mental disability as of the date of her husband's death.

**3. Master and Servant § 94— workmen's compensation—disabled spouse—no finding of permanent disability required**

G.S. 97-38, the statute providing compensation for life or until remarriage for the disabled spouse of an employee who dies under compensable circumstances, does not on its face require a finding of permanent disability.

APPEAL by defendants from the North Carolina Industrial Commission opinion and award of 27 December 1978. Heard in the Court of Appeals 8 March 1979.

Defendants appeal from the Commission's finding that plaintiff is entitled to receive lifetime compensation payments for the death of her husband because she was disabled at the time of his death. Plaintiff's husband died under compensable circumstances on 3 October 1975. The award was made pursuant to G.S. 97-38 which, in pertinent part, is as follows:

"Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period

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in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage . . . .”

Plaintiff's evidence tends to show the following. When her husband died she was 56 years old and lived alone. Her two adult children lived in other towns. She worked for Thalhimers prior to 1971 but has not been employed since. Plaintiff testified that she had been deeply depressed during the two to three years prior to her husband's death. She had a degenerative disc problem and had been in and out of the hospital. When she stood for too long her ankles would swell and cause pain. She suffered from these conditions on the date of her husband's death. Plaintiff also testified that she had had shock therapy and psychiatric treatment. Before and after her husband's death, plaintiff was an alcoholic.

Plaintiff's children testified that their mother had a back problem and that her ankles used to swell. She had been in and out of the hospital since they were children. For four or five years before her husband's death, plaintiff drank all day long. She was drinking the night he was killed. Their mother is incapable of working.

Plaintiff's Social Security records which included medical reports were introduced into evidence. They showed that she had applied for disability benefits on 27 August 1971 and it was determined that she was entitled to these payments. That determination was still in effect at the time of her husband's death. Plaintiff's medical records from Watts Hospital were also introduced. Defense counsel objected to the introduction of any records which contained diagnoses and treatments made by medical personnel but this objection was overruled.

Dr. James Davidson testified that he first saw plaintiff in 1971 for backaches and a urinary tract infection. She was hospitalized in January, 1975 for diverticulitis. On 13 November 1975 she came to him again for backache and urinary tract infection. Subsequent to her husband's death, she was suffering from delirium tremens after being hospitalized for a broken ankle. Dr. Davidson diagnosed her as a chronic alcoholic.

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The Deputy Commissioner found that plaintiff had a history of multiple hospitalizations for anxiety, drug toxicity, neurosis, barbituate poisoning, psychoneurosis, attempted suicide and multiple physical ailments. The Commissioner included findings as to diagnoses made by various doctors who treated plaintiff between 1971 and 1975. He concluded that plaintiff was unable to support herself because of physical and mental disabilities and, therefore, was entitled to compensation benefits for the initial 400 weeks and thereafter during her lifetime or until she remarried, absent a change of condition.

The Commissioner's opinion and award was affirmed and adopted by the Full Commission with some amendments, including the striking of the change of condition contingency from the award. From this decision, defendants appealed.

*Haywood, Denny & Miller, by George W. Miller, Jr., and Charles H. Hobgood, for plaintiff appellee.*

*Gene Collinson Smith, for defendant appellants.*

VAUGHN, Judge.

[1] Defendants first contend that the Commission erred in allowing into the record the plaintiff's social security file containing medical reports of various doctors and in using these reports to establish plaintiff's disability under G.S. 97-38. The Deputy Commissioner made the following findings of fact, based on these records, which were adopted by the Full Commission.

"8. On June 25, 1973, Dr. Robert A. Huffaker, a psychiatrist with offices in Durham, North Carolina, reported his findings concerning a psychiatric evaluation of the plaintiff widow. At that time she gave a history that she began to have incapacitating symptoms approximately four years prior to said examination, including increased back pain, a presumptive diagnosis of rheumatoid arthritis, a possible diagnosis of gout, possibly a diagnosis of kidney disease, et cetera. She translated her pain into difficulties on her job which required lifting and bending and, therefore, she stopped working. She indicated that the pain in her back and legs had increased over the past four years, that her weight had increased 50 to 75 pounds over that period and she had

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become more aware of an underlying sense of depression; that during said period she felt essentially unable to do anything constructive for herself or her working situation, felt totally at a loss in regard to her personal worthwhile-ness, in regard to her home situation and family, and in regard to her work situation. She stated at that time: 'I feel I have been a total wreck, mentally and physically.'

"Dr. Huffaker surmised that changes in plaintiff widow's home environment probably played a significant role in contributing to her 'apparently exaggerated feelings of illness'; at that time the two children were going away from home, the daughter having married and the son being away in college. Plaintiff expressed a strong feeling that she had worked all her life and deserved to be taken care of and helped. She expressed a feeling of being used and not being loved for herself; and even indicated that she was adopted as a child because her family wanted someone to use to do the chores. Dr. Huffaker expressed the opinion that plaintiff, throughout her life, had been plagued by anxieties and insecurities.

"In summary, Dr. Huffaker stated that plaintiff had stopped functioning as a productive and self-sufficient individual in recent years; that plaintiff was preoccupied with somatic problems and denied psychological difficulties; that her then present pattern of dependency and somatic preoccupation appeared fixed; that it was doubtful that said condition can be reversed at that time without a major change in her life circumstances; that the prognosis for self-sufficiency appeared highly guarded and uncertain; that plaintiff should receive psychotherapy (although she appeared highly resistant to psychiatric treatment) and drug therapy for depression and tension. Dr. Huffaker diagnosed plaintiff's condition as 1) passive-dependent personality disorder, severe, probable; 2) involuntional depressive reaction, masked, with preoccupation with somatic symptoms, moderate, possible.

"9. On October 10, 1972, plaintiff widow was examined by Dr. W. Raney Stanford of Durham, North Carolina. At that time her history included the following: she complained of pain in the lumbo-sacral spine and in her left ankle existing for two years and progressively getting worse; she

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complained of incapacitating pain and multiple other problems and indicated that her husband did most of the housework. Dr. Stanford diagnosed plaintiff's condition as: 1) hypertrophic arthritis: disc disease of spine. Involvement of left ankle and both elbows. Very crippling arthritis. 2) Conjunctivitis. Obesity. Some acid indigestion. 3) Neurosis with anxiety state.

"An x-ray done on May 11, 1971 by Dr. Donald M. Monson showed, inter alia: advanced degenerative disc disease at L5-S1, with virtually complete loss of the intervertebral disc substance; so-called reverse spondylolisthesis of L5 posteriorly on S1 incident to the degeneration; moderately advanced degenerative joint disease involving the lower lumbar apophyseal joints; mild left lumbar rotoscoliosis; early degenerative changes about both sacroiliac joints apparently without change since 1966 studies. Degenerative changes in the lumbar spine had progressed considerably in that interim, however.

"An x-ray done on May 14, 1971 by Dr. John F. Sherill, Jr. showed diffuse narrowing of the C5-C6 and C6-C7 interspaces with a moderate hypertrophic spurring about the anterior aspects of the vertebral bodies, minimal posterior spurring, the changes being those of degenerative disc disease.

"Plaintiff was examined by Dr. Eulyss R. Troxler, an orthopedist practicing in Greensboro, on April 17, 1973, who reported x-ray findings of mild scoliosis to the left, some hypertrophic changes in the lumbosacral area, minimal liping of the upper fifth lumbar vertebra and slight narrowing of the lumbosacral joint; no definite spondylolisthesis and a small spur on the weight bearing portion of the left heel. Dr. Troxler was of the opinion that plaintiff could perform light work on an eight-hour basis, being able to sit without difficulty, walk and lift up to 20 to 25 pounds and could carry, push or lift the average load of an adult woman. He also expressed the opinion that plaintiff could have difficulty climbing stairs."

Generally, these reports would be hearsay and not admissible. Nevertheless, medical records are allowed into evidence as an

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exception to the hearsay rule if they are made in the regular course of business, made contemporaneously with the events by one authorized to make them, and are identified and authenticated. *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962). The problem arises, however, when medical records contain diagnostic opinions of physicians who are not available for cross-examination. When such diagnoses are ordinary findings based on objective data, the tendency is to allow the opinion into evidence. On the other hand, if the diagnosis is purely speculative, the courts will exclude such evidence. C. McCormick, *Handbook of the Law of Evidence* § 313 (2d Ed. 1972). Between these two extremes, however, lie opinions based on subjective data or involving problems of interpretation such as psychiatric diagnoses; the courts will usually allow these opinions into evidence. McCormick, *supra*. In *Thomas v. Hogan*, 308 F. 2d 355 (4th Cir. 1962), the Fourth Circuit ruled that the trial court committed prejudicial error in excluding a medical record showing the results of a blood test. The Court stated that routine diagnoses and tests made in the regular course of business should be allowed into evidence. The Court observed that

“There is good reason to treat a hospital record entry as trustworthy. Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records are deserving of a presumption of accuracy even more than other types of business records.” *Thomas v. Hogan, supra*, at 361.

A contrary position was taken in *New York Life Insurance Co. v. Taylor*, 147 F. 2d 297 (D.C. Cir. 1944), where the Court refused to allow into evidence medical records containing a psychiatric diagnosis. The records were introduced to prove the suicidal intent of the decedent. The Court felt that a psychiatric diagnosis involved conjecture and opinion and should, therefore, be subjected to cross-examination.

The introduction of medical records in federal courts is now governed by Rule 803(6) of the Federal Rules of Evidence. This rule provides for the business records exception to the hearsay rule to apply to any “memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or



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diagnoses . . . if kept in the course of a regularly conducted business activity." The notes of the Advisory Committee indicate that Rule 803(6) conforms to the holding in *Thomas v. Hogan*, *supra*, by specifically allowing records containing opinions and diagnoses into evidence.

In the present case, we conclude that no prejudicial error occurred by reason of the introduction of the medical records. They presented plaintiff's medical background and corroborated her testimony and the testimony of her children. There was also ample evidence, aside from the medical records, upon which the Commission could have based its findings of disability.

[2] Defendants next contend that the evidence was insufficient to support the findings of fact, that the findings of fact were improper because they merely summarized the evidence, and that the conclusions of law were not supported by findings of fact based on competent evidence. On appeal, this Court is limited to the questions of whether the findings of fact are supported by competent evidence and whether the conclusions of law are justified by these findings. *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). The Commission must make specific findings with respect to crucial facts upon which the right to compensation depends. *Gaines v. Swain & Son, Inc.*, *supra*; *Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975). Defendants contend that the Commission's recitation of the medical records and the testimony of plaintiff, her children and Dr. Davidson were insufficient findings of fact. Defendants rely on *Gaines v. Swain & Son, Inc.*, *supra*, wherein this Court held that since the crucial findings made by the Commission were merely recitations of the evidence, they were not sufficiently positive and specific to enable the Court to judge the propriety of the order. In *Gaines*, there is no indication that the Commission ever specifically found that the injury was caused by a work-related accident. In the present case, however, the Commission specifically found that "[p]laintiff widow was unable to support herself by reason of physical and mental disability as of the date of the deceased employee's death, her conditions including degenerative disc disease, severe passive-dependent personality disorder and alcoholism." This finding is sufficiently positive and specific to enable this Court to review the order. Furthermore, the evidence supports this finding. Plaintiff and her two children were competent to testify about her health and her ability to work. *Carter v. Bradford*, 257 N.C. 481, 126 S.E. 2d 158 (1962); *Kenney v. Kenney*,

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15 N.C. App. 665, 190 S.E. 2d 650 (1972); 1 Stansbury, N.C. Evidence 2d § 129 (Brandis rev. 1973). In addition to the testimony showing that plaintiff was a chronic alcoholic, there was also evidence showing that she suffered from various other medical problems. This evidence was sufficient to support the finding that she was disabled.

[3] Finally defendants contend that the Commission erred in awarding plaintiff lifetime compensation. The Commission determined that the plaintiff was entitled to compensation for life or until she remarries. This award follows the wording of G.S. 97-38 which does not on its face require a finding of permanent disability. The question of whether the award may be modified upon a showing of a change in plaintiff's condition is not presented by this appeal.

Upon review of the Commission's order, we hold that the findings of fact are supported by competent evidence and that the conclusions of law are supported by the findings of fact.

Affirmed.

Judges ERWIN and MARTIN (Harry C.) concur.

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CAROLINA POWER & LIGHT COMPANY v. JOHN W. MERRITT AND WIFE,  
EDITH R. MERRITT; WILLIAM D. MERRITT, JR.; JOHN W. MERRITT  
AND WILLIAM D. MERRITT, JR., EXECUTORS OF THE ESTATE OF WILLIAM D.  
MERRITT, SR., DECEASED

No. 789SC751

(Filed 5 June 1979)

**1. Eminent Domain § 12— abandonment of earlier proceeding—no extinguishing of right**

A final judgment entered in an earlier condemnation proceeding against respondents was not *res judicata* in the present proceeding since the "Final Judgment" of the earlier action was in fact a voluntary dismissal and since abandonment of the proceeding in which no interest was taken did not extinguish petitioner's right of eminent domain.

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**2. Eminent Domain § 7.1— obtaining permit—no prerequisite to condemnation proceeding**

A permit from the U.S. Army Corps of Engineers which is now required but was not required at the time this eminent domain action was instituted could not have been a prerequisite to the filing of this action.

**3. Courts § 6.3— appeal from clerk—findings of fact in clerk's judgment**

The trial court, upon appeal from the clerk, did not err in failing to hear evidence or to order a statement of the case prepared by the clerk, since the judgment of the clerk set out her findings of fact and a more formal statement of the case could not have aided the judge in his determination.

**4. Eminent Domain § 15— compensation paid into court—possession by condemnor pending appeal**

The trial court in an eminent domain proceeding did not err in refusing to stay petitioner's entry upon the land pending appeal, since petitioner had deposited with the clerk the full amount of compensation awarded by the commissioners, and respondents were thereby protected from damage. G.S. 40-19.

APPEAL by respondents from *Hobgood, Judge*. Order entered 21 April 1978 in Superior Court, PERSON County. Heard in the Court of Appeals 2 May 1979.

Petitioner seeks to acquire by condemnation respondents' land, for the purpose of constructing a steam electric generating plant. The defenses raised by respondents include a final judgment entered in 1962 which respondents allege is *res judicata*, and the alleged failure of petitioner to acquire from the United States Government the required consent to this construction project.

The proceeding was heard on the pleadings by the Clerk of Superior Court, and by the Clerk's order of 14 October 1977, the proceeding was dismissed. Petitioner appealed from this order to Superior Court. Judge Walker found that the clerk's findings of fact did not support her conclusions of law, set aside the clerk's order, and remanded the proceeding to the clerk for the appointment of commissioners. The commissioners to appraise the tracts of land were appointed on 12 December 1977.

On 15 December 1977, respondents, alleging newly discovered evidence that petitioner must acquire a U.S. Army Corps of Engineers permit before beginning the project, moved to have any action of the commissioners deferred, and to have the proceeding dismissed. At a hearing before the clerk on 28

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December, petitioner stipulated that it must have a Corps of Engineers permit before it could dredge and fill Mayo Creek in connection with the project, and that application for this permit had been made in March 1977 but had not yet been granted. The clerk entered judgment on 30 December 1977 dismissing the proceeding.

Petitioner appealed from this judgment to Superior Court, and a hearing was held on 27 February 1978. At the hearing, an employee of the Corps of Engineers testified that petitioner could not proceed with its construction project without a permit from the Corps of Engineers. Judge Hobgood concluded that the necessity for this permit did not prevent petitioner from acquiring respondents' land in a condemnation special proceeding under North Carolina law, and he set aside the clerk's order dismissing the proceeding. He did not remand, but retained jurisdiction in the Superior Court, and ordered the commissioners to proceed with their appraisal.

On 29 March 1978 the commissioners filed their report, assessing damages at \$1,105,166. Petitioner's objection to this report was overruled, and on 21 April 1978 the report was confirmed by Judge Hobgood. Petitioner gave notice of appeal from this confirmation, and Judge Hobgood ordered petitioner to deposit the full amount of the award in the clerk's office pending determination of the appeal, and allowed petitioner to enter upon and possess the land while the appeal was pending. Respondents appeal.

*Andrew McDaniel, and Ramsey, Hubbard and Galloway, by James E. Ramsey, for petitioner appellee.*

*Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., for respondent appellants.*

ARNOLD, Judge.

[1] In February 1962 the petitioner brought condemnation proceedings against these respondents, seeking to acquire for the purpose of constructing a steam electric generating plant 447.17 acres of the 558.273 acres it wishes to condemn in the present proceeding. Respondents' demurrer and their motion to dismiss

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**Power & Light Co. v. Merritt**

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were overruled. Stipulations were filed by the parties in May, and on 4 December 1962 a "Final Judgment" was entered, as follows:

THIS CAUSE coming on to be heard and it appearing that the plaintiff, Carolina Power & Light Company, does not need any portion of the defendants' property described and for the purposes stated in the petition filed in this cause and has abandoned all plans for acquiring any portion of said property for such purposes, and it further appearing that a final judgment should now be entered setting forth such abandonment and dismissing the action.

NOW, THEREFORE, IT IS HEREBY ORDERED, CONSIDERED, ADJUDGED AND DECREED:

1. That the plaintiff has abandoned all plans for acquiring the defendants' property or any portion thereof as described and for the purposes stated in the petition filed in this case.

2. That the plaintiff has no right, title or interest in and to any portion of said property.

3. This action is hereby dismissed and the costs of the same are taxed against the plaintiff.

Respondents argue that this 1962 judgment is *res judicata* in the present action.

"Basic to the doctrine of *res judicata* is the premise that a plea of *res judicata* must be founded on an adjudication—a judgment on the merits." *Taylor v. Electric Membership Corp.*, 17 N.C. App. 143, 145, 193 S.E. 2d 402, 403 (1972). The 1962 judgment upon which respondents rely, though labelled "Final Judgment," shows upon its face that it is in fact a voluntary dismissal of petitioner's action. The only facts that conceivably were decided were that petitioner had at that time abandoned its plans to acquire respondents' property, and that it had acquired no interest in that property by its action.

Because the petitioner once abandoned a condemnation action involving the same parties, lands and purposes, respondents would have us find that petitioner cannot bring the present action. Our Supreme Court held, however, that the right of eminent domain "is not necessarily exhausted by a single exercise of the

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power," *Power Co. v. Wissler*, 160 N.C. 269, 273, 76 S.E. 267, 269 (1912), in a case where an interest in the property actually was taken in the first condemnation proceeding. Where, as here, the first proceeding has been abandoned and no interest has been taken, certainly the right of eminent domain is not extinguished.

[2] Respondents next argue that petitioner was not entitled to bring this action because it failed to acquire, prior to the institution of the action, a permit from the U.S. Army Corps of Engineers to allow petitioner to excavate and fill on Mayo Creek. However, according to the uncontradicted testimony of George Frank Yelverton of the Corps of Engineers, on the date of the institution of this action, 15 June 1977, no such permit was required. Jurisdiction over waters such as Mayo Creek was not given to the Corps of Engineers until 1 July 1977. A permit which is now required but was not required at the time this action was instituted could not have been a prerequisite to the filing of this action. Respondents' argument fails.

[3] Petitioner's appeal from the first order of the Clerk of Superior Court was heard by Judge Walker. His order of 22 November 1977 states in part "[t]hat even though the Clerk of Superior Court of Person County has not prepared a statement of the case in this proceeding as a result of a hearing before her . . . , the Court is of the opinion that the Finding of Facts as stated in [her] Judgment are sufficient for consideration of this Matter by this Court." He concluded that one of the clerk's findings of fact was incorrect and the others did not support her conclusions of law, and set aside her judgment dismissing the proceeding. Respondents assign error to the trial court's failure to hear evidence or order a statement of the case prepared by the clerk.

G.S. 1-274 requires the clerk "to prepare and sign a statement of the case, of his decision and of the appeal" for the use of the judge. It has been held that this statement "should embrace the material facts [and] copies of necessary paper writings . . . to the end the Judge may review the decision of the Clerk appealed from upon its full merits." *Brooks v. Austin*, 94 N.C. 222, 224 (1885). Here, the judgment of the clerk, which was before Judge Walker, sets out her findings of fact, and respondents have made no objections to these findings. The judge changed only one

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of the findings, and this because both parties stated to the court that the evidence underlying it, an answer to interrogatories, had been error. Otherwise, the court's decision to set aside the clerk's judgment was based upon his determination that the findings of fact failed to support the clerk's conclusions of law. We fail to see how any more formal statement of the case could have aided him in this determination, and we note that the Court in *Brooks v. Austin, supra*, required only that the clerk's statement "embrace the material facts," not necessarily the evidence. In the absence of a showing that any material facts were excluded from the judge's consideration, we find no prejudicial error.

[4] Finally, respondents argue that the trial court erred in refusing to stay petitioner's entry upon the land pending this appeal. G.S. 40-19 states in pertinent part that "[i]f the [petitioner], at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then . . . the [petitioner] may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal." On 21 April 1978 Judge Hobgood ordered petitioner to deposit with the Clerk of Court the full amount awarded by the Commissioners, and respondents do not argue that petitioner has failed to do this. Instead, they rely on *Airport Authority v. Irvin*, 2 N.C. App. 341, 163 S.E. 2d 118 (1968), arguing that where the right to condemn is in issue, the respondents must be protected against the possibility of irreparable damage.

The petitioner in *Airport Authority* sought an air rights easement which would allow it to cut trees on respondents' property. While appeal of the commissioners' damage award was pending before the Superior Court, respondents obtained a temporary restraining order to prevent petitioner's interference with the trees on the land. Petitioner appealed from the denial of its request that the temporary restraining order be dissolved, and this Court held that, while petitioner was entitled to enter and possess the property pending final adjudication, "since respondents challenge petitioner's right to condemn and the cutting or trimming of trees on the subject property would cause irreparable damage to respondents should they ultimately prevail, the Superior Court was fully empowered to grant the restraining orders." *Id.* at 345, 163 S.E. 2d at 121.

The fact that we held in *Airport Authority* that the Superior Court was *empowered* to grant a restraining order does not lead

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inescapably to the conclusion that it was *required* to do so. "It ordinarily lies in the sound discretion of the [trial] court to determine whether or not a temporary injunction will be granted. . . ." *Conference v. Creech*, 256 N.C. 128, 139-40, 123 S.E. 2d 619, 626 (1962). On appeal, we are not bound by the findings of the trial court as to the injunction, but there is a presumption that the judgment entered by the trial court is correct. *Id.*

Having reviewed the evidence in this case, we find no error in the court's refusal to grant a temporary restraining order. G.S. 40-2(3) gives petitioner the right of eminent domain, and G.S. 40-19 affords the property owner protection by allowing the court to award damages to be paid from the deposit made by petitioner in the event condemnation is ultimately defeated. In the case at bar, however, we find that respondents do not have sufficient grounds to defeat the condemnation.

The order of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

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CHARLES H. FRANCIS, JR. AND WIFE, CAROLYN F. FRANCIS v. DURHAM  
COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 7814DC717

(Filed 5 June 1979)

**1. Infants § 5— child in custody of department of social services—mother's consent to adoption—jurisdiction to award custody**

The district court had subject matter jurisdiction of an action for custody of a minor child who was physically present in this State and in the custody of a county department of social services. The fact that the mother had surrendered the child to the department of social services and had signed a general consent for his adoption did not vest subject matter jurisdiction over all matters pertaining to the child's custody exclusively in the clerk of superior court or in the superior court itself under the provisions of G.S. Ch. 48 governing adoptions.



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**2. Infants § 6; Adoption § 1— custody hearing—failure to give protective order to department of social services**

The district court in a child custody proceeding did not err in failing to grant defendant county department of social services a "protective order based upon confidentiality of records as set out in G.S. 48-25," since defendant may not now justly complain if the district court failed to enter an order which defendant contends it had no power to grant, and since neither the director nor any employee of defendant was required in this action to disclose any type of information acquired in the contemplation of an adoption referred to in G.S. 48-25.

**3. Adoption § 2.1— consent to adoption—no right to choose adoptive parents**

No provision of law gives the right to decide who may and who may not be considered as adoptive parents to a natural parent who has given the director of social services an irrevocable general consent for the adoption of his child.

APPEAL by defendant, the Durham County Department of Social Services, from *Pearson, Judge*. Judgment entered 7 April 1978 in District Court, DURHAM County. Heard in the Court of Appeals 26 April 1979.

This is an appeal from judgment awarding custody of a minor child to its paternal grandparents. The child, Nathan Allen Francis, was born 28 June 1976 to Cheryl Anne Bush Francis and husband, Leonard Francis. His father, Leonard Francis, died on 10 December 1976. On 28 November 1977 the child's mother turned him over to the Durham County Department of Social Services (the Department) and signed a consent for his adoption. The time within which the mother might withdraw her consent has expired, and she has shown no interest in doing so. She is not a party to this proceeding.

On receiving the child from his mother, the Department followed its normal procedure and placed him temporarily in a foster home in Durham. Following the death of the child's father there had been practically no communication between the child's mother and his paternal grandparents, and the grandparents did not immediately learn that their grandson had been placed with the Department. Upon learning of this, they immediately went to the Department and attempted to commence adoption proceedings, but were told that the Department was unable to consider their request to have the child placed with them as adoptive parents. The letter from the Department informing them of this

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stated that it was "because of the position of the mother, and, as N.C. law gives the parent the right to make this decision." Upon receiving this notification from the Department, the paternal grandparents commenced the present proceeding in the district court to obtain custody of the child.

In their complaint, filed 1 March 1978, the paternal grandparents alleged the foregoing facts and in addition alleged that "they can provide the child with a nice home with the love, devotion, upbringing, and general welfare that the child needs and deserves." The Department filed a motion to dismiss the complaint under G.S. 1A-1, Rule 12(b)(1) on the grounds that the district court lacked jurisdiction over the subject matter and under Rule 12(b)(6) on the grounds that the complaint failed to state a claim upon which relief can be granted. The district court denied the Department's motion to dismiss and, after a hearing on the merits, entered judgment finding the foregoing facts and in addition finding facts and making conclusions of law as follows:

7. At the time of this hearing, there were no adoption proceedings pending by anyone concerning the adoption of the said infant.

8. The plaintiff husband is 46 years old, in good health, and gainfully employed by General Telephone Company. He has been so employed for seven years. He is retired from the U.S. Army and receives a pension therefrom.

9. The femme plaintiff is 45 years old, in good health and works part-time. It is not economically necessary for her to work.

10. Both of the plaintiffs are natives of Durham and have numerous relatives in the Durham community. The plaintiffs have raised, in addition to the one deceased son, a daughter and two sons. The daughter is 24 years old and the sons are 22 and 17 respectively. The daughter is married and she and her husband have a four year old child. They live in Durham County and are very close to the plaintiffs, both physically and emotionally. The two sons both live in the home of the plaintiffs. Additionally, the femme plaintiff has a sister fifteen years her junior whom she and the male plaintiff raised after the death of their mother when the sister was 14 years

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old. The sister is now married, lives in Durham and enjoys a very close relationship with the plaintiffs.

11. All members of the family and many close relatives are completely supportive of the plaintiffs in their efforts to obtain custody of the infant child. The Francis family is a close-knit, sharing family which places great emphasis on blood relations. Said family members would not hesitate to assist, in any way possible, with the maintenance and support of the infant child should anything happen to either or both of the plaintiffs.

12. The plaintiffs live in a nice home and there are ample facilities in the home for the raising of the infant child. Their finances are such that the addition of another child would place no undue economic hardship on them.

13. The plaintiffs are hardworking, intelligent people who have successfully raised four children and are quite capable of raising a fifth. They live in a good community with good educational facilities nearby.

14. No evidence whatsoever has been presented to deny the fitness of the plaintiffs.

15. The plaintiffs are fit, suitable and proper parents and are the natural grandparents of the infant child. The defendant has, prior to this hearing, legal custody of the child by virtue of the General Statutes of North Carolina. The best interest of the child, including his health, education, welfare and general upbringing, would best be served by awarding sole and exclusive custody of the infant child to the plaintiffs.

16. There exists no impediments to the immediate transfer of the infant child from the home of the foster parents to the plaintiffs herein.

**CONCLUSIONS OF LAW**

1. The Civil District Court of Durham County has jurisdiction over the parties and the subject matter of this action.

2. The plaintiffs are fit, suitable and proper persons to have custody of the infant child, Nathan Allen Francis.

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3. The best interest of the infant child will be served by awarding his custody, care and upbringing to the plaintiffs.

On these findings and conclusion, the district court entered judgment awarding custody of the child to the plaintiffs, its paternal grandparents. From this judgment, the Department appeals.

*Mount, White, King, Hutson, Walker & Carden by E. Lawson Moore and William O. King for appellees.*

*Lester W. Owen and James W. Swindell for Durham County Department of Social Services, defendant appellant.*

PARKER, Judge.

[1] Appellant, the Durham County Department of Social Services, first contends that the district court did not have jurisdiction over the subject matter of this action and that its motion to dismiss made under G.S. 1A-1, Rule 12(b)(1) should have been allowed. We do not agree.

This is a civil action for custody of a minor child. The child was physically present in this State and the court obtained personal jurisdiction over the defendant agency, which had actual control and custody of the child when this action was commenced. Either of these factors would vest jurisdiction in the courts of this State to determine custody of the child. *See* G.S. 50-13.5(c)(2). "The district court division is the proper division . . . for the trial of civil actions and proceedings for . . . child custody." G.S. 7A-244. The procedure in actions for custody or support of minor children is prescribed in G.S. 50-13.5. Subsection (h) of that statute provides that "[w]hen a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court and may be heard at any time." We hold that by virtue of these statutes the district court had jurisdiction over the subject matter of this action.

We find no merit in appellant's contention that, the child having been placed by its mother with the appellant and the mother having signed a general consent for his adoption, the provisions of G.S. Ch. 48 governing adoptions apply so as to vest subject matter jurisdiction over all matters pertaining to the child's custody

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exclusively in the clerk of superior court or in the superior court itself. G.S. 48-12(a) provides that “[a]doption shall be by a special proceeding before the clerk of superior court,” but here no proceeding for the adoption of the child had been filed when this action was instituted. Plaintiffs’ informal oral request made to the Department that their grandchild be placed with them for adoption, which request the Department denied, did not amount to the institution of an adoption proceeding. All that had happened here prior to the institution of the present custody action is that the mother had surrendered the child to the defendant Department and had signed a general consent for his adoption. The effect of this was to give legal custody of the child to the Department “unless otherwise ordered by a court of competent jurisdiction.” G.S. 48-9.1(1). Here, a court of competent jurisdiction has otherwise ordered. Appellant’s first assignment of error is overruled.

[2] Appellant next contends that the court erred in failing to grant it a “protective order based upon confidentiality of records as set out in G.S. 48-25.” Subsection (c) of the cited statute is as follows:

(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its natural, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19.

The record on appeal does not reveal exactly what type of “protective order” was requested by the appellant and does not even clearly reveal that the district court, after being presented with a proper motion by defendant for any such order, refused to grant it. Indeed, in this regard appellant’s brief contains the statement that “[t]he offer made by the District Court to provide the defend-

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ant a protective order was of no avail because the District Court is without jurisdiction to grant such an order as denoted in G.S. Sec. 48-25 quoted above." Appellant may not now justly complain if the district court failed to enter an order which appellant contends it had no power to grant. Whatever may be the situation in that regard, it is manifest that appellant was not prejudiced by the absence of any "protective order." Neither the director nor any employee of the Durham County Department of Social Services was required in this action to disclose any information of the type referred to in G.S. 48-25.

We have examined appellant's remaining contentions set forth in its brief and find them without merit. Our review of this case has been made more difficult by appellant's failure to comply with the directive of Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure that "[e]ach exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference." In the record on appeal the appellant referred to exceptions under its assignments of error but such exceptions do not otherwise appear in the record. For failure to comply with the Rules of Appellate Procedure this appeal would have been subject to dismissal. Rule 25, N.C. Rules of Appellate Procedure. Nevertheless, we have elected not to dismiss this appeal in order that we may pass upon the jurisdictional question which appellant sought to raise.

[3] Finally, we take note of the reason stated in defendant Department's letter as to why it was unable to consider plaintiffs' request to have their grandchild placed with them for adoption. The stated reason was that it was "because of the position of the mother and, as N.C. law gives the parent the right to make this decision." It is apparent from this that the Department was acting under a misapprehension of the law when it refused to consider plaintiffs' request. No provision of law gives the right to decide who may and who may not be considered as adoptive parents to a natural parent who has given to a director of social services an irrevocable general consent for the adoption of his child.

The order appealed from is

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**State v. Simms**

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Affirmed.

Judges MITCHELL and MARTIN (Harry C.) concur.

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STATE OF NORTH CAROLINA v. FRANKLIN ALBERT SIMMS, ALIAS  
FRANK HERSHAW

No. 7922SC56

(Filed 5 June 1979)

**1. Criminal Law § 91.4; Constitutional Law § 44— appointment of new counsel on day of trial—no continuance**

Where defendant's attorney requested permission to withdraw because of ethical reasons on the morning of the trial, the trial court did not err in refusing the request and refusing to continue the case, since defendant was adequately represented by another lawyer appointed by the court to be his "principal" counsel ninety minutes before trial began; both counsel participated in the case throughout the trial; defendant thus had the benefit of two lawyers; and defendant at no time expressed any dissatisfaction with his original attorney or with the addition of the "principal" attorney.

**2. Criminal Law § 91.7— absent witness—continuance properly denied**

The trial court did not abuse its discretion in denying a motion for continuance because of the absence of a witness when counsel had several months to confer with defendant and possible witnesses, and counsel only learned of the desired witness a short time before trial.

**3. Constitutional Law § 43; Criminal Law § 66.5— line-up prior to arrest—no right to counsel**

Defendant was not entitled to counsel during a line-up where he had not been arrested or charged in this case at the time of the line-up, and the fact that defendant had been charged with another offense in another county did not require that counsel be present.

**4. Criminal Law § 66.15— identification of defendant— independent origin of identification**

Evidence was sufficient to support the trial court's findings that witnesses' in-court identifications of defendant were based upon their personal observation at the time of the crime and were not tainted by any impermissible pretrial procedure where such evidence tended to show that the witnesses observed defendant at close range for three to five minutes; both witnesses gave officers detailed, accurate descriptions of defendant; both were emphatic about their identification of defendant at the preliminary hearing and one witness promptly pointed him out in a line-up proceeding and from photographs; and the crime and subsequent identifications were separated by a short interval of time.

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**5. Criminal Law § 88.4— cross-examination of defendant—prior convictions and misconduct**

Cross-examination of defendant with respect to prior convictions or acts of misconduct did not constitute prejudicial error, since nothing in the record indicated that the questions were asked in bad faith or concerned matters not within the knowledge of defendant.

APPEAL by defendant from *Hairston, Judge*. Judgment entered 19 October 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 24 April 1979.

Defendant was indicted and convicted of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Judgment of imprisonment was entered for twenty-five to thirty-five years.

On 9 August 1978, defendant moved to suppress all evidence obtained from a pretrial line-up prior to arrest and all identification evidence resulting from defendant's arrest.

On the day of trial, 16 October 1978, defendant's court-appointed counsel, Mr. Bedford Cannon, moved to withdraw from the case for the reason that defendant had related a second set of facts to him that morning. This later statement involved the defense of alibi, was substantially different from prior statements and would significantly alter the defense strategy. The court denied Mr. Cannon's motion but appointed Mr. Constantine H. Kutteh II as defendant's principal counsel. Mr. Kutteh was appointed to the case approximately ninety minutes before the trial began.

Mr. Kutteh moved for a continuance for the reason that he was not prepared for trial due to his late appointment to the case. This motion was denied.

Before trial began, voir dire was held on the motion to suppress. The motion to suppress pretrial identification was overruled, the court entered an order finding facts and conclusions of law.

The State's evidence showed James Powell operated the Treat-U-Right Mart in Statesville. Larry Morrison was working there with him about 8:15 p.m. on 26 January 1978 when a black man with a gun in his hand ran in the door and hollered "this is a



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holdup." The man was approaching Morrison with a small caliber revolver when Powell threw a camera at him. At this time, a second black man came in the store. Powell tried to go down the stairs but fell and the first man shot him in the right hand. Powell told him the money was in the cash register. The second man had already opened the cash register and taken \$415 from it. The men told them not to follow and ran out of the store. Powell was taken to the hospital for treatment of his wound.

Powell described the man with the revolver as about 5 feet 7 inches tall, weighing 145 pounds and wearing dark clothes with a little gray snap-down bill pancake cap. The second man was about 5 feet 7 or 8 inches tall, weighing 155-160 pounds and had on a toboggan and flannel type coat. Over objection, in open court he identified Simms as the man who had the gun. Morrison also identified the defendant as the man with the gun at the robbery, and in general corroborated Powell's testimony.

Defendant's evidence showed he had lived in Los Angeles until he moved to Hickory the year before. On the night in question he had been playing Monopoly and bingo with his girlfriend, her sister and the sister's husband at his house from about 7:30 p.m. to 9:30 p.m. After they left, defendant and his girlfriend watched TV and went to sleep. Defendant works at Shuford Mills and does not own a gun. Janice Johnson corroborated defendant's testimony that she is his girlfriend and was with him at his house playing Monopoly and bingo with friends on the night of the robbery.

*Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.*

*Pope, McMillan & Kutteh, by Constantine H. Kutteh II, and McElwee, Hall, McElwee & Cannon, by E. Bedford Cannon, for defendant appellant.*

MARTIN (Harry C.), Judge.

[1] Defendant argues the trial court should have allowed attorney Cannon to withdraw as counsel for defendant and continue the case. Defendant did not make the motion to remove attorney Cannon as his lawyer; the motion was made by Cannon on what he considered to be ethical grounds. Cannon was concerned about allowing defendant to testify to what he thought could be per-

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jured testimony, in the light of defendant's previous statements to him about the case. The court did not allow Cannon to withdraw as counsel for defendant, but in order to relieve him of his ethical problems, the court appointed attorney Kutteh as "principal" counsel for defendant. This left defendant with two attorneys, one who had been with the case since 7 March 1978, prior to the preliminary hearing, and totally familiar with all aspects of the case; the second being appointed some ninety minutes before trial and unencumbered by the conflicting statements of defendant. Had the court allowed Cannon to withdraw as counsel, Kutteh's motion for continuance would have been allowed because he, alone, did not have sufficient time to prepare for trial. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976); *State v. Moore*, 39 N.C. App. 643, 251 S.E. 2d 647 (1979). The trial court overcame this problem by keeping Cannon in the case and adding Kutteh as additional counsel. Both counsel participated in the case throughout the trial. Defendant had the benefit of two lawyers. The uncontradicted evidence shows defendant did not at any time express any dissatisfaction with Cannon as his attorney or with the addition of Kutteh. The case had been continued twice at prior sessions of court, once because defendant was being tried in another county and once on motion by defendant. The facts here are similar to *United States v. Abshire*, 471 F. 2d 116 (5th Cir. 1972), where defendant had appointed counsel for six months before trial who had thoroughly prepared the case for trial. Shortly before trial, additional counsel was appointed. He moved for continuance, which was denied. Both counsel actively participated in the trial. The Court held the defendant had received effective assistance of counsel and the denial of the continuance was proper. See also *Sykes v. Virginia*, 364 F. 2d 314 (4th Cir. 1966); *State v. Beeson*, 292 N.C. 602, 234 S.E. 2d 595 (1977).

[2] Defendant further contends a continuance was necessary in order for him to secure witnesses as to alibi. He told attorney Cannon about the necessity of these witnesses for the first time on the day the case was called for trial. Defendant had a duty to tell his lawyer about these witnesses before this late date. The trial court did not abuse its discretion in denying a motion for continuance because of the absence of a witness, when counsel had several months to confer with defendant and possible

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witnesses, and counsel only learned of the desired witness a short time before trial. *State v. Payne*, 11 N.C. App. 101, 180 S.E. 2d 379, *aff'd*, 280 N.C. 170, 185 S.E. 2d 101 (1971); *State v. Scott*, 8 N.C. App. 281, 174 S.E. 2d 80, *cert. denied*, 277 N.C. 116 (1970). Defendant's counsel produced evidence in support of his contention of alibi through the testimony of defendant and the witness Janice Johnson. Where the absent witness's testimony would only be corroborative or cumulative of evidence offered, it is not an abuse of discretion to deny a motion for continuance because of the absence of the witness. *State v. Shirley*, 12 N.C. App. 440, 183 S.E. 2d 880, *cert. denied*, 279 N.C. 729, 184 S.E. 2d 885 (1971).

As stated in *Moore, supra*, the chief consideration is whether the grant or denial of a continuance will be in the furtherance of substantial justice. We hold the trial court did not err in denying attorney Cannon's motion to withdraw or in denying attorney Kutteh's motion for a continuance.

[3] Defendant objected to the admission in evidence of the results of a line-up viewed by the State's witnesses Morrison and Powell, in which defendant was identified as one of the robbers. Defendant contends he was denied the right to counsel at the line-up and that it was impermissibly suggestive. Defendant, at that time, was confined in another county on other charges and was brought from that jail to the line-up. Nine persons were in the line-up, which was for the purpose of seeking identification of suspects in several different cases, including the robbery of Powell. Defendant had not been arrested or charged with robbery of Powell at the time of the line-up. A person has a right to counsel at a pretrial line-up when it is a critical stage of the criminal prosecution against defendant. *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178 (1967). However, this right only attaches at or after the commencement of adversary judicial proceedings against defendant. *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Sanders*, 33 N.C. App. 284, 235 S.E. 2d 94, *dis. rev. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977). Defendant had not been arrested or charged in this case at the time of the line-up, therefore, he was not entitled to counsel during the line-up procedure. The fact that defendant was charged with another offense in another county did not trigger the requirements of counsel under *Gilbert* in this case.

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After the voir dire hearing on the line-up question, the court found facts and made conclusions of law that the proceeding was not impermissibly suggestive. Powell was unable to make a definite identification of defendant at the line-up. The evidence sustained the court's finding that the line-up procedure was proper and not impermissibly suggestive. We are bound by those findings on appeal when they are supported by competent evidence, and may not set them aside or modify them. *State v. Cox*, 289 N.C. 414, 222 S.E. 2d 246 (1976). The assignment of error is overruled.

Defendant also assigns as error the in-court identification of defendant by Powell and Morrison. This assignment also involves defendant's contention that the in-court proceeding was tainted by an improper photographic identification of defendant by Morrison. In *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968), the Supreme Court expressly approved identification of suspects by photograph and stated:

[E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

*Id.* at 384, 19 L.Ed. 2d at 1253. This rule has been followed in North Carolina. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974).

In evaluating the likelihood of mistaken identification, the following factors are to be considered: (1) the opportunity of the witness to see and observe the defendant at the time of the crime, (2) the witness's degree of attention to defendant, (3) the accuracy of witness's prior description of the defendant, (4) the level of certainty demonstrated by the witness at the confrontation, (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972); *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975).

[4] In considering these factors, the evidence shows Morrison and Powell had ample time, three to five minutes, to see, observe and remember defendant. Defendant did not wear a mask. Powell could clearly see defendant because when defendant shot him, he

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was within a few feet, standing over him. Morrison was face to face with defendant at close range when he handed the money to him. Both witnesses gave the officers detailed, accurate descriptions of defendant. Both witnesses were emphatic about their identification of defendant at the preliminary hearing and Morrison promptly pointed him out in the line-up proceeding and also from the photographs. The crime and the subsequent identifications were separated by a short interval of time. The trial court in its order on the voir dire hearing found facts that supported its conclusion that the in-court identifications were based upon their personal observation of defendant at the time the crime was committed, and were not tainted by any impermissible photographic identification procedure or line-up. The evidence supports these findings and they are conclusive on appeal. *State v. Cox, supra*. The assignments of error are overruled.

[5] We turn to defendant's contention that the cross-examination of him by the district attorney constitutes error. Defendant's counsel objected to thirteen questions put to defendant by the district attorney. All involved either alleged prior convictions or acts of misconduct by defendant. Nothing in the record indicates the questions were asked in bad faith or concerned matters not within the knowledge of defendant. Generally the scope of cross-examination is in the discretion of the trial judge and his rulings will not be held for error in the absence of showing that the questions improperly influenced the jury. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). The solicitor may ask questions tending to discredit a witness, even though they are disparaging; however, he may not needlessly badger or humiliate the witness. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). A defendant may be asked about prior unrelated criminal convictions and whether he has done or committed certain criminal acts or reprehensible conduct. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). In *State v. Cogdell*, 26 N.C. App. 522, 216 S.E. 2d 163, cert. denied, 288 N.C. 244, 217 S.E. 2d 668 (1975), the court approved the solicitor asking defendant in an armed robbery case whether he had ever used or possessed controlled substances.

Defendant relies upon the dissent in *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978). In *Ross*, the questions objected to related to what the officers found in defendant's house when he

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was not there. Other persons rented portions of the house from defendant. The questions set out in the dissent, except the first, did not relate to what defendant Ross did, but to the acts of the officers. The questions in the case at bar are directed to acts committed by defendant and do not come within those referred to in *Ross*. We hold the cross-examination of defendant did not constitute prejudicial error.

The defendant received a fair trial and we find

No error.

Judges PARKER and MITCHELL concur.

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GRADY M. CLICK, EMPLOYEE v. PILOT FREIGHT CARRIERS, INC., EMPLOYER,  
SELF-INSURER

No. 7810IC401

(Filed 5 June 1979)

**1. Master and Servant § 55.3— workmen's compensation—finding of accident—supporting evidence**

A finding by the Industrial Commission that the cart plaintiff was pulling was struck by another cart and hit him in the back and, therefore, that an accident occurred, was supported by plaintiff's testimony at the hearing although such testimony contradicted prior statements made by plaintiff.

**2. Master and Servant § 56— workmen's compensation—causal relation between accident and injury—absence of medical testimony**

Plaintiff's evidence was sufficient to support a finding that an accident at work caused his herniated disc, notwithstanding there was no medical evidence that the accident could have caused the disc injury, where plaintiff's testimony showed that the onset of pain was concurrent with the accident and that he was hospitalized soon thereafter, and there was no indication that he had had any previous back trouble.

APPEAL by defendant from the North Carolina Industrial Commission opinion and award of 1 March 1978. Heard in the Court of Appeals 7 February 1979.

Plaintiff instituted this proceeding seeking compensation for a back injury allegedly sustained while working for the defend-

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ant. The Full Commission made findings of fact which provided, in pertinent part, as follows:

"1. As of 31 August 1976 plaintiff had been employed by defendant employer for approximately ten years. He worked on the loading dock and a part of his job was to hook and unhook four-wheel carts which were pulled on the dock by a conveyor belt-type device. On 31 August 1976 plaintiff unhooked and attempted to pull one of the carts to a location on the dock. Such cart was heavily loaded and weighed in excess of two thousand pounds. As plaintiff attempted to pull the cart, a cart behind the one he was pulling struck his cart causing it to hit him in the back. Plaintiff had pain in his back at such time.

2. Plaintiff sustained, as described above, an injury by accident arising out of and in the course of his employment with defendant employer.

3. On the evening following his accident plaintiff again had back pain when he simply stooped over to pick up some socks. He thereafter remained in bed because of his back until the following Friday, at which time he was hospitalized under the care of Dr. Richard P. Rose of the Forsyth Orthopedic Associates.

4. On 16 September 1976 plaintiff underwent exploratory surgery by Dr. Rose at the L4,5 interspace. Because of a great deal of bleeding during surgery it was felt that any exploration of the interspace would have been harmful to the patient and no herniated disc was found upon such operation. Plaintiff thereafter underwent an additional myelogram and surgery was again undertaken, at which time a herniated disc was found at L4,5 interspace and such herniated disc was removed. Plaintiff remained under the care of Dr. Rose and on 15 March 1977 was rated by the Doctor as having a 25 percent permanent disability of the spine.

5. As a result of the injury by accident giving rise hereto plaintiff was temporarily totally disabled from 1 September 1976 to 15 March 1977.

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6. As a result of the injury by accident giving rise hereto plaintiff has a 25 percent permanent partial disability or loss of use of the spine."

Based on these findings of fact, the Commission concluded as a matter of law, that plaintiff sustained an injury by accident arising out of and in the course of his employment and that he was entitled to compensation for temporary total disability and a twenty-five percent permanent partial disability. From this award, defendant appeals.

*Yeager and Powell, by Frank J. Yeager, for plaintiff appellee.*

*Deal, Hutchins and Minor, by Walter W. Pitt, Jr., and Richard D. Ramsey, for defendant appellant.*

VAUGHN, Judge.

In reviewing workmen's compensation awards, this Court is bound by the findings of fact of the Industrial Commission if they are supported by competent evidence even though the record contains evidence which would support contrary findings. *Smith v. Burlington Industries*, 35 N.C. App. 105, 239 S.E. 2d 845 (1978); *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971). This Court may only determine whether any competent evidence was presented to support the Commission's findings and whether these findings justify the Commission's decision. *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E. 2d 649 (1969).

[1] Defendant's first assignment of error is directed to the finding that there was an accident. The record shows that plaintiff gave conflicting stories as to how the injury arose. Immediately after the injury, plaintiff told fellow workers that he felt a pain in his back as he was pulling a cart off of the line but did not say that he had been hit in the back by a cart. He did not tell his supervisor that he was hurt and he continued to work until the end of his shift. At home that evening, plaintiff felt a pain in his back as he was bending over to take off his shoes. He told his doctor that he had hurt his back when he bent over to pick up something off of the floor. He submitted insurance forms to another insurer wherein he stated that the accident occurred at home. When he went back to visit his fellow workers at work he



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told his supervisor that he had not been injured at work. In a statement made on 6 October 1976, plaintiff claimed that he felt a pain in his back as he was pulling a cart off of the line. Not until the hearing in July, 1977, did plaintiff assert that the cart he was pulling was struck by another cart and hit him in the back. Nevertheless, the Commission found in accordance with plaintiff's testimony, that he was hit in the back by a cart, and, therefore, that an accident occurred. This finding was supported by plaintiff's testimony, even though it contradicted other statements by plaintiff. We, therefore, are bound by this finding.

[2] Another issue presented by this appeal is whether plaintiff has presented sufficient evidence to support the finding that the accident at work caused the herniated disc and the resulting disability. Defendant contends that the Commission erred in finding a causal relationship between the injury and plaintiff's accident at work because there was no medical evidence stating that the accident could have caused this injury. Medical evidence is not necessarily required to prove that a work-related accident caused a particular injury. "In appropriate circumstances, awards may be made when medical evidence on these matters is inconclusive, indecisive, fragmentary or even nonexistent." Larson's Workmen's Compensation Law, § 79.51, 15-246 to 15-247 (1976). The question is, what are appropriate circumstances.

This Court addressed the question of whether, in the absence of expert medical testimony as to the causal relationship between an injury and an accident, an award for temporary total disability can be made in *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E. 2d 491, cert. den., 276 N.C. 728 (1970). In *Tickle*, plaintiff employee testified that he was employed by defendant and was unloading bundles of cardboard from a truck. Each bundle weighed between seventy and seventy-five pounds. Normally he would only pick up one bundle at a time, but, as he was unloading, another bundle stuck to the one he was picking up. Plaintiff immediately experienced back pain and did not work the rest of the day. Plaintiff's doctor testified that when he saw him the next day, plaintiff was suffering pain in the muscles in his back. Plaintiff told the doctor that he had been bending over picking up bundles and had twisted his back. The doctor did not testify that this accident could have caused this injury. In affirming an award for temporary total disability, the Court found that where an injury is

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uncomplicated, lay testimony is sufficient to support a finding as to causation.

"We agree that where the injury or illness is such that a lay person could have no well-founded knowledge with respect thereto and could do no more than engage in speculation as to the cause of the condition complained of, then expert medical testimony is necessary, but 'There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.' . . . We think the case now before us falls in the latter category, and that plaintiff introduced evidence from which the trier of the facts might draw a reasonable inference that the particular injury of which he complained was the proximate result of the accident." (Citations omitted.) *Tickle v. Insulating Co.*, *supra*, at 8, 173 S.E. 2d at 494.

See also *Soles v. Farm Equipment Co.*, 8 N.C. App. 658, 175 S.E. 2d 339 (1970).

Generally, the more complicated the situation, the greater the need for expert testimony linking the injury with a work-related accident. In *Uris v. State Compensation Department*, 247 Or. 420, 427 P. 2d 753 (1967), the Court stated,

"In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury . . ." (Citation omitted.) *Uris v. State Compensation Department*, *supra*, at 426, 427 P. 2d at 756.

Thus, in *Lamb v. Industrial Commission*, 13 Ariz. App. 408, 477 P. 2d 282 (1970), where plaintiff was operated on to repair a herniated disc six years after the last work-related accident, the Court stated that "[w]here the result of an accident for which

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workmen's compensation is claimed is of such a nature that it is not clearly apparent to an ordinary layman, this must be established by expert medical testimony." *Lamb v. Industrial Commission, supra*, at 409, 477 P. 2d at 283.

In *Casey's Case*, 348 Mass. 572, 204 N.E. 2d 710 (1965), plaintiff received a compensable back injury in October, 1961. In July, 1962, he suffered another back injury doing a different type of work and brought suit to recover for the further disability. As the insurance carriers had changed since the first injury, the issue presented was whether the incapacity was caused by the first injury or the second. The Court held that medical testimony as to the cause of the disability was required in this case because the causal relationship was a complicated question. Since the plaintiff produced no medical testimony to substantiate the causal relationship, recovery was denied.

The North Carolina Supreme Court has denied recovery in a negligence action when plaintiff failed to prove that the accident caused her back injury. In *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965), defendant was driving plaintiff to the store. Defendant stopped her car on the shoulder of the road with the engine running and the car in gear. Plaintiff got out and was standing between the open door and the door frame when defendant's foot slipped off of the clutch and the car lurched forward. The door hit the plaintiff in the right hip and twisted her body against the side of the car. Six months later plaintiff was diagnosed as having a ruptured disc. Plaintiff produced no evidence to show that the accident could have caused the ruptured disc. The Court found that the jury's award of damages could not be upheld because the plaintiff had failed to produce medical evidence that the accident caused this injury.

"There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of . . . . For instance, no medical evidence was required to link plaintiff's soreness the next day and the six-inch bruise on her right hip with the incident on June 12th. Where, however, the subject matter—for example, a ruptured disc—is 'so far removed from the usual and ordinary experience of the average man that expert knowledge is essen-

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tial to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or a physical condition.' . . .

"Where 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' . . . The physical processes which produce a ruptured disc belong to the mysteries of medicine." (Citations omitted.) *Gillikin v. Burbage, supra*, at 325, 139 S.E. 2d at 760.

The Court, therefore, awarded a new trial.

*Gillikin* was followed in *Miller v. Lucas*, 267 N.C. 1, 147 S.E. 2d 537 (1966), where plaintiff complained of back pains for over eight months between the accident and an operation to correct a ruptured disc. No medical evidence was presented to show that the ruptured disc might have resulted from the accident. Thus the Court held it was error to charge the jury concerning damages resulting from this back operation.

In other cases, however, the testimony of the injured employee has been sufficient to establish causation. In *Di Fiore v. United States Rubber Co.*, 78 R.I. 124, 79 A. 2d 925 (1951) the only testimony as to the cause of the injury was by the employee and his testimony was in conflict with some of the medical evidence. Nevertheless, the Court held that the employee's testimony that he hurt his back in the accident was some evidence of causation.

"Of course it did not necessarily prove that the accident had caused a rupture of the discs. In the circumstances, however, that fact could be reasonably inferred . . . from all the evidence, especially in view of the fact that there was nothing tending to show that petitioner had such an injury before the accident." *Di Fiore v. United States Rubber Co., supra*, at 128, 79 A. 2d at 927.

In *Gubser v. Industrial Commission*, 42 Ill. 2d 559, 248 N.E. 2d 75 (1969), the employee was picking up a patient when he hurt his back. He continued to work for a week and six months later a ruptured disc was found. Despite the absence of medical

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testimony, the Court held that a causal connection had been established. The employee experienced pain at the time of the occurrence, informed his employer and sought medical attention. *See also Harris Cattle Co. v. Parker*, 256 Ark. 166, 506 S.W. 2d 118 (1974).

In the case at bar, plaintiff's only evidence linking the herniated disc with the accident at work was his own testimony. We note that nothing in the doctor's report specifically states that the back injury could have been caused by this accident. Indeed, the doctor's statement recites that plaintiff gave him a history of an onset of pain immediately after picking up an object from the floor. Nevertheless, we conclude that plaintiff's testimony was sufficient to establish a causal connection between the accident and the injury. His testimony showed that the onset of pain was concurrent with the accident, and he was hospitalized soon thereafter. There was no indication that he had had any previous back trouble. The doctor's report established that plaintiff suffered a twenty-five percent permanent partial disability. We find, therefore, that the evidence was sufficient to support the Commission's findings of fact and that these findings justify the Commission's award.

Affirmed.

Judges CLARK and MITCHELL concur.

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STATE OF NORTH CAROLINA v. LONNIE JONES

No. 7812SC1139

(Filed 5 June 1979)

**1. Homicide § 28.4— defense of home—no instruction required**

Evidence in a homicide prosecution was insufficient to require an instruction on defense of home where it tended to show that defendant did not fire the fatal shots until deceased had ceased beating on the front door of defendant's home and had turned on defendant's brother.

**2. Homicide § 28— self-defense—no instruction required**

The trial court in a homicide prosecution properly refused to instruct the jury on self-defense where there was no evidence that deceased, at the time he

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was shot, was attacking or otherwise attempting to harm defendant so that defendant would have a reasonable basis for believing that he must kill in order to prevent his own death or serious injury; rather, according to defendant's own evidence, the victim was in the process of fending off an attack from defendant's brother at the time he was shot twice in the back and once in the side.

**3. Homicide § 27.1— heat of passion—jury instruction not required**

Defendant in a homicide prosecution was not entitled to a mitigating instruction on heat of passion where defendant's own testimony indicated that he initially fired warning shots in an attempt to get the victim to leave the premises and that he then shot deceased to protect his brother, and such evidence tended to show that defendant's actions were reasoned rather than the result of some suddenly aroused violent passion.

Judge WEBB dissenting.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 29 August 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 23 April 1979.

Defendant was charged in a proper indictment with the second degree murder of Lonnie Gregory, Jr. Upon defendant's plea of not guilty, the State presented evidence tending to show the following:

On 22 October 1977, Van Porter, Ronnie Jones, Joe Thrash, and Buddy Dunn were walking down Cude Street heading toward the Jones' house located on Center Street in the Massey Hill section of Fayetteville. As they passed Richard Hall's house on Cude Street, a man standing in the front yard yelled derogatory comments and threw a beer can at them. The four youths then began running and the man, Lonnie Gregory, chased them down Cude Street and onto Center Street where they ran up to the Jones' house. Inside the house were Mrs. Alma Jones, the defendant's mother, Carolyn Jones, Johnny Ray Jones, and Billy Jean Locklear. The four youths informed the occupants that there was some trouble outside. At this time, Lonnie Gregory was standing in the road in front of the house cursing and shouting, and he dared everybody in the house to come outside and fight him. The defendant, who was in the kitchen, went to a room in the back of the house and got a loaded .22 automatic rifle, and then walked out the back door. Mrs. Alma Jones came out on the porch and told Lonnie Gregory to go home and leave them alone, that they did not want any trouble. The defendant then came around the

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side of the house and fired some shots from the rifle. At this point, Lonnie Gregory was still in the road and was not hit by any of the shots. Gregory ran up to the house and began beating on the front door. Ronnie Jones, the defendant's brother, came around the house with a shovel and hit Gregory three times with it. As Gregory turned toward Ronnie Jones, he was shot twice in the back and once in the side by the defendant. At this point Weldon Whitehead, a friend of Lonnie Gregory, arrived on foot and saw the deceased lying face down near the front porch of the house. Shortly thereafter, an automobile pulled up in front of the Jones' residence and Tommy Gregory, the brother of Lonnie Gregory, got out and ran up to the porch. Tommy Gregory and Weldon Whitehead took Lonnie Gregory to the hospital where he subsequently died from the three gunshot wounds.

The defendant presented evidence tending to show the following:

The first shots fired when Lonnie Gregory was standing in the street were fired up into the air as warning shots in an attempt to get Gregory to leave. After Lonnie Gregory came onto the porch, he tore the screen and beat on the front door. Ronnie Jones, the brother of the defendant, got a shovel from the yard behind the house. He then went to the front of the house and hit Gregory three times with the shovel in an attempt to get Gregory to stop beating on the front door. When Gregory had chased Ronnie Jones and the others down Cude Street he told Ronnie Jones that if he caught him he would kill him. While he was being chased, Ronnie Jones saw Gregory reach in his pocket, but he could not tell whether Gregory had a weapon at that time because it was too dark. When Gregory was up on the porch beating on the front door, Ronnie Jones saw an object in Gregory's right hand that "was something like a knife." After Gregory had been hit with the shovel for the third time, he turned slightly to his right. At that point the defendant fired the three shots that struck Gregory. The defendant testified, "I fired the shots because he turned on my brother . . . When I shot Lonnie Gregory, Jr., I was frightened, scared. I shot him because he said he was going to hurt somebody and he had turned towards my brother at that time." The defendant did not see any weapon in Gregory's hand during the time that Gregory was standing in the street. When Gregory was on the porch beating on the door, the defendant saw

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what he thought was a pocket knife in Gregory's right hand. When Gregory turned on Ronnie Jones after being hit with the shovel, the defendant thought he saw the knife again. The defendant testified, "I thought Lonnie Jr. Gregory was trying to get in on my mom and my sisters and my brothers, to hurt them or somebody . . . [H]e had just started to turn when I started shooting."

The defendant was found guilty of second degree murder and sentenced as a regular youth offender to a term of fifty years. Defendant appealed.

*Attorney General Edmisten, by Associate Attorney Fred R. Gamín, for the State.*

*Assistant Public Defenders James R. Parish and Malcolm R. Hunter, Jr. for defendant appellant.*

HEDRICK, Judge.

[1] The defendant first contends that the trial court erred in refusing to charge the jury on defense of home. In North Carolina, the courts have recognized a substantive right of an individual to defend his home from attack that is a separate right from that of an individual to defend himself or his family. *State v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142 (1945).

When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry even by the taking of the life of the intruder . . . A householder will not, however, be excused if he employs excessive force in repelling the attack. . . [Citations omitted.]

*State v. Miller*, 267 N.C. 409, 411, 148 S.E. 2d 279, 281 (1966). See also *State v. Gray*, 162 N.C. 608, 77 S.E. 833 (1913).

We are of the opinion that there was insufficient evidence that the defendant's actions in the present case were directed towards preventing the violent and forceful entry of an intruder



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into his home to require the judge to give an instruction on defense of home. By his own testimony, the defendant admitted that he did not shoot Lonnie Gregory until Gregory had turned on his brother. While the defendant did testify that he thought Gregory "was trying to get in on my mom and my sisters and my brothers, to hurt them or somebody," the evidence also discloses that Gregory had stopped beating on the front door of the house and had turned toward the defendant's brother when Gregory was shot. The defendant testified, "I fired the shots because he turned on my brother . . . I shot him because he said he was going to hurt somebody and he had turned towards my brother at that time." This testimony did raise the issue of defense of a family member, and the jury was properly instructed with regard to that defense. In light of the above, however, we think there was insufficient evidence presented to raise the issue of defense of habitation to require the judge to instruct the jury with regard to it.

[2] The defendant next contends that the trial court erred by failing to charge the jury on the defendant's right of self-defense. A person may use such force as is necessary to save himself from death or great bodily harm in the lawful exercise of his right to self-defense. A person may kill another in self-defense even if it was not necessary to kill to avoid death or great bodily harm if he believes it is necessary and has reasonable grounds for such belief. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). When the State or defendant produces evidence that the defendant acted in self-defense, then the trial judge must state and apply the law of self-defense to the facts of the case. On the other hand, if there is insufficient evidence of self-defense, there is no duty of the trial judge to give instructions on that defense. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976).

In the present case there was no evidence that the defendant shot and killed Lonnie Gregory in self-defense. While the defendant did testify that he was frightened and scared, in order to require the judge to instruct on self-defense, there must be some evidence that the defendant acted out of a reasonable belief that it was necessary for him to kill or use the force used in order to save himself from death or great bodily harm. There was no evidence that Lonnie Gregory was, at the time he was shot, attacking or otherwise attempting to harm the defendant so that

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the defendant would have a reasonable basis for believing that he must kill in order to prevent his own death or serious injury. According to the defendant's own evidence, the victim was in the process of fending off an attack from the defendant's brother at the time he was shot twice in the back and once in the side. We hold that under this evidence, the trial judge properly refused to instruct the jury on self-defense.

[3] Defendant's final contention is that the judge erroneously failed to charge the jury that if the defendant acted out of a heat of passion he would only be guilty of voluntary manslaughter. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Davis, supra*. When there are circumstances that cause an accused to kill another out of a heat of passion, a homicide may be mitigated from murder to manslaughter. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970). Heat of passion means "that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions." *State v. Pope*, 24 N.C. App. 217, 222, 210 S.E. 2d 267, 271 (1974). In *State v. Jennings*, 276 N.C. at 161, 171 S.E. 2d at 450, the Court quoted with approval Black's Law Dictionary's definition of heat of passion as "any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection."

In order to be entitled to an instruction on heat of passion negating the element of malice and reducing the offense from murder to manslaughter, there must be some evidence from the State or the defendant that the intent to kill was formed under the influence of some suddenly aroused violent passion. *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977); *State v. Brogden*, 36 N.C. App. 118, 243 S.E. 2d 181 (1978). In the absence of such evidence, the State is entitled to rely on the presumption that the killing was done with malice when it is admitted that the killing was accomplished with a deadly weapon. See *State v. Chavis*, 30 N.C. App. 75, 226 S.E. 2d 389, *cert. denied*, 290 N.C. 778, 229 S.E. 2d 33 (1976).

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The ruling in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), precludes the State from utilizing these presumptions in such a way as to relieve it of the burden of proof on the elements of malice and unlawfulness when the issue of their existence is raised by the evidence. *State v. Berry, supra*; *State v. Hankerson, supra*; *State v. Brogden, supra*.

In the present case, there was no evidence that the defendant acted out of a heat of passion. Indeed, the defendant's own testimony indicates that he initially fired warning shots in an attempt to get Gregory to leave and then he shot the deceased to protect his brother. This evidence tends to show that the defendant's actions were reasoned rather than the result of rage, anger, or some suddenly aroused violent passion. Thus, the State was entitled to rely on the presumption of malice and the defendant was not entitled to a mitigating instruction on heat of passion.

Defendant also argues under this assignment of error that if he had an "honest and actual belief" that the killing was necessary in order to prevent great bodily harm or death to his brother, that would be sufficient to rebut the presumption of malice. Defendant cites *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978), in support of this argument.

The rule argued for by the defendant has never been the law of North Carolina. In order for the killing of another to be excused on the basis of defense of a family member, the defendant must have had a *reasonable* belief that the killing was necessary to prevent the death or serious injury of the family member. *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968). *State v. Potter*, 295 N.C. at 143, 244 S.E. 2d at 408, reaffirms the proposition that when a person is killed by another who is acting in self-defense, the killing will be excused if "it appeared to defendant and he believed it to be necessary to shoot [the attacker] in order to save himself from death or great bodily harm," *State v. Deck, supra*, and "defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. *State v. Ellerbee*, 223 N.C. 770, 28 S.E. 2d 519 (1944)."

We hold defendant had a fair trial free from prejudicial error.

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No error.

Chief Judge MORRIS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent for two reasons. First, I believe the defendant was entitled to a charge on the defense of the home. The majority says this is not so because the deceased had turned away from trying to enter the house at the time he was shot. I would hold that although the deceased was not presently trying to force an entrance, the evidence showed he was on the porch for that purpose, and the defendant could reasonably believe he intended to commit a felony or inflict some serious personal injury upon the inmates. I do not believe he had to be in the act of trying to force his way in at the very moment the defendant fired the gun. *See State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974) for a case in which the Supreme Court held self-defense should be charged although the deceased was not at that very moment threatening the defendant.

I also believe the defendant was entitled to a charge in regard to acting out of the heat of passion. I can imagine situations more provocative than the one defendant faced, but this one was certainly provocative enough. I believe a jury could reasonably conclude that the circumstances surrounding the defendant were enough to make a normal man so angry as to overcome his reason.

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**Woodhouse v. Board of Commissioners**

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O. LARRY WOODHOUSE AND GERALD F. FRIEDMAN, PETITIONERS-APPELLEES  
v. BOARD OF COMMISSIONERS OF THE TOWN OF NAGS HEAD,  
RESPONDENT-APPELLANT

No. 781SC698

(Filed 5 June 1979)

**1. Municipal Corporations § 30.6— conditional use permit—burden of proof**

An applicant for a conditional use permit has the initial burden of making a positive showing of the existence of each and every fact and condition required by statute or ordinance for such a permit, and only after an applicant has made the required showing must a denial of a conditional use permit be based upon findings which are supported by competent, material and substantial evidence appearing in the record that the required facts and conditions do not exist.

**2. Municipal Corporations § 30.6— conditional use permit—planned unit development —fire protection—failure to make prima facie showing**

A town ordinance requirement for a conditional use permit for a planned unit development that there be "public and private facilities existing or clearly to be available" included adequate fire fighting facilities. Therefore, petitioners failed to carry their burden of establishing *prima facie* entitlement to a conditional use permit for a planned unit development where they failed to offer any evidence whatsoever as to the availability or adequacy of fire fighting facilities.

APPEAL by respondent from *Fountain, Judge*. Judgment entered 5 May 1978 in Superior Court, DARE County. Heard in the Court of Appeals 24 April 1979.

During the fall of 1977, the petitioners-appellees, O. Larry Woodhouse and Gerald F. Friedman, applied to the Board of Commissioners of the Town of Nags Head for a conditional use permit allowing them to use 5.548 acres of property bounded by the Atlantic Ocean and located in a R-2 (medium density residential) zone as a planned unit development or "PUD." By their application, the petitioners sought approval for construction in the R-2 zone of a planned unit development which would contain thirty-two dwelling units, a sewage treatment plant, two tennis courts, a handball court and parking facilities. The proposed development would contain 5.77 dwelling units per acre and, thereby, comply with the requirement that maximum density of dwelling units in the R-2 zone not exceed six dwelling units per acre. The peti-

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tioners acknowledged, however, that the proposed development would not comply with certain other requirements generally applicable in the R-2 zone. For this reason, the petitioners applied for a conditional use permit pursuant to Section 7.02 C(8) and Article IX of the Nags Head Zoning Ordinance [hereinafter "Ordinance"], which provide for conditional use permits for planned unit developments within R-2 zones when certain prescribed requirements have been met.

The petitioners received substantial approval for their proposed planned unit development from the Planning Board of The Town of Nags Head. Their application then was considered during an open meeting of the respondent Board of Commissioners of the Town of Nags Head [hereinafter "Board"] on 6 January 1978. The Board heard from the petitioners and other interested parties at that time and discussed the petitioners' application openly among themselves at length. A transcript of that hearing in its entirety was made a part of the record on appeal. The respondent Board then tabled the matter pending its referral of the application to the Board's engineering firm and other appropriate parties to permit a review of the use proposed by the petitioners and its impact upon the Town of Nags Head.

The Board again considered the petitioners' application during an open meeting on 6 March 1978. After hearing from the petitioners and other interested parties, the members of the Board discussed the matter in that open meeting and denied the petitioners' application by a vote of three to two. The petitioners were formally advised of the Board's action by letter dated 9 March 1978 and received by the petitioners on 10 March 1978. Among the several reasons given by the Board for denying the petitioners' application was the following:

2. The planned development potentially outstrips community fire fighting facilities or services available to us now or in the reasonable future without the imposition of heavy and untimely or disadvantageously phased tax burdens upon the entire taxpaying population of the Town, most of whom would derive little or no benefit from the necessary expenditures. The type of project envisioned would significantly increase the fire danger and the danger of a major fire which, once started, would be substantially harder to control than a

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fire in a single family home or in a duplex allowed as a matter of right in the general zoning district encompassing the site in question.

The petitioners in apt time filed a petition for writ of certiorari with the trial court pursuant to G.S. 160A-388 seeking judicial review of the decision of the respondent Board. The trial court allowed the petition and issued a writ of certiorari on 29 March 1978. After a hearing, the trial court signed its judgment on 4 May 1978. Having first made numerous findings of fact, the trial court reached the following conclusions of law:

CONCLUSIONS OF LAW

(1) Petitioners have standing to maintain this appeal and it is properly before the Court for decision;

(2) The record does not contain competent, material and substantial evidence to support the reasons given by the respondent for denying the petitioners' application for a conditional use permit;

(3) The record contains competent, material and substantial evidence which shows that petitioners' application for a conditional use permit to construct a planned unit development complies fully with all the applicable conditions, standards, regulations and requirements of the Nags Head Zoning Ordinance.

(4) The decision of the respondent in denying petitioners' application for a conditional use permit to develop the property described in their application as a planned unit development is contrary to law.

As a result of its findings of fact and conclusions of law, the trial court in its judgment reversed the decision of the respondent Board and ordered the Board to approve the petitioners' application. The judgment of the trial court was filed with the clerk on 5 May 1978. From this judgment, the respondent Board appealed.

Other facts pertinent to this appeal are hereinafter set forth.

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*Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P. A., by Norman W. Shearin, Jr. and Dewey W. Wells, for petitioners appellees.*

*Kellogg, White & Evans, by Thomas L. White, Jr. and Thomas N. Barefoot, for respondent appellant.*

MITCHELL, Judge.

The respondent Board assigns as error the trial court's conclusions of law to the effect that the record before it contained competent substantial evidence showing that the petitioners' application for a conditional use permit to construct a planned unit development complied fully with the requirements of the Ordinance and that the denial of the petitioners' application was contrary to law. In support of this assignment, the Board contends *inter alia* that the petitioners failed to produce competent, material and substantial evidence tending to establish that the community fire fighting facilities, existing or clearly to be available by the time they might be needed to protect the petitioners' planned unit development would be adequate to secure the public's safety from the danger of fire. The Board further contends that the petitioners had the duty in the first instance to make a positive showing that such public facilities would be adequate and that, as they failed to make any such positive showing, the Board properly denied their application for a conditional use permit. We agree.

[1] In *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969), the Supreme Court of North Carolina stated that:

When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions do exist.

274 N.C. at 165, 166 S.E. 2d at 85. When such an applicant has produced competent, material and substantial evidence tending to establish the existence of the conditions which the applicable statute or ordinance prescribes for the issuance of a conditional use permit such as that sought by the petitioners in the present



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case, then the applicant has established a *prima facie* entitlement to that permit. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). There are, however, no presumptions in favor of such applicants and they have the initial burden of making a positive showing of the existence of each and every fact and condition required by the statute or ordinance. *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E. 2d 496, *cert. denied*, 281 N.C. 314, 188 S.E. 2d 897 (1972). Only after an applicant has made the required showing must a denial of a conditional use permit be based upon findings which are supported by competent, material and substantial evidence appearing in the record that the required facts and conditions do not exist. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974).

Here, Section 7.02 C(8) of the Ordinance, relied upon by the petitioners, provides that planned unit developments may be authorized as conditional uses within the R-2 zone under the provisions of Article IX of the Ordinance. That article of the Ordinance includes Section 9.01 D which provides as follows:

D. Where Permitted

Planned Unit Developments may be established as a conditional use in specified zones where tracts suitable in location and character for the uses and structures proposed are to be planned and developed as units, according to the requirements and procedures set forth in this Article. PUD's shall be appropriately located with respect to intended functions, to the pattern and timing of development existing or proposed in the plans of the Town, and to public and private facilities, existing or clearly to be available by the time development reaches the stage where they will be needed.

[2] The petitioners were required to produce competent, material and substantial evidence tending to show that the requirement of Section 9.01 D of the Ordinance that there be "public and private facilities, existing or clearly to be available" had been met. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974); *Craver v. Board of Adjustment*, 267 N.C. 40, 147 S.E. 2d 599 (1966). We think that such "public and private facilities" included among other things adequate fire fighting

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facilities. This construction is consistent with the General Assembly's grant of the zoning power to cities and towns and particularly with the requirement of G.S. 160A-383 that "Zoning regulations shall be made in accordance with a comprehensive plan and designed to . . . secure safety from fire. . . ." As the petitioners in the present case failed to offer any evidence whatsoever as to the availability or adequacy of fire fighting facilities, they failed to carry their initial burden of establishing *prima facie* entitlement to the conditional use permit which they sought.

The Board found as a fact that the available fire fighting facilities were inadequate to justify granting the petitioners' application for a conditional use permit. Assuming *arguendo* that this finding was erroneous as no competent evidence was presented to the Board with regard to fire fighting facilities, such error was harmless. The finding by the Board that fire fighting facilities were inadequate included *a fortiori* the finding of fact that the Board had been unable to find from the evidence offered by the petitioners that adequate and available fire fighting services existed or would exist by the time they might be needed. See *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E. 2d 496, cert. denied, 281 N.C. 314, 188 S.E. 2d 897 (1972). The latter finding was fully justified by the failure of the petitioners to bear their initial burden of proof and was sufficient to justify the Board's denial of the permit.

The transcript of the proceedings before the Board during its open meeting of 6 January 1978 is replete with statements by members of the Board with regard to their concern that available fire fighting facilities well might not be adequate to protect the petitioners' proposed development. The transcript of the 6 March 1978 meeting of the Board also reveals numerous similar expressions of concern by members of the Board and others. Despite their knowledge of these concerns, the petitioners failed to offer any evidence whatsoever at either meeting concerning the availability or adequacy of fire fighting facilities.

The Board gave the petitioners every opportunity to offer evidence and to be heard and did not dispense with any essential element of a fair trial. See *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). The petitioners failed to produce competent, material and substantial evidence tending to establish

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the existence of all of the facts and conditions which the Ordinance required for the issuance of the conditional use permit which they sought. Therefore, the petitioners failed to establish *prima facie* entitlement to the conditional use permit. This being the case, the Board properly denied their application.

For these reasons, we find that the trial court erred in its conclusions that the record before it contained competent, material and substantial evidence showing that the petitioners' planned unit development would comply fully with the Ordinance and that the Board's decision denying the petitioners' application was contrary to law. The judgment of the trial court reversing the decision of the respondent Board and directing the Board to grant approval for the petitioners' construction of a planned unit development in accordance with their application, must be and is hereby

Reversed.

Judges PARKER and MARTIN (Harry C.) concur.

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CAROL ANN PARRISH v. RUSSELL UZZELL, D/B/A U & H MOTORS AND WILLIAM A. PARRISH, JR., ADMINISTRATOR OF THE ESTATE OF WILLIAM A. PARRISH, SR.

No. 784SC766

(Filed 5 June 1979)

**1. Rules of Civil Procedure § 41.1— dismissal other than by plaintiff's notice—dismissal without prejudice—"second dismissal" rule inapplicable**

Though two dismissals of plaintiff's actions based on the same claim were obtained at plaintiff's instance, neither was effected by the plaintiff filing a notice of dismissal as authorized by G.S. 1A-1, Rule 41(a)(1)(i), and both were therefore without prejudice so that plaintiff was not prevented by the "second dismissal" rule from bringing a third action on the same claim.

**2. Rules of Civil Procedure § 41.1; Limitation of Actions § 12.1— voluntary dismissal—action commenced within one year—statute of limitations tolled**

Plaintiff's action instituted on 9 December 1977 to recover for personal injuries sustained on 8 August 1968 was not barred by the three year statute of limitations where plaintiff brought her first action within three years of her in-

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juries, brought her second action within one year of dismissal of her first action, and brought her third action within one year of dismissal of her second action.

APPEAL by plaintiff from *Small, Judge*. Judgment entered 27 June 1978 in the Superior Court, ONSLOW County. Heard in the Court of Appeals 3 May 1979.

This is an action to recover damages for personal injuries which plaintiff alleges she received on 8 August 1968 when the automobile in which she was riding was driven by her husband into a hole in the driveway on defendant Uzzell's premises. She alleges that her husband was negligent in his operation of the automobile, that Uzzell was negligent in allowing the hole to remain in the driveway without giving warning of its existence, and that the negligence of her husband and of Uzzell concurred to proximately cause her injuries. This is the third action which plaintiff has brought on this claim in the superior court in Onslow County.

The first action was brought on 2 February 1970 against plaintiff's husband and against Uzzell and was terminated on 23 March 1973 by entry of the following order:

This cause coming on to be heard, and being heard, before the undersigned Judge Presiding at the March 19th, 1973, session of the Onslow County Superior Court, and it appeared to the Court from the statement of plaintiff's counsel that plaintiff has elected to dismiss this action without prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff's cause be dismissed without prejudice and be taxed with the costs to be charged by the Clerk.

This the 23rd day of March, 1973.

s/ WALTER W. CAHOON  
Judge Presiding

The second action was brought on 7 March 1974 against plaintiff's husband and against Uzzell when plaintiff filed a complaint identical to that she had filed in the first action. The second action was terminated on 13 December 1976 by entry of the following order:

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THIS CAUSE being heard by the Undersigned Judge on the Motion of defendant to dismiss this action and on the Motion of plaintiff's attorney of record to withdraw from this case and after hearing statement of counsel, the Court is of the opinion that the Motion to Dismiss and the Motion to Withdraw should not be allowed.

That upon oral Motion of the plaintiff to take a Voluntary Dismissal without prejudice, the Court is of the opinion and in his discretion this Motion should be allowed.

IT IS, THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the defendant's Motion to Dismiss be denied.
2. That the plaintiff's Motion to Withdraw be denied.
3. That the Motion made by plaintiff's attorney to take a Voluntary Dismissal without prejudice in the Court's discretion and in the interest of justice is hereby allowed.

This the 13 day of December, 1976.

s/ ROBERT D. ROUSE, JR.  
Judge Presiding

The present action was filed on 9 December 1977 against defendant Uzzell and against the estate of plaintiff's deceased husband. Except for the allegations relative to the estate, the complaint in the present action is in all material respects the same as the complaints filed in the first two actions.

Defendant Uzzell moved to dismiss the present action on the grounds that the dismissal of the second action operated as an adjudication on the merits pursuant to G.S. 1A-1, Rule 41(a)(1) and also on the grounds that present action is barred by the three year statute of limitations contained in G.S. 1-52. The court entered judgment finding that the order entered by Judge Rouse on 13 December 1976 was the second dismissal of an action based on the same claim and that pursuant to G.S. 1A-1, Rule 41(a)(1), such second dismissal operated as an adjudication on the merits barring plaintiff's right to maintain the present action. From judgment dismissing her action, plaintiff appeals.

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*Joseph C. Olschner for plaintiff appellant.*

*Ward and Smith by William Joseph Austin, Jr., and Michael P. Flanagan for defendant appellee, Russell Uzzell.*

PARKER, Judge.

The trial court found that, pursuant to the provisions of G.S. 1A-1, Rule 41(a)(1), the dismissal of plaintiff's second action operated as an adjudication on the merits of her claim, thereby barring her right to maintain any further action based on the same claim. We do not agree and accordingly reverse.

G.S. 1A-1, Rule 41(a), entitled "Voluntary dismissal; effect thereof," contains two subsections as follows:

- (1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.
- (2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under

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this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

It will be seen that G.S. 1A-1, Rule 41(a) establishes three methods by which a voluntary dismissal of a civil action may be effected: (1) by the plaintiff filing a notice of dismissal at any time before he rests his case, (2) by the filing of a stipulation of dismissal signed by all parties who have appeared in the action, and (3) by order of the judge "upon such terms and conditions as justice requires." The first two methods are provided for in subsection (1) and the third in subsection (2) of Rule 41(a). The Rule makes clear that, unless otherwise specified, a voluntary dismissal effected by any of the three methods, whether by plaintiff's notice, by stipulation, or by order of the judge, is without prejudice *with one express exception*. This express exception is applicable only to a dismissal effected by plaintiff's notice. G.S. 1A-1, Rule 41(a)(1) provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim." (Emphasis added.)

[1] In the case now before us, the plaintiff obtained a voluntary dismissal of her first action by electing to dismiss without prejudice and so informing the court, which then *ordered* the case dismissed without prejudice. She obtained a voluntary dismissal of her second action by making an oral motion to the court to be allowed to take a voluntary dismissal without prejudice, which motion was allowed by an *order* entered "in the Court's discretion and in the interest of justice." Thus, while each dismissal was obtained at plaintiff's instance, neither was effected by the plaintiff filing a notice of dismissal as authorized by G.S. 1A-1, Rule 41(a)(1)(i), to which alone the "second dismissal" rule applies. "The 'second dismissal' rule does not apply to make voluntary dismissals by stipulation or by order of court 'on the merits', though preceded by a prior voluntary dismissal." Phillips, 1970 Pocket Parts, 2 McIntosh, N.C. Practice and Procedure, § 1648, p. 70. Of course, the stipulation itself or the order of the judge can provide that the dismissal is with prejudice, whether or not there has been a prior dismissal effected by the filing of a notice. However, neither of the orders by which plaintiff's first two ac-

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tions were dismissed contained any such provision. We hold, therefore, that the trial court erred in applying the "second dismissal" rule in the present case. Our holding in this regard is consistent with the principle, recognized by courts of other jurisdictions which have considered the matter, that "the two-dismissal rule is to be strictly construed since it is in derogation of previously existing right." See Annot., 65 A.L.R. 2d 642, 643 (1959).

[2] Appellee contends that even if the second dismissal rule is not applicable, plaintiff's present action is barred by the three year statute of limitations contained in G.S. 1-52. We do not agree.

G.S. 1A-1, Rule 41(a)(2) provides that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time." Plaintiff's first action was timely commenced on 2 February 1970, within three years of her injury, which she alleged occurred on 8 August 1968. Her first action was dismissed by order of the court on 23 March 1973. Plaintiff commenced her second action on 7 March 1974, within one year after the dismissal of her first. Her second action was dismissed by order of the court on 13 December 1976. Plaintiff commenced her present action on 9 December 1977 within one year after the dismissal of her second action. Neither the order by which her first action was dismissed nor the order by which her second action was dismissed specified a shorter time than one year after the dismissal within which plaintiff might bring a new action. We hold that the plaintiff's action is not barred by the statute of limitations.

This interpretation of the tolling provisions of G.S. 1A-1, Rule 41(a) is consistent with the interpretation given by decisions of our Supreme Court to the similar provision contained in our former G.S. 1-25. Although that statute was repealed by Ch. 954, Sec. 4, 1967 Session Laws effective with the adoption of our new Rules of Civil Procedure, its tolling provision was incorporated into G.S. 1A-1, Rule 41(a). Interpreting our former statute, our Supreme Court held that under its provisions a plaintiff had the right to bring an unlimited series of actions based upon the same claim, provided he brought each new action within one year of the



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dismissal of the immediately preceding action. *See Trull v. R. R.*, 151 N.C. 545, 66 S.E. 586 (1909). Recognizing that this right "was sometimes abused by action after action being instituted after a cause was nonsuited," the Court held that "the only remedy was a bill of peace." *See* concurring opinion of Clark, C.J., in *Bradshaw v. Bank*, 172 N.C. 632, 635, 90 S.E. 789, 791 (1916).

For the reasons stated, the judgment of the trial court dismissing plaintiff's action is

Reversed.

Judges MITCHELL and MARTIN (Harry C.) concur.

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MICHAEL L. COLE v. EARL SORIE AND HALLIE M. SORIE

No. 786SC666

(Filed 5 June 1979)

**1. Trial § 16— allowance of motion to strike—failure to instruct jury not to consider stricken testimony**

Defendant was not prejudiced by the trial court's failure, after allowing defendant's motion to strike testimony, to instruct the jury that the stricken testimony should not be considered in the jury's deliberations of the case where the record discloses that the jury must have understood that the stricken testimony was not to be regarded as evidence in the case.

**2. Contracts § 26.3— breach of contract—labor costs—some costs not covered by contract—credibility**

In a builder's action to recover under a construction contract, the trial court did not abuse its discretion in refusing to strike plaintiff's testimony regarding his claim for labor costs because certain of the claimed costs allegedly were not recoverable under the contract, since this was a matter affecting plaintiff's credibility and did not render all evidence on labor costs incompetent, and it was incumbent upon defendant to bring out on cross-examination and in jury argument the fact of these excess charges in mitigation of the damages claimed.

**3. Contracts § 28.1— breach of contract action—instruction on defendant's contentions**

In this action for breach of a construction contract, the trial court's instruction that defendant contended he had paid plaintiff "\$114,000 and had provided in his own services and things rendered in an amount of \$8000 to \$10,000 and that represents all of the money due under the contract" could not have

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been misleading to the jury where the court had just correctly instructed the jury that defendant contended that the parties had an oral agreement that the cost of construction would not exceed \$117,000, that he had already paid plaintiff \$114,000, and that he did not breach the contract by refusing plaintiff's demand for an additional \$41,518.

**4. Contracts § 27.3—breach of contract—absence of evidence of damages—nominal damages**

The trial court erred in refusing to submit to the jury defendant's claim for plaintiff's breach of a construction contract because defendant failed to produce evidence of damages since defendant's evidence of plaintiff's breach of the contract entitled defendant to nominal damages at least.

APPEAL by defendant from *Browning, Judge*. Judgment entered 28 March 1978 in Superior Court, HALIFAX County. Heard in the Court of Appeals 4 April 1979.

Plaintiff initiated this action upon a construction contract with defendant to construct a residence in Halifax County. Plaintiff alleges that he and defendant entered into a contract wherein defendant agreed to pay the actual cost of labor, materials, and subcontracts, plus 5% of that cost for "overhead" and 10% of cost for profit. Plaintiff alleges that he has completed the dwelling in accordance with the plans and specifications, but that defendant has refused to pay the remaining balance allegedly due in the amount of \$41,518.19. He prayed for judgment in that amount and that such amount be declared a lien on the property as of 23 October 1975, the date labor or materials were first furnished to the site, pursuant to the statutory materialmen's lien provisions. Defendant answered, averring that the contract of construction was partly written and partly oral, part of the oral agreement being that the price would not exceed \$117,000, and that defendant had already paid \$114,000. Defendant further alleged that plaintiff had failed to complete the construction in a workmanlike manner or according to the owners' plans and specifications as required by the contract. Defendant also moved that his wife, Hallie M. Sorie, be dismissed from the lawsuit.

The action was tried before a jury. Hallie M. Sorie was dismissed as a party to the suit, and the jury returned a verdict for plaintiff against defendant Earl Sorie in the amount of \$42,620.76. Defendant appeals.

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*Clark & Godwin, by Charlie D. Clark, Jr., for plaintiff appellee.*

*Hux & Livermon, by James S. Livermon, Jr., for defendant appellant.*

MORRIS, Chief Judge.

Defendant has brought forward on appeal five assignments of error. We will address the arguments in support of each assignment of error in the order in which they appear in the briefs with the exception of Assignment of Error No. 3, which we find to be without merit and not requiring discussion.

[1] Defendant first assigns error to the trial court's failure to instruct the jury, after allowing defendant's motion to strike certain testimony, that the testimony stricken from the record should not be considered by the jury in their deliberations on the case. In *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966), the Supreme Court faced the precise question here presented by defendant. That Court's resolution of the issue is equally applicable in this case. We quote:

"Although the proper procedure, upon allowing a motion to strike an answer not responsive to the question, is for the court immediately to instruct the jury not to consider the answer, we think that the failure to do so in this instance, in view of the court's prompt allowance of the motion to strike, is not prejudicial error. The jury could only have interpreted the ruling of the court as meaning that the answer given by the witness was not to be regarded as evidence in the case." 266 N.C. at 450, 146 S.E. 2d at 500.

[2] Defendant next assigns error to the trial court's denial of his motion to strike certain testimony of the plaintiff elicited on direct examination. Defendant sought to have the trial court strike all of the plaintiff's testimony regarding any portion of his claim for labor costs. The basis for this motion was the fact that plaintiff's testimony on cross-examination suggested that he was billing defendant for his personal labors expended on the house and for other labor expended in pouring a concrete slab for a tobacco barn on the defendant's farm. Defendant argues that these matters were irrelevant and not properly includable in plaintiff's

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claim for relief under the construction contract, because he contends plaintiff's labor was compensated for by the 10% profit in the contract, and because labor expended on projects other than construction of the dwelling were not due under the contract upon which this suit is based. Defendant concedes that the ruling on the motion to strike, because it was not made until the conclusion of the plaintiff's evidence, was a matter within the trial court's discretion. See *McGrady v. Quality Motors*, 23 N.C. App. 256, 208 S.E. 2d 911 (1974), cert. denied, 286 N.C. 545, 212 S.E. 2d 656 (1975).

We find no abuse of discretion on the part of the trial judge. The admission of this alleged irrelevant matter did not render all evidence on labor costs incompetent. It was incumbent upon defendant, upon discovering that a portion of the costs of labor to which plaintiff had testified was not properly recoverable in this action, to bring out on cross-examination and in jury argument the fact of these excess charges in mitigation of the damages alleged. The fact that plaintiff's claim for labor may have been inflated by labor costs not due under the contract tends to discredit plaintiff's evidence with respect to damages, and is a matter affecting his credibility, not the admissibility of evidence relating to labor costs under the contract. This assignment of error is overruled.

[3] Defendant's fourth assignment of error is directed to the trial court's summary of the evidence and the contentions of the parties with respect to the second issue: "Did Earl Sorie breach the construction contract?" Defendant complains that the trial court misstated defendant's contentions as follows:

"That Mr. Sorie paid Mr. Cole \$114,000 and has provided in his own services and things rendered in an amount of \$8000 to \$10,000 and that represents all of the money due under the contract. That, in fact, Mr. Cole did not perform many of the items contemplated in the contract and thereby Mr. Cole, in fact, breached the contract."

In fact, as defendant correctly notes, defendant's primary contention throughout the trial was that the contract had a maximum price ceiling of \$117,000, that he had already advanced plaintiff \$114,000, and that he did not breach the contract by refusing plaintiff's demand for an additional \$41,518.19. The court's statement would have been more precise had he more fully explained

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the meaning of the phrase "all the money due under the contract". However, it is our opinion that the court's statement could not have been misleading to the jury which just had been instructed correctly under the issue, "Did the plaintiff, Michael L. Cole, enter into a contract with Earl Sorie for the construction of a house as alleged in the Complaint?" that defendant contended that they had entered into an oral agreement that the total cost of the house would not exceed \$117,000 (this instruction appearing in the record in the fourth paragraph preceding defendant's exception). Moreover, the record does not indicate that defendant requested the court to correct its statement of the contentions, which he is required to do in order to preserve the alleged error. *Redevelopment Commission v. Smith*, 272 N.C. 250, 158 S.E. 2d 65 (1967).

[4] At trial defendant presented evidence in support of his claim that plaintiff had failed to complete the house in a workmanlike manner and had deviated from the plans and specifications governing the construction. This evidence consisted of photographs indicating that a portion of the roof was not completed according to specifications, that masonry work was incomplete or defective, that a metal grate was not placed over an opening for the basement window, that the ceiling and the basement stairway were incomplete, that broken window locks were not replaced, that the black marble surrounding the fireplace had cracked, and that there were several water leaks in the house. Defendant, however, failed to produce any evidence of damages, and the trial court refused to submit the issue of his claim to the jury. This constitutes defendant's fifth assignment of error.

Our Supreme Court has recognized that proof of an injury to a party's legal rights entitles that party to nominal damages at least. The Court in *Hutton v. Cook*, 173 N.C. 496, 499, 92 S.E. 355, 356 (1917), stated the principle, as applied to an action of trespass, as follows:

"They [nominal damages] are not given as an equivalent for the wrong, or as a substantial recompense, for they are not such, but are merely a small sum awarded in recognition of the right, and of the technical injury resulting from a violation of it, as above authorities will show. They have been described as 'a peg on which to hang costs'."

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*Cole v. Sorie*

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The principle that the violation of a legal right entitles a party to at least nominal damages has been applied to establish that "[i]n a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Bowen v. Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936); see also *Tillis v. Cotton Mills* and *Cotton Mills v. Tillis*, 251 N.C. 359, 111 S.E. 2d 606 (1959); *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968). See generally 22 Am. Jur. 2d, Damages § 9. In *Bowen v. Bank*, supra, the gravamen of the injury complained of by the intervening plaintiff was his embarrassment, and not monetary damages. The case was remanded to the trial court for entry of the jury verdict rendered granting the intervening plaintiff nominal damages of one dollar and charging the costs to the defendant. Furthermore, in *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960), the Court rejected an assignment of error based on the trial court's failure to grant a motion for nonsuit due to plaintiff's failure to introduce evidence on the extent of damages, recognizing that the proof of breach of contract was sufficient to support an award of nominal damages. We hold that plaintiff's evidence of breach of the construction contract was sufficient to go to the jury despite the fact that no damages were shown. The evidence established a prima facie case of breach of contract entitling defendant to at least nominal damages.

Because of the error in failing to submit the issue of plaintiff's breach of the construction contract, and because of the possible effect on plaintiff's claim of a possible finding that he breached the construction contract by failing to comply with the plans and specifications, we think fairness dictates that the matter must be returned to the trial court for a new trial on all issues.

New trial.

Judges CLARK and ARNOLD concur.

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**Horne v. City of Charlotte**

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CHARLES E. HORNE AND WIFE, DOROTHY C. HORNE v. CITY OF CHARLOTTE AND PAUL HUDSON D/B/A CAROLINA LAWN SERVICE

No. 7826DC642

(Filed 5 June 1979)

**Eminent Domain §§ 2, 13; Municipal Corporations § 43— contract with city to abate nuisance—contractor not liable for destruction of vegetation—remedy against city to recover compensation for taking**

A contractor who is employed by a city to abate a nuisance on private property by removing trash, weeds and junk therefrom is not liable to the property owner for damages for the destruction of vegetation on the property where the contractor did not deviate from the contract through negligence or otherwise; rather, the owner's remedy is against the city to recover just compensation for the property taken or damaged upon proof that the conduct of the city in ordering such method of abatement of a nuisance was not within its police power.

APPEAL by plaintiff from *Brown, Judge*. Order entered 22 February 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 23 April 1979.

This is an action against the City of Charlotte and Paul Hudson for damage done to the plaintiffs' property when the City hired Hudson to abate an alleged nuisance on plaintiffs' property. The City contracted with Paul Hudson, d/b/a Carolina Lawn Service, to remove an accumulation of trash, weeds, and junk.

Plaintiff alleges that:

"6. . . . [T]he defendant Paul Hudson was the agent and employee of the defendant City and he was operating within the course and scope of his employment.

7. On or about the 13th day of July, 1977, the defendant City, by and through defendant Paul Hudson, without the consent of the plaintiff or either of them, wrongfully and unlawfully entered onto and upon the land of the plaintiffs, trespassed thereon, and destroyed a planted blackberry patch, destroyed an assortment of small bushes, and removed a cover crop of honeysuckle vines which had served to hold the soil in place and prevent erosion.

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**Horne v. City of Charlotte**

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8. By reason of the wrongful and unlawful conduct of the defendant aforesaid, the plaintiffs have been damaged to the extent of \$5,000.00."

Defendant City answered the complaint and included a motion to dismiss the action for plaintiffs' failure to comply with G.S. 1-539.15 by improperly instituting the action in less than 30 days following the notice to the City that an action would be commenced. The City also avers, by way of defense, that the weeds growing on the property amounted to a nuisance; that the plaintiffs refused to permit the City to enter their land to abate the alleged nuisance; that the city council, pursuant to statutory authority, enacted "an ordinance finding that the accumulation of weeds, trash, and junk on plaintiffs' property constituted a nuisance"; and that the City ordered the nuisance abated with costs for removal to be charged to the owners and a lien placed on the property.

Defendant Hudson answered the complaint and included a motion to dismiss on the grounds that plaintiffs' cause of action, if any, was against the City for the taking of property in an action for inverse condemnation, or that if there was a taking under the police power then there would be no recovery because the action of the City would constitute *damnum absque injuria*. In his answer, defendant admits removing the weeds, trash and junk, and avers that he did so in a workmanlike manner without any negligence or wrongdoing on his part. Furthermore, he avers that he was acting as a contractor for the City and that he is, therefore, entitled to defenses available to the City.

The trial court entered an order dismissing the complaint as to both defendants for failure of plaintiffs strictly to comply with G.S. 1-539.15. Plaintiffs appeal from that portion of the order dismissing the defendant Paul Hudson d/b/a Carolina Lawn Service.

*Nelson M. Casstevens, Jr., for plaintiff appellants.*

*Office of the City Attorney, by W. A. Watts, for defendant appellees.*

MORRIS, Chief Judge.

The narrow question presented by this appeal is whether the plaintiffs' complaint is sufficient to allege a claim for relief



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**Horne v. City of Charlotte**

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against the defendant Paul Hudson, d/b/a Carolina Lawn Service. Plaintiffs contend that G.S. 1-539.15, the statute relied upon by the trial court in dismissing plaintiffs' complaint against Paul Hudson, is inapplicable to that portion of the complaint directed against the individual defendant. Their contention is that Hudson, being an individual contractor for the City, is personally liable for his own tortious acts. Defendant, on the other hand, contends that there is no independent cause of action against Hudson absent an allegation of negligence on his part, because Hudson was acting within the scope of his contract with the City. Therefore, dismissal of the action against the City required dismissal of the action against Hudson. In the alternative, the defendant argues that even if the reason stated in the order was improper, the complaint fails to state a claim for relief, as pointed out in defendant's motions because there is no allegation of negligence nor conduct *ultra vires* the City by defendant.

The law with respect to the liability of the contractors of a municipality for wrongful acts generally is the same as that applying to contractors of a private business. A contractor meeting the requirements of an independent contractor is, subject to exceptions discussed below, solely responsible for his own wrongful acts. *Drake v. Asheville*, 194 N.C. 6, 138 S.E. 343 (1927); *see generally* 18 McQuillen, Municipal Corporations § 53.75 a. (3d ed. rev. 1977). On the other hand, when control over the manner and performance of the work is maintained by the city, the employee and the municipality both are liable to the same extent as any employer and employee. *Bailey v. Winston*, 157 N.C. 252, 72 S.E. 966 (1911); 18 McQuillen, *supra*, § 53.76 a. Defendant Hudson apparently took the position that he was acting as an independent contractor when he answered the complaint averring that he was acting as an "individual contractor", whereas plaintiffs alleged that Hudson was acting within the course and scope of his employment as an agent and employee of the City. However, we need not determine in which category Hudson falls. The alleged conduct by defendants in this action, if taken as true, is conduct for which the City of Charlotte is solely responsible.

It is an established doctrine that when a contractor, whether as an independent contractor or employee, is employed to do an act allegedly unlawful in itself, such as committing a trespass, the

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municipality is solely liable for the resulting damages. See generally 18 McQuillen, supra, § 53.76 d.; see also *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 97 Cal. Rptr. 840 (1971); *Kaler v. Puget Sound Bridge & Dredging Co.*, 72 Wash. 497, 130 P. 894 (1913); *DiMaggio v. Mystic Building Wrecking Co.*, 340 Mass. 686, 166 N.E. 2d 213 (1960). This proposition was recognized by our Supreme Court in *Drake v. Asheville*, supra, where the Court found that in order for the municipality to avoid liability for the conduct of its independent contractor, the contract *inter alia* must provide for work that lawfully may be performed. Similarly, in *Bailey v. Winston*, supra, the Court observed that a city may be responsible even for the acts of an independent contractor when the contract properly performed is either intrinsically dangerous or violates a duty which the city owes to the person injured. The general rule that a contractor or agent lawfully acting on behalf of a principal to whom the right of eminent domain has been accorded cannot be held personally liable if the contract is performed without negligence on his part was recognized in *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900 (1963). The principle is a sound one. The reasoning behind the rule was well stated in an opinion of the Supreme Court of Appeals of Virginia and quoted with approval in *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198 (1968). The Court's opinion, authored by Whittle, Judge, in reversing a judgment for landowners where it was admitted that the contractor performed the contract without negligence, said:

"If this were not the rule [i.e., if the contractor were liable under these circumstances], the State or subdivisions thereof having the power to condemn private property for public use, would find it difficult to secure bids from contractors. The contractor's bid is based upon the theory that the public agency has a legal right to submit its plans and specifications for the work to be performed, and that if he performs the work in accordance with the plans and specifications he will incur no liability in the absence of negligence. The public agency and not the contractor is the party clothed with the power of eminent domain, and if there is to be any special or unforeseen liability attached to the exercise of this power then it should be borne by the agency as an incident to the peculiar power.

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This conclusion is amply supported by the authorities. The public agency or corporation causing the land to be condemned or the work to be done is primarily liable for injuries caused by the exercise of the power of eminent domain. [Citations omitted.] And this applies to property taken or damaged by a city, county or other political subdivision. [Citations omitted.] A contractor or agent lawfully acting on behalf of a principal to whom the right of eminent domain has been accorded, in making a proposed public improvement, cannot be held personally liable for damages if such improvement is made without negligence on his part. [Citations omitted.]" *Tidewater Constr. Corp. v. Manly*, 194 Va. 836, 839-40, 75 S.E. 2d 500, 502 (1953).

Analogous principles have been applied in cases involving the construction of highways under the authority of the State which, like a municipality, has the power of eminent domain. In *Sales Co. v. Board of Transportation*, 292 N.C. 437, 233 S.E. 2d 569 (1977), the Court recognized the principle that a contractor employed by the Board of Transportation for the performance of work in connection with the construction or maintenance of a highway, and who performs his work with proper care and skill, cannot be held liable by the owner of property for the performance of the contract. The remedy is against the Board of Transportation for "inverse condemnation". Similarly, in *Highway Commission v. Reynolds Co., supra*, a highway contractor's work performed strictly according to the contract caused damages to nearby buildings. When the State sued the contractor for recovery of damages it was required to pay in an inverse condemnation proceeding, the Court held that the contractor was not liable unless the State discharged a liability on account of some wrongful act for which the contractor was primarily liable. See also *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182 (1952).

With these principles in mind, we direct our discussion to the sufficiency of the pleadings. According to *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), "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 which could be proved in support of the claim." 277 N.C. at 103, 176 S.E. 2d at 166, quoting, 2A Moore's Federal Practice ¶ 12.08 (2d ed. 1968).

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**Hunter v. Liability Co.**

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Plaintiffs allege that defendant Hudson "wrongfully and unlawfully entered onto and upon the lands of the plaintiffs, trespassed thereon", and destroyed certain vegetation while Hudson was "within the course and scope of his employment". Hudson answered admitting that he did remove the accumulation of trash, weeds, and junk, but averred that it was all pursuant to his contract with the City. From the foregoing discussion it is clear that plaintiffs must establish that defendant Hudson deviated from the contract through wrongful conduct of his own before plaintiffs may establish a cause of action against him. Plaintiffs' complaint has alleged no deviation from the contract through negligence or otherwise, nor has it alleged facts which suggest that plaintiffs could prove such a deviation. On the face of the pleadings before us, taking plaintiffs' allegations as true, the complaint fails to state a claim against defendant Hudson for which relief may be granted.

Plaintiffs' right of recovery, if any, was properly against the City of Charlotte, under the test of whether the conduct by the City in ordering this method of abatement of the nuisance was within its police power. If not, the action would amount to a taking of private property which would entitle plaintiffs to bring an action for just compensation. *See Rhyne v. Mt. Holly*, 251 N.C. 521, 112 S.E. 2d 40 (1960). The order of the trial court dismissing plaintiffs' complaint is, therefore,

Affirmed.

Judges HEDRICK and WEBB concur.

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MAXWELL B. HUNTER v. MICHIGAN MUTUAL LIABILITY COMPANY,  
LUMBERMENS MUTUAL INSURANCE COMPANY AND DOUGLAS C.  
TAYLOR

No. 7826SC710

(Filed 5 June 1979)

**Insurance § 85— automobile liability insurance—non-owned automobile—motorcycle not included**

Liability insurance policies covering a truck and automobile owned by the insured do not provide excess coverage under the "non-owned automobile"

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clause to the insured with respect to claims arising out of a motorcycle accident.

APPEAL by defendants Michigan Mutual Liability Company and Lumbermens Mutual Insurance Company from *Smith (David I.), Judge*. Judgment entered 9 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 April 1979.

This is an action for declaratory judgment to determine an issue of insurance coverage. On 28 June 1975, Maxwell Hunter was operating a 1974 Kawasaki motorcycle, owned by Ira Case, with the owner's consent. Douglas Taylor was riding the motorcycle as a passenger and was injured when the motorcycle ran off the road. Taylor instituted a civil action against Hunter for his injuries. On the day of the accident Case had a liability policy on the motorcycle with Shelby Mutual Insurance Company, with \$15,000 liability coverage per person. On the same day Hunter had an automobile liability insurance policy with Michigan Mutual Liability Company insuring a 1971 Chevrolet truck that he owned and he also had an automobile liability insurance policy with Lumbermens Mutual Insurance Company insuring a 1969 Chevrolet automobile owned by him. Hunter instituted the present declaratory action asserting that the motorcycle was a "non-owned automobile" within the terms of his policies with Michigan and Lumbermens and therefore those policies should provide him excess liability coverage above the \$15,000 primary liability coverage on the Shelby Mutual policy.

Both Michigan and Lumbermens moved to dismiss the complaint for failure to state a claim. A hearing was held on those motions and the judge found facts and entered judgment as follows:

1. On June 28, 1975 Plaintiff, Maxwell B. Hunter, was operating a 1974 Kawasaki motorcycle identification no. S3E-09102S3F-08962 bearing 1975 N.C. License No. 122142 owned by and registered in the name of Ira Ernest Case, by and with the consent of Ira Ernest Case. On said occasion Defendant Douglas C. Taylor was riding as a passenger on the motorcycle when said motorcycle ran off the roadway and turned over, injuring Defendant Douglas C. Taylor.

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2. On August 4, 1977 Douglas C. Taylor filed suit in the Superior Court of Mecklenburg County (No. 77-CVS-6113) against Maxwell B. Hunter praying for \$300,000.00 in total, compensatory damages for injuries, past, present, and future, including medical expenses, pain and suffering in body and mind, lost earnings, permanent disability and scarring.

3. On June 28, 1975, Ira Ernest Case had in force a liability policy No. 32-116-A00622 issued by Shelby Mutual Insurance Company of Shelby, Ohio, with \$15,000.00 liability limits per person covering the above described 1974 Kawasaki motorcycle.

4. Defendant Michigan Mutual Liability Company had in force and effect on June 28, 1975 its liability policy, No. 55-0-803524 issued to Jean Fonda and Maxwell Brown Hunter as the insured.

5. Defendant Lumbermen's Mutual Casualty Company had in force and effect on June 28, 1975 its liability policy, No. VZ-599-813, issued to Maxwell B. Hunter as the insured.

It further appearing to the Court from argument of counsel, the record in this case and from the evidence presented by the parties in open Court that there is no genuine issue as to any material fact on Plaintiff's First Claim for relief and that the Plaintiff is entitled to a declaratory judgment as a matter of law on his First Claim;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that this proceeding be converted to one under Rule 56 of the North Carolina Rules of Civil Procedure for summary judgment, and summary judgment is hereby granted in favor of Plaintiff on his First Claim for relief against the Defendants in that:

It is declared that the insurance policy #55-0-803524 of Michigan Mutual Liability Company and the insurance policy #VZ599-813 of Lumbermen's Mutual Casualty Company afford coverage to the Plaintiff and that the Defendants, Michigan Mutual Liability Company and Lumbermen's Mutual Casualty Company are obligated under their policies to afford a defense to Maxwell B.

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**Hunter v. Liability Co.**

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Hunter, Plaintiff herein as a result of the accident on June 28, 1975 set forth in that prior instituted action entitled *Douglas C. Taylor v. Maxwell B. Hunter*, #77-CVS-6113 in Mecklenburg Superior Court, North Carolina.

From entry of the foregoing judgment, defendants appealed.

*Donald M. Tepper, for the plaintiff.*

*Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe, and Irvin W. Hankins III, for Lumbermens Mutual Insurance Company.*

*Golding, Crews, Meekins, Gordon & Gray, by Marvin K. Gray and Robert Burchette, for the defendant Michigan Mutual Liability Company.*

*Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, by T. LaFontine Odom and L. Holmes Eleazer, for Douglas Taylor.*

MARTIN (Robert M.), Judge.

The question for our decision is whether the two liability insurance policies covering the truck and automobile owned by plaintiff must provide excess coverage under the "non-owned automobile" clause to the plaintiff with respect to claims arising out of the motorcycle accident of 28 June 1975. Plaintiff contends that the term "non-owned automobile" in the policies includes a motorcycle. He argues that the "owned automobile" provisions of the policies treat "automobile" as "an umbrella-like, generic term encompassing motor vehicles in general" since detailed definitions are used to specify only certain types of automobiles for coverage. Thus, when the "non-owned automobile" provision extends coverage to all "automobiles" or trailers not owned by or furnished for the regular use of the insured, plaintiff argues that the word "automobile" is unmodified and unrestricted and should be interpreted as including all motor vehicles, including motorcycles.

The defendants, Michigan and Lumbermens, issued to Maxwell B. Hunter policies which provided liability coverage for Mr. Hunter "arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile. . . ." The policies set forth the following definitions:

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“named insured” means the individual named in Item 1 of the declarations and also includes his spouse, if a resident of the same household. “insured” means a person or organization described under “Persons Insured”;

“relative” means a relative of the named insured who is a resident of the same household;

“owned automobile” means

- (a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,
- (b) a trailer owned by the named insured,
- (c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period provided
  - (1) it replaces an owned automobile as defined in (a) above, or
  - (2) the company insures all private passenger, farm or utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or
- (d) a temporary substitute automobile; “temporary substitute automobile” means any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

“non-owned automobile” means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative other than a temporary substitute automobile;



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“private passenger automobile” means a four wheel private passenger, station wagon or jeep type automobile;

“farm automobile” means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

“utility automobile” means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pickup body, sedan delivery or panel truck type not used for business or commercial purposes;

“trailer” means a trailer designed for use with a private passenger automobile if not being used for business or commercial purposes with other than a private passenger, farm or utility automobile, or a farm wagon or farm implement while used with a farm automobile;

The Supreme Court of this State has considered the definitions of an automobile in four insurance cases, namely: *Seaford v. Insurance Co.*, 253 N.C. 719, 117 S.E. 2d 733 (1961); *LeCroy v. Insurance Co.*, 251 N.C. 19, 110 S.E. 2d 463 (1960); *Jernigan v. Insurance Co.*, 235 N.C. 334, 69 S.E. 2d 847 (1952); *Anderson v. Insurance Co.*, 197 N.C. 72, 147 S.E. 693 (1929). Each case holds that a motorcycle is not included in the term “automobile” or “motor driven car” as they are used in insurance policies. Plaintiff distinguishes *Seaford* on grounds that the policy therein did not define the term “automobile” and distinguishes *LeCroy*, *Jernigan* and *Anderson* on grounds that they involved either medical coverage or fire insurance, not liability insurance.

Defendants cite a 1969 Louisiana case, *LaBove v. Insurance Co.*, 219 So. 2d 614 (La. App.), *cert. denied* 254 La. 22, 222 So. 2d 69 (1969), which dealt with an identical fact situation. The issue decided by the court was whether the term “non-owned automobile” as described in the policy included a two wheeled motorcycle. In holding that the policy did not extend coverage to motorcycles the court stated at page 616:

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In the ordinary use of language in America, the word "automobile" refers to a motor-driven car with a body and having more than two wheels for support as protection to the driver against accidents; whereas the word "motorcycle" indicates a motor vehicle driven on two wheels. *Laporte v. North American Acc. Ins. Co.*, 161 La. 933, 109 So. 767, 48 A.L.R. 1086. Having regard to this ordinary meaning of the terms, as well as to the intended function of automobile liability policies and the scope of the risks intended to be covered, the courts have consistently held that motorcycles are not considered automobiles for purposes of coverage by automobile liability policies. 1A Appleman's Insurance Law and Practice, Section 573, page 402.

Although in the one instance in the policy in the definition of "private passenger automobile" the restriction to a "four wheel" vehicle was made, and a like restriction was not made in the definition of a "non-owned automobile," from a reading of the policy as a whole this Court finds no ambiguity as to whether the policy would afford protection arising out of the operation of an automobile as opposed to a motorcycle. We believe it would do violence to reason and the ordinary acceptance of the meaning of words to extend the provisions of this policy to motorcycles, where it was obviously intended to cover automobiles.

A contract of insurance is a contract between the parties and both parties are bound by its terms. The language of the policies in the present case is clear. North Carolina precedent demonstrates our courts' historical unwillingness to extend to the term "automobile" a meaning that the term does not ordinarily possess in its commonly understood usage. We find no ambiguity in the term "automobile" as used in these policies and are confident that persons obtaining insurance are not at all likely to be misled by the policy language into thinking that an "automobile" is a "motorcycle" for the purposes of the policy. For the reasons stated, the judgment of the trial court is reversed.

Reversed.

Judges ARNOLD and ERWIN concur.

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**In re Cardo**

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## IN THE MATTER OF THE ADOPTION OF JAMES EDWIN CARDO

No. 7826SC676

(Filed 5 June 1979)

**1. Adoption § 2.2— abandonment of child—child's health—admissibility of evidence**

In a proceeding for declaration of abandonment, the trial court did not err in permitting the child's mother to testify concerning his health, since testimony that the child was in need of medical attention and respondent failed to provide funds or otherwise show concern about his condition tended to be some evidence of willful abandonment.

**2. Adoption § 2.2— petition for declaration of abandonment filed—money sent to child—evidence irrelevant**

In a proceeding for declaration of abandonment, the trial court did not err in excluding evidence of funds sent by respondent to the child's mother after the filing of the petition for a declaration of abandonment, since any funds sent after the filing would be irrelevant to the issue of whether the child had been abandoned as alleged in the petition.

**3. Adoption § 2.2— abandonment of child—jury instruction**

In a proceeding for declaration of abandonment, the trial court's instruction which included a statement that the abandonment must be purposely and deliberately done and which also included a recapitulation of respondent's evidence which showed that he did not have sufficient income to provide child support was proper; furthermore, the court was not required to instruct that the jury, if unsure of the answer to the issue, should consider the best interests of the child and should resolve a conflict of interest between the child and an adult in favor of the child.

**4. Adoption § 2.2— abandonment of child—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a proceeding for declaration of abandonment where it tended to show that respondent did not write, call or inquire about his son from March 1976 until June 1977; respondent knew his former wife was planning to remarry and he could have contacted the court to obtain her new address; the wife notified respondent's parents as to her address in December 1976 but did not hear from respondent until June 1977; and respondent failed to provide support for the child during the six months prior to the institution of this action.

APPEAL by respondent from *Ferrell, Judge*. Judgment entered 13 February 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 April 1979.

This proceeding for a declaration of abandonment was instituted on 20 June 1977 by the stepfather of James Edwin Cardo

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*In re Cardo*

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(Jamie) against the child's father. The respondent father denied having abandoned his child and requested a jury trial. The child is the son of the respondent and the petitioner's wife who were divorced in February, 1972. The mother was granted custody at that time.

The evidence tends to show that after his divorce, Jamie and his mother visited with the respondent and his parents in Jacksonville, Florida on holidays and sometimes on the weekends. Jamie and his mother lived in Gainesville, Florida where the respondent came to visit four or five times in 1973 and 1974. The respondent also called to inquire about Jamie when he and his mother moved to Clewiston, Florida. The respondent was working as a fisherman on a commercial fishing vessel. Under court order, he was obligated to pay \$15.00 per week for child support. He paid approximately \$545.00 in 1973 as child support, \$500.00 in 1974 and \$420.00 in 1975. The respondent was jailed in January, 1976, for failing to make payments but paid \$360.00 and was released after three or four hours. He paid \$60.00 in February, 1976, but paid nothing thereafter until 10 June 1977.

Petitioner married Jamie's mother in June of 1976 and they moved to Charlotte. Jamie's mother wrote to the court in Gainesville to give them her new address. She had told the respondent and his parents that she was planning to marry the petitioner. No support payments or other communications were received from the respondent from March, 1976, until June, 1977. Respondent sent \$100.00 on 10 June 1977 after the petitioner had contacted the respondent's parents in May, 1977, concerning a consent to the adoption. Jamie received several presents from the respondent's parents at Christmas of 1976 and in March of 1977.

Jamie's mother testified, over objection, that Jamie had several physical and emotional problems which surfaced in June, 1976. She wrote the respondent's parents about these problems in December, 1976. She did not receive any reply from the respondent.

The respondent's father testified that his son worked in Cape Canaveral and could be located through a friend although it might take a week to find him. He knew that the respondent had almost no income. The respondent did, however, contribute a little for the presents sent to Jamie. Respondent's father remembered be-

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*In re Cardo*

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ing contacted by the petitioner's attorney concerning the respondent's consent to the adoption. He did not believe that the respondent would give his consent.

The petitioner testified that since his marriage he has provided for Jamie's support. The respondent sent \$100.00 on 10 June 1977. Petitioner would have testified that they received \$1,500.00 after the petition was filed, but the objection to that question was sustained.

The respondent, testifying in his own behalf, stated that he was now living with his parents and working as a foreman for a construction firm. He had previously worked as a commercial fisherman. In September, 1976, he was involved in a boating accident in which one man drowned. Respondent was in the water for fifteen hours and was severely injured. He admitted that he was still obligated by the court order to pay \$15.00 a week and that he had never paid the full amount owed in any year. When he was arrested in January, 1976, his father paid to have him released. He testified that he did not pay child support or call his son because he was embarrassed that he did not have the money. His income in 1972 was \$4,500.00, in 1973 was \$2,286.00, in 1974 was \$1,900.00, in 1975 was \$2,200.00, and in 1976 was \$3,700.00. He last saw the child in January of 1976. His former wife never restricted his right to see the child prior to June of 1977.

Respondent's motions for a directed verdict were denied. The jury found that the respondent willfully abandoned the child for at least six consecutive months prior to 20 June 1977. From this judgment, the respondent appealed.

*Farris, Mallard & Underwood, by Ray S. Farris, for petitioner appellee.*

*Hamel, Hamel, Welling & Pearce, by Hugo A. Pearce III, for respondent appellant.*

VAUGHN, Judge.

The sole issue for trial was whether respondent had abandoned the child for six months immediately preceding the date the petition was filed, 20 June 1977. *See G.S. 48-2(3a).*

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[1] The respondent first contends that the trial court erred in allowing Jamie's mother to testify about his health. He argues that this testimony was irrelevant to the issue of whether Jamie had been abandoned and was prejudicial. Furthermore, he argues, the testimony was not limited to the time period prior to the date the petition was filed but included testimony concerning Jamie's health at the time of the hearing. We find that the respondent was not prejudiced by this testimony. That the child was in need of medical attention and respondent failed to provide funds or otherwise show concern about his condition, tends to be some evidence of willful abandonment. Jamie's mother informed the respondent's parents in December, 1976, of Jamie's health problems but received no communication from the respondent until June, 1977. This assignment of error is overruled.

[2] Respondent next contends that the court erred in disallowing testimony of funds sent by the respondent after the filing of the petition for a declaration of abandonment. The record indicates that the respondent sent \$1,500.00 for the child's care after 20 June 1977. Any funds sent after this date would be irrelevant to the issue of whether Jamie had been abandoned as alleged in the petition and, therefore, this evidence would not be admissible. Respondent's reliance on *Pratt v. Bishop*, 257 N.C. 486, 126 S.E. 2d 597 (1962), is misplaced. In *Pratt*, evidence tending to show that the father attempted to sell his consent to the adoption after the filing of the petition was admitted to show that he had a "weak cause" in protesting the action for abandonment. This evidence was, therefore, used to confirm guilt. In the present case, however, the respondent seeks to exonerate his prior conduct by actions taken, in all likelihood, in response to the filing of the petition seeking a declaration of abandonment. Legal abandonment, however, is not a transitory concept that may be recessed at the whim of the transgressor.

[3] Respondent contends that the judge did not properly define willful abandonment. He also argues that the judge should have instructed the jury that an explanation as to why a parent has failed to contribute to the support of his child could negate a willful intent to abandon. The trial judge instructed the jury as follows.

"I will now define, Members of the Jury, the terms 'abandonment' and 'willful.' The term 'abandonment,' as used

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in this legal proceeding, means there must be willful or intentional conduct on the part of the Respondent parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child, or a willful neglect and refusal to perform the natural and legal obligations of parental care and support.

“The term ‘willful,’ Members of the Jury, as used in this legal proceeding, means that an alleged abandonment must be done purposely and deliberately, indicating a purpose to do it without authority, considerlessly, whether one has the right or not, in violation of the law. In determining whether or not this has been willful abandonment, you may consider whether the Respondent parent has withheld his presence from the child, his love, his care, the opportunity for the child to display affection. Also you may consider the willful neglect, if any, to lend support and maintenance to or for the benefit of the child.

“Now, Members of the Jury, the responsibility to provide a child food, clothing, and shelter endures constantly, and thus a failure to perform the parental duty to support and maintain a child may be considered by you in determining whether a parent has relinquished his claim to the child. However, such failure does not in and of itself constitute willful abandonment.”

After some deliberation, the jury requested that these instructions be repeated and the judge complied. The second instruction did not differ from the first. We find that these instructions were not erroneous.

In *Pratt v. Bishop, supra*, Justice Sharp (now Chief Justice) gave an in depth review of what constitutes willful abandonment for the purposes of G.S. 48-2. Justice Sharp stated that

“abandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . .

“Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent

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withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child . . . .

“Certainly a continued wilful failure to perform the parental duty to support and maintain a child would be evidence that a parent had relinquished his claim to the child. However, a mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wilful intent to abandon.” (Citations omitted.) *Pratt v. Bishop, supra*, at 501-02.

In considering a request for an instruction, “the court is not required to charge the jury in the precise language of the instructions requested so long as the substance of the request is included in the charge.” *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E. 2d 1 (1972). The respondent wished to emphasize that parents may explain why they have failed to support their child. Although this point was not specifically set out, the jury was told that the abandonment must be purposely and deliberately done. Willful neglect, if any, to provide support is to be considered but the failure to provide support does not, in and of itself, constitute willful abandonment. The court also related the respondent’s evidence which showed that he did not have sufficient income to provide child support. Taken as a whole, this instruction was proper. See *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966).

Respondent contends that the court erred in failing to instruct the jury that, when it is unsure of the answer to the issue, it should consider the best interests of the child, and when the interests of the child and an adult are in conflict, this conflict should be resolved in the child’s favor. We first note that this instruction was requested by the petitioner, not the respondent. Indeed, the instruction would most likely have been prejudicial to respondent. Furthermore, this passage, taken from G.S. 48-1(3), is a statement of legislative policy with respect to adoptions. A specific definition as to what constitutes an abandoned child is provided by G.S. 48-2(3a). This assignment of error is overruled.



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[4] Finally, respondent contends that the court erred in failing to grant his motion for a directed verdict and his motion for judgment notwithstanding the verdict. When taken in the light most favorable to the petitioner, the evidence was sufficient to support a finding that the respondent had willfully abandoned Jamie. G.S. 48-2(3a) defines an abandoned child as "any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child." As earlier stated, willful abandonment is willful or intentional conduct showing an intent to forego all parental duties. *Pratt v. Bishop, supra*. The evidence showed that the respondent did not write, call or inquire about his son from March, 1976, until June, 1977. He knew his former wife was planning to remarry and he could have contacted the court to obtain her new address. She notified his parents as to her address in December, 1976, but did not hear from the respondent until June, 1977. The respondent failed to provide support for the child during the six months prior to the institution of this action. This evidence and the other evidence to which we have referred was sufficient to withstand the respondent's motions. We have carefully considered all of respondent's assignments of error and conclude that no prejudicial error has been shown.

No error.

Judges ERWIN and MARTIN (Harry C.) concur.

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VIRGIE M. HESTER v. JAMES ALBIN MILLER, CHRISTOPHER EDWARD MILLER, AN INFANT, JOY MAYO IPOCK, AND DAVID GENTRY IPOCK

No. 7810SC745

(Filed 5 June 1979)

**1. Negligence § 10 – proximate cause**

It is not required that defendant's negligence be the sole proximate cause of an injury or the last act of negligence in order to hold him liable, but it is sufficient if his negligence was one of the proximate causes.

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**2. Negligence § 10.1—intervening negligence**

In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury and must be the sole proximate cause of the injury.

**3. Negligence § 29.3—proximate cause—insulating negligence—question of fact**

The trial court erred in granting defendant automobile driver's motion for summary judgment on the ground that her negligence was not, as a matter of law, a proximate cause of plaintiff's injuries but was insulated by the negligence of defendant dump truck driver where plaintiff presented materials tending to show that defendant automobile driver slowed down and turned from the road without giving a turn signal, that the driver of two following vehicles, including plaintiff, had to brake hard and come to a complete stop, and that plaintiff's vehicle was struck from the rear by the dump truck, since a question of fact was presented as to whether defendant automobile driver's negligence set in motion a chain of circumstances leading up to plaintiff's injuries and was a proximate cause of those injuries.

APPEAL by plaintiff from *McLelland, Judge*. Order granting summary judgment for the defendants Joy Mayo Ipock and David Gentry Ipock entered 20 June 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 1 May 1979.

On 27 May 1977 plaintiff filed a complaint alleging that on 1 September 1976, plaintiff was injured in an automobile collision caused by the joint and concurring negligence of the defendants. The complaint alleged, *inter alia*, that plaintiff was following two cars down Highway 55 near Reelsboro, North Carolina, heading east at about 50 to 55 miles per hour. The first automobile was driven by the defendant Joy Mayo Ipock and was owned by defendant David Gentry Ipock. The second automobile was operated by Mrs. Berry Morris. The first car abruptly slowed and then its driver applied brakes and turned to the right into a private driveway without providing a turn signal. The Morris car veered left and proceeded beyond the point where the Ipock car turned off the road. Plaintiff braked and came to a complete stop. Within seconds, a dump truck operated by Christopher Edward Miller, and owned by James Albin Miller, struck the rear of plaintiff's camper truck and pushed it off the road into a tree. The gasoline tank exploded and plaintiff suffered severe burns.

The defendants Ipock denied negligence and denied that any negligence on their part proximately caused the plaintiff's in-

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juries. The defendants Miller also denied negligence and denied that their negligence proximately caused plaintiff's injuries.

On 23 March 1978, the defendants Joy Mayo Ipock and David Gentry Ipock moved for summary judgment on the grounds that, assuming that Joy Mayo Ipock was negligent in failing to provide a turn signal, that said negligence was not, as a matter of law, a proximate cause of the plaintiff's injuries. In support of their motion for summary judgment, the defendants presented the depositions of Mrs. Berry Morris and the plaintiff. The deposition of Mrs. Morris tended to show that the road was straight and level and the weather was clear at the time of the accident. Mrs. Morris was following the Ipock car at about 50 to 55 miles per hour. A little less than 50 yards before the driveway, Mrs. Ipock slowed somewhat. Mrs. Ipock then braked, brought her car almost to a complete stop, and turned right without indicating that she intended to turn. Mrs. Morris braked hard and came to a stop about one-half of a car length before the driveway. The plaintiff also braked to a complete stop. Just as Mrs. Morris was preparing to drive forward, she heard the impact of Miller's truck striking plaintiff's camper. The Ipock car was either off the road at that time, or partly off the road.

The deposition of the plaintiff tended to show that the brake lights on Ipock's car were on for four or five seconds. The car slowed down gradually, stopped, and then turned right. Plaintiff braked and came to a complete stop. Within a few seconds she heard Miller's truck approaching, she heard the brakes applied and the truck hit her camper on the left rear.

On 20 June 1978, the court granted the defendants' motion for summary judgment on the grounds that the alleged negligence of Joy Mayo Ipock was not, as a matter of law, a proximate cause of the plaintiff's injuries.

*Johnson, Gamble and Shearon by Samuel H. Johnson for plaintiff appellant.*

*Ragsdale, Liggett & Cheshire by Peter M. Foley for defendant appellees.*

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CLARK, Judge.

Plaintiff contends that the court erred in granting defendants' motion for summary judgment, since there are material issues of fact as to whether Joy Mayo Ipock negligently failed to provide a turn signal, and whether such negligence was a proximate cause of the automobile accident. Defendants contend that, even assuming that Joy Mayo Ipock was negligent, that her negligence was not the proximate cause of the accident since her negligence was completely insulated by the negligence of Christopher Edward Miller in following the Hester vehicle too closely and in failing to maintain a proper lookout.

Summary judgment is appropriate only when the moving party establishes that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). It is only in the exceptional negligence case, however, that summary judgment is appropriate. ". . . This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury . . . to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries. . . ." *Robinson v. McMahan*, 11 N.C. App. 275, 280, 181 S.E. 2d 147, 150, cert. denied, 279 N.C. 395, 183 S.E. 2d 243 (1971).

Proximate cause has been defined as a "cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable. . . ." 9 Strong's N.C. Index 3d *Negligence* § 8, at 363 (1977); *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968).

[1] There may be more than one proximate cause of an injury. It is not required that the defendants' negligence be the sole proximate cause of injury, or the last act of negligence. *See Batts v. Faggart*, 260 N.C. 641, 133 S.E. 2d 504 (1963); *Richardson v. Grayson*, 252 N.C. 476, 113 S.E. 2d 922 (1960). In order to hold the defendant liable, it is sufficient if his negligence is one of the

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proximate causes. *McEachern v. Miller*, 268 N.C. 591, 151 S.E. 2d 209 (1966); *Bechtler v. Bracken*, 218 N.C. 515, 11 S.E. 2d 721 (1940).

[2] In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury. The intervening negligence must be the *sole* proximate cause of the injury. *Rattley v. Powell*, 223 N.C. 134, 25 S.E. 2d 448 (1943). In cases involving rearend collisions between a vehicle slowing or stopping on the road without proper warning signals, and following vehicles, the test most often employed by North Carolina courts is foreseeability. The first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen. See *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); Byrd and Dobbs, *Survey of North Carolina Case Law, Torts*, 43 N.C.L. Rev. 906, 927-30 (1965). See Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C.L. Rev. 951 (1973). The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur.

Since “[p]roximate cause is an inference of fact . . . [i]t is only when the facts are all admitted and *only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not.*” *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E. 2d 740, 742 (1944); *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360 (1960). The question of intervening and concurring negligence is also ordinarily for the jury. *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879 (1965); *Davis v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440 (1962). Only if the court is able to determine from the undisputed facts that the defendants’ negligence was remote, and not a proximate cause of the injury, does the question become one of law for the court. 57 Am. Jur. 2d *Negligence* § 198 (1971).

[3] The testimony set forth in the depositions of the plaintiff and Mrs. Berry Morris tends to show that Joy Mayo Ipock slowed down and turned off the road without giving a turn signal, that Mrs. Morris and plaintiff had to brake hard, that their vehicles came to a stop and that within moments the defendant Miller’s truck struck the rear of plaintiff’s camper. There is no testimony as to how fast the Miller vehicle was traveling or how closely the

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Miller vehicle was following the Hester camper. The testimony is also unclear as to how much time elapsed between the stopping of the Morris and Hester vehicles and the impact. The testimony of the time lapse varied from "a few seconds" to "a couple of minutes."

In the case before us we apply the law to the proof in light of the fact that the proof supporting the motion for summary judgment is but a forecast of the evidence and that the danger of leaving the plaintiff with no avenue of relief should be avoided in a case alleging concurring negligence of multiple defendants which may best be determined simultaneously. We conclude that the proof supporting the motion for summary judgment does not establish intervening negligence as a matter of law and that the negligence of the defendants Ipock might have set in motion a chain of circumstances leading up to plaintiff's injuries.

There remains, therefore, a question of fact as to whether the defendant Joy Mayo Ipock's alleged negligence was a proximate cause of the plaintiff's injuries. The order entering summary judgment in favor of the defendants Joy Mayo Ipock and David Gentry Ipock was erroneously granted.

Reversed and remanded.

Judges PARKER and CARLTON concur.

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STATE OF NORTH CAROLINA v. DAVID NORMAN PARKS

No. 785SC1131

(Filed 5 June 1979)

**Criminal Law § 73.2; Homicide § 15— statements by homicide victim—inadmissible hearsay**

The trial court in a homicide prosecution erred in admitting into evidence extrajudicial statements of the victim concerning her intent to tell defendant that she wanted a separation and to leave the marital home since such statements were inadmissible hearsay.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 10 August 1978, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 26 March 1979.

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State v. Parks

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Defendant was charged with the murder of his wife, Deborah Block Parks on 4 September 1977. At trial the State sought a verdict of second-degree murder. Defendant was convicted of voluntary manslaughter and appeals from the judgment imposing a prison term of not less than twelve nor more than sixteen years.

*Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr. for the State.*

*William K. Rhodes, Jr. for defendant appellant.*

CLARK, Judge.

The victim, Deborah Parks, was killed about 1:30 p.m. on Sunday, 4 September 1977, in her mobile home where she lived with her husband, the defendant. Only the two of them were present when the fatal shot was fired. The State contends that defendant intentionally shot his wife. Defendant contends that the fatal shot was fired accidentally by him while cleaning his rifle. The State's theory is that on this Sunday afternoon about 1:15 p.m. she took five boxes to the mobile home; that she told defendant she wanted to separate from him and that she was going to pack his clothes in the boxes; that defendant became emotionally upset and intentionally shot her with his rifle.

The State attempted to prove this theory of the case by evidence which included the testimony of State's witnesses that the victim had made statements to them as follows:

1. Bette Block, mother of the victim Debbie Parks, testified that on the Sunday in question she was working at the Blockade Runner. Debbie came to see her about 11:30 a.m. and had lunch with her. Debbie was "frightened to death." *Debbie told her that she was going home and tell her husband she wanted him to leave, and that she was going to pack his clothes in the boxes.* Debbie left shortly after 1:00 p.m.

2. Dr. Neill Musselwhite, the victim's employer, testified that on several occasions he had talked with the victim about her relationship with her husband. On Thursday, two weeks before her death, *she told him that she felt very locked into her situation with her husband for financial reasons, and that she wanted to go back to school.* On the Monday preceding her death, she came to

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work tired and upset, and *she told him that she had told her husband she did not love him and wanted a separation, that as a result her husband had locked himself in the bathroom and attempted suicide. On the Friday preceding her death, she told him that she had made an appointment with an attorney.*

3. Diane Alexander, who worked with the victim in Dr. Musselwhite's office, testified that she talked with Debbie on the Friday before her death, and *Debbie told her that she had an appointment to see her lawyer on the following Wednesday about a separation from her husband, that Debbie talked with her about the relationship with her husband, and that as a result of this conversation the witness advised Debbie to spend the weekend with her.*

The defendant assigns error in the admission, over his objection, of these statements by the victim to the State's witnesses, contending that the statements were incompetent hearsay.

The testimony of the State's witnesses as to these extrajudicial statements by the victim depend upon the competency and credibility of the victim and are therefore hearsay. 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973). The statements are inadmissible unless they fall within the recognized exception to the hearsay rule. It appears that admissibility depends upon whether the statements of the victim are declarations of intention within the exception recognized in *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), which also involved a homicide prosecution. In *Vestal* the victim's dead body was found floating in Lake Gaston on 21 June 1969. The victim's wife testified that her husband told her on the evening of 15 June 1969 while "preparing" to leave home that he was going with the defendant on a business trip to Wilmington, Delaware. The State's theory was that he was killed in Greensboro shortly after he left home. The majority held the evidence admissible to show that the victim intended to go on a trip with the defendant, that he left home with such intent, and that he "reached and entered into the company of" the defendant. For the court, Justice Lake stated: "The two fold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness." 278 N.C. at 582, 180 S.E. 2d at 769. And it was pointed out that the subsequent death of the victim established



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necessity (the unavailability of the declarant as a witness), and the circumstances under which the statements were made supplied the reasonable probability of trustworthiness because it is a matter of everyday experience that a man leaving his home for an out-of-town trip will inform his wife as to his destination, traveling companion, purpose and anticipated time of return.

In the case *sub judice*, the extrajudicial statements of the victim that she intended to go home where she would find her husband may be admissible under the "declaration of intention" exception to the hearsay rule. But the primary purpose of the various statements was not to prove that the victim went home where she found her husband because this was established by the State's evidence, including defendant's admission that he shot her while in the mobile home. Her declarations of intent to tell defendant she wanted a separation and to leave the home did not have "the reasonable probability of truthfulness", as did the victim's declaration of intent to meet and take a trip with defendant in *Vestal*. In general the other statements of the victim were offered to prove the truth of the matters asserted, *i.e.*, marital discord and defendant's attempted suicide, and do not come within any recognized exception to the hearsay rule.

The victim's hearsay statements were crucial on the question of whether the homicide was intentional, as contended by the State, or accidental, as contended by the defendant. Clearly, the admission of the victim's hearsay statements was prejudicial error, which requires a new trial.

We find no merit in defendant's contention that the trial court erred in admitting the opinion testimony relative to the force required to pull the trigger and fire the rifle. The witness Carpenter was an expert and his opinion was based on facts within his own personal knowledge as a result of a series of tests performed on the rifle. *See State v. Grady*, 38 N.C. App. 152, 247 S.E. 2d 624, *appeal dismissed*, 296 N.C. 107, 249 S.E. 2d 806 (1978).

Nor do we find merit in defendant's contention that the trial court erred in submitting to the jury the lesser offense of voluntary manslaughter. There was sufficient evidence of heat of passion to support the submission of voluntary manslaughter. However, it is noted that much of the evidence from which heat of passion could be reasonably inferred was contained in the hear-

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say statements of the victim, which we have found were in admissible. On retrial the trial judge must determine whether the evidence then submitted justifies the submission to the jury of the voluntary manslaughter offense. *See State v. Putnam*, 24 N.C. App. 570, 211 S.E. 2d 493 (1975).

For prejudicial error in the admission of hearsay evidence we order a

New trial.

Chief Judge MORRIS and Judge ARNOLD concur.

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THE COUNTY OF STANISLAUS v. HARRY WESLEY ROSS, JR.

No. 781DC768

(Filed 5 June 1979)

**1. Parent and Child § 10— complaint under Uniform Reciprocal Enforcement of Support Act—earnings and employer of defendant**

A complaint under the Uniform Reciprocal Enforcement of Support Act was not deficient because of its failure to state the name of defendant's employer or the amount of his earnings.

**2. Parent and Child § 10— complaint under Uniform Reciprocal Enforcement of Support Act—change in circumstances not necessary**

A complaint for child support under the Uniform Reciprocal Enforcement of Support Act need not allege a substantial change in circumstances since the legislature intended that its enactment of G.S. 52A-21 would provide authority to the courts of this State to apply the Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments or whether there had been a change in the circumstances of either the child or its parents.

**3. Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act—complaint as evidence**

The trial court's findings of fact in an action brought under the Uniform Reciprocal Enforcement of Support Act were supported by competent evidence where the complaint was introduced into evidence and each of the court's findings was supported by allegations of fact set forth in the complaint. G.S. 52A-19.

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**4. Parent and Child § 7— duty of father to support child**

Where the trial court found that defendant was the father of the child for whom support was sought, the court properly concluded that defendant owed a duty of support to the child.

**5. Parent and Child § 7— earnings of \$1700—child support of \$200**

A finding by the trial court that defendant has an income of \$1700 per month is sufficient to support the court's conclusion that he has sufficient earning capacity to enable him to support his minor child in an amount of \$200 per month although the court also found that defendant has expenses of \$1710 per month, since defendant may not avoid his duty to support his minor child simply by spending all of the money he earns but must share his earnings with his minor child to the end that each may have a reasonable amount for support, with the minor child's reasonable needs for food, clothing and shelter taking priority.

APPEAL by defendant from *Beaman, Judge*. Order entered 9 June 1978 in District Court, DARE County. Heard in the Court of Appeals 3 May 1979.

This action for child support was instituted by the County of Stanislaus, State of California, by the filing of a complaint in the Superior Court of the State of California. The complaint alleged that the defendant, Harry Wesley Ross, Jr., is the father of Suzanne Gail Ross who was born on 11 December 1962. The complaint further alleged that the defendant has not provided reasonable support for the child since 10 September 1970 and continues to refuse to provide reasonable support for her. The child has lived in one of the plaintiff's foster homes since 10 September 1970. The plaintiff county has provided for the necessities of life and care of the child and has paid \$750 in public assistance for the support of the child. The child is continuing to receive public assistance from the plaintiff at the rate of \$200 per month, which amount the defendant is able to pay and is necessary for the support of the child. The Superior Court of the State of California certified that the plaintiff's complaint had been verified and transmitted the complaint and certification to the Clerk of the District Court for Dare County, North Carolina, pursuant to the provisions of the Uniform Reciprocal Enforcement of Support Act. G.S., Chap. 52A.

The defendant responded to the complaint by moving to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted. In addition, the defendant

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answered the allegations of the complaint by admitting that he was the father of Suzanne Gail Ross and denying all of the other allegations.

When the case was called for trial, the only evidence presented for the plaintiff county was the verified complaint. The only evidence presented for the defendant was a list of his income and expenses which was introduced as an exhibit. The trial court overruled the defendant's motion to dismiss at the close of all of the evidence. The trial court then made the findings of fact including the following: that the County of Stanislaus is a political subdivision of the State of California; that since 10 September 1970, the county has provided for the care and necessities of life for Suzanne Gail Ross; that Harry Wesley Ross, Jr. is the father of that child; that the father is residing or domiciled in Dare County, North Carolina; that since 10 September 1970, the father has refused to provide reasonable and adequate support for his child; that since 10 September 1970, the child has received public assistance in the amount of \$750 and is continuing to receive public assistance in the amount of \$200 per month; that the defendant father has a monthly income of approximately \$1,700 and monthly expenses of approximately \$1,710; and, that the defendant has sufficient earning capacity to enable him to support his child in the amount of \$200 per month. Upon these findings of fact, the trial court concluded as a matter of law that the defendant owed a duty to support to his child; that the defendant is indebted to the plaintiff for public assistance paid for the support of his child; and, that the defendant has the ability to support his child in the amount of \$200 per month. The trial court then ordered that the defendant pay the plaintiff, the County of Stanislaus, \$750 plus \$200 per month for the support of his child. From that order, the defendant appealed.

*Attorney General Edmisten, by Associate Attorneys Henry H. Burgwyn and R. James Lore, for plaintiff appellee.*

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

MITCHELL, Judge.

[1] The defendant first assigns as error the trial court's denial of his motion to dismiss for failure to state a claim upon which relief

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can be granted. In support of this assignment, the defendant contends that the motion should have been granted because the complaint fails to state where he was employed or the amount of his earnings. We do not agree. The Uniform Reciprocal Enforcement of Support Act requires that the plaintiff's complaint "state the name and, so far as known to the plaintiff, the address and circumstances of the defendant and his dependents for whom support is sought and all other pertinent information." G.S. 52A-10. The complaint may, but is not required to, contain the name of the defendant's employer. As the complaint contained the name, address and circumstances of the defendant, as well as allegations that the plaintiff was entitled to child support payments from the defendant, it was not made defective by its failure to contain the name of the defendant's employer or the amount of the defendant's earnings.

[2] The defendant further contends that the complaint failed to state a claim upon which relief could be granted because it did not allege a substantial change in circumstances. The defendant refers us to *Childers v. Childers*, 19 N.C. App. 220, 198 S.E. 2d 485 (1973), as authority for this contention.

The facts in the present case are distinguishable from those in *Childers*, and we do not find that case applicable. Unlike the situation in *Childers*, this case does not involve an action pursuant to G.S. 50-13.7 for an order which "modifies or supersedes" a prior order. Although the record indicates that a prior judgment was entered in California in 1964 requiring the defendant to pay \$50 per month child support, that action was apparently initiated against the defendant by the mother of his minor child Suzanne Gail Ross. The present action, on the other hand, is an original action brought by the County of Stanislaus against the defendant and is independent of all other previous actions. The legislature apparently foresaw and provided for just such situations when it enacted G.S. 52A-21 which provides that "A support order made by a court of this State pursuant to [the Uniform Reciprocal Enforcement of Support Act] does not nullify and is not nullified by a support order made by a court . . . of any other state pursuant to a substantially similar act or any other law regardless of priority of issuance, unless otherwise specifically provided by the court." In such situations, that statute further provides for credits for payments pursuant to one support order

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County of Stanislaus v. Ross

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against amounts owned pursuant to the other. The legislature apparently intended that its enactment of G.S. 52A-21, after our opinion in *Childers*, would provide authority to the courts of this State to apply the Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments or whether there had been a change of circumstances of either the child or its parents. Therefore, it was not necessary that the complaint in the present case contain allegations of facts constituting changed circumstances. Additionally, we find this view consistent with the legislative intent that the remedies provided by the act be "in addition to and not in substitution for any other remedies" and that the act "be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states having a substantially similar act." G.S. 52A-4; G.S. 52A-32. For the reasons previously discussed, this assignment of error is overruled.

[3] The defendant next assigns as error the trial court's findings of fact. He contends that those findings are not supported by the evidence. The defendant further contends that no evidence was presented for the plaintiff county. In an action brought under the Uniform Reciprocal Enforcement of Support Act, the complaint is "admissible as prima facie evidence of the facts therein stated. . . ." G.S. 52A-19. In the present case, the record on appeal clearly reflects that the complaint was introduced as evidence on behalf of the plaintiff county. Each of the trial court's findings of fact is supported by allegations of fact set forth in the complaint. Therefore, those findings of fact are supported by competent evidence. This assignment of error is overruled.

[4] The defendant next contends that the trial court erred in concluding that the defendant owed a duty of support. The trial court found that the defendant was the father of the child for whom support was sought. That finding was supported by competent evidence. A father owes a duty to support his minor child. G.S. 50-13.4(b); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). Therefore, the trial court did not err in its conclusion and the defendant's assignment of error is overruled.

[5] The defendant further assigns as error the trial court's conclusion that he has sufficient earning capacity to enable him to pay support in the amount of \$200 per month. He concedes in his

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brief that the complaint is sufficient to establish the child's needs, but contends that the evidence fails to show his ability to meet those needs. We do not agree.

The defendant's evidence supported the trial court's findings that his income is \$1,700 per month and his expenses are \$1,710 per month. These facts as found by the trial court do not reveal that the defendant is unable to pay \$200 per month in child support; they merely tend to show that he cannot pay \$200 per month and continue to maintain his present life-style. The defendant's evidence indicated that his expenses included among other things \$100 per month for clothing, \$183 per month for car payments, \$100 per month for truck payments, \$100 per month for automobile expenses, \$90 per month for payments on a loan, and \$341 per month for payments on a mortgage. If by reason of the trial court's judgment the defendant is required to survive with less clothing, less convenient transportation or less desirable housing, then so be it. He may not avoid his duty to support his minor child simply by spending all of the money he earns. The defendant must share his earnings with his minor child to the end that each may have a reasonable amount for support, with the minor child's reasonable needs for food, clothing and shelter taking priority. Absent extraordinary circumstances not presented by the facts of the present case, evidence that a defendant has an income of \$1,700 per month, or substantially less for that matter, will be considered sufficient to support the trial court's conclusion that he has sufficient earning capacity to enable him to support his minor child in the amount of \$200 per month. This assignment is without merit and is overruled.

The defendant has presented additional assignments of error. We find them without merit.

The judgment of the trial court must be and is hereby

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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**Dixon v. Weaver**

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STEPHEN OLIVER DIXON v. JUNE KEYS WEAVER

No. 7810SC752

(Filed 5 June 1979)

**1. Automobiles § 91.3— running out of gas—failure to warn motorist—no willful and wanton conduct**

Evidence that defendant ran out of gas on an interstate highway, abandoned her car in the left lane thus blocking the highway, and failed to flag or warn other motorists that there was danger ahead although there were others in her car who could have done so was insufficient to require the trial judge to submit an issue of willful and wanton conduct on the part of defendant to the jury.

**2. Negligence § 15— counsel's reference to comparative negligence—correction by court**

In an action to recover for injuries sustained in an automobile accident, plaintiff was not prejudiced where the trial court promptly sustained plaintiff's objection and corrected the statement by defendant's counsel concerning comparative negligence.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 10 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 2 May 1979.

Plaintiff filed complaint charging that he was injured as the result of negligence on the part of defendant. Defendant answered denying negligence, pleaded contributory negligence, and counterclaimed for property damages. At trial, the jury answered the issue of negligence and the issue of contributory negligence in the affirmative. Judgment was entered against plaintiff, and he appealed.

*William L. Thorp and Anne R. Slifkin, for plaintiff appellant.*

*Gary S. Lawrence, for defendant appellee.*

ERWIN, Judge.

Plaintiff presents four arguments on appeal: (1) that the trial court erred in refusing to submit the issue of defendant's willful and wanton negligence to the jury; (2) that the trial court erred in failing to instruct the jury that plaintiff had no duty to anticipate the negligence of defendant since the jurors could not understand the issue of contributory negligence unless they understood that



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**Dixon v. Weaver**

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plaintiff was not negligent in failing to anticipate that another driver would leave her car on the travel portion of the highway and fail to give any warning to others using the highway; (3) that the trial court erred in failing to instruct the jury that failure to warn other motorists of a stalled vehicle constitutes negligence since this made it impossible for the jury to properly consider whether or not plaintiff's actions constituted contributory negligence under the facts in this case; and (4) that the trial court committed error in allowing defense counsel to ask a question on *voir dire* which might allow the jury to use comparative negligence or percentage negligence in reaching a verdict in this case. We have carefully considered each of the arguments of the plaintiff and find no error on the record before us for the reasons that follow.

The evidence presented at trial tended to show that plaintiff was traveling west on Interstate 40 between Raleigh and Durham when this accident occurred. Plaintiff testified that he saw a truck parked on the right-hand side of I-40 with its flashing lights on and that he proceeded to follow a grey Plymouth into the left lane in order to avoid the truck, although it was not on the roadway. Thereafter, the Plymouth swerved to the right, and plaintiff was faced with defendant's car parked in the left-hand lane. He tried to avoid defendant's car but struck it, and as a result, his truck crashed causing damages to it and injuries to him.

M. S. Wilder testified that he saw defendant's automobile stopped in the left-hand lane, and he saw someone waving him to stop; he did. His truck was parked on the right-hand shoulder of the highway with blinker lights on. Wilder stated that defendant was asking him if he would take her to get some gasoline when the collision occurred.

Trooper Bailey, who investigated the accident, testified that plaintiff's truck traveled approximately 224 feet from the point of impact, that defendant's car traveled approximately 103 feet from the point of impact, and that there were no skid marks prior to the point of impact. The signal lights were on and flashing on the rear of defendant's car when he arrived on the scene.

Defendant testified that she was traveling on I-40, going from Raleigh to Durham, when her car ran out of gasoline, cut off, and stopped in the left lane for west-bound traffic. She put on her

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signal lights. She and her children attempted to move the car, but were unable to do so. She flagged Mr. Wilder and was talking to him when the accident occurred.

Mr. James Cherney testified for defendant that he was following plaintiff's vehicle just prior to the accident. When he saw the collision, he pulled into the right-hand lane with no difficulty, and he saw no other automobile in this lane at that time.

[1] Plaintiff contends that defendant's conduct on this occasion amounted to willful and wanton negligence: that defendant should have known that she was going to run out of gasoline on an interstate highway; that knowing this condition, she continued to drive in the left lane rather than in the right lane; that she abandoned her car in the left lane for travel, blocking the highway; that she did not flag or warn other drivers that there was danger ahead, although there were others in her car who could have done so. Mr. Wilder testified:

"[I] told the defendant that she should get her car off the road. She looked like she had plenty of help to move it as she had a big boy with her in the car. Also because the car was on the grade, she could have rolled the car off the road, but she didn't want to."

Our Supreme Court stated in *Wagoner v. R. R.*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953):

"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. *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991; *Ballew v. R. R.*, 186 N.C. 704, 120 S.E. 334; *Foster v. Hyman, supra*; *S. v. Stansell*, 203 N.C. 69, 164 S.E. 580; 38 Am. Jur., negligence, Sec. 48."

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*Wagoner* was followed by this Court in *Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977). Plaintiff calls our attention to *Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E. 2d 290, 294 (1967), which stands for the rule: "Ordinarily, where willful or wanton conduct for which defendant is responsible is a proximate cause of the injuries complained of, contributory negligence does not bar recovery." (Citations omitted.) However, the facts in the case *sub judice* are clearly distinguishable from *Pearce*, where the defendant was driving his motor vehicle at a speed of or near 90 m.p.h. in a 55 m.p.h. zone and failed to stop for a stop sign. This conduct gave rise to an inference of willful, wanton, or intentional conduct, or gross negligence on the part of that defendant. In the case before us, taking the evidence in the light most favorable to the plaintiff, we hold that the evidence was not sufficient to require the trial judge to submit an issue of willful and wanton conduct on the part of the defendant to the jury. This assignment of error is overruled.

Plaintiff did not request the trial judge to give any instructions; however, he complains that there were errors in the instructions given. We do not agree.

Plaintiff contends that defendant was negligent in failing to warn plaintiff that her vehicle was stopped on the road. The court did not instruct the jury as plaintiff contended. The record revealed: (1) that the accident occurred in the daytime while the weather was clear; (2) that I-40 was straight at the point of impact and for some distance prior to impact; (3) that there were no obstructions to plaintiff's view except the possibility of the grey Plymouth in front of him; and (4) that defendant's car was not hidden and was in plain view. The record does not reveal the distance plaintiff was driving behind the Plymouth nor the distance from the point the Plymouth was driven into the right lane to the point defendant's car was stalled.

It is the duty of the driver of an automobile to keep a reasonable, careful lookout in the direction of travel so as to avoid collision with animals, persons, and vehicles on the highway. *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676 (1954). Defendant's vehicle could or should have been seen on the highway. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657 (1954). We find no error.

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Dixon v. Weaver

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[2] The record reveals the following:

“VOIR DIRE EXAMINATION

MR. LAWRENCE: Ladies and gentlemen, if in deliberation, in your deliberation of the facts in this case if you should determine that one party, say the plaintiff, was 10 to 20% at fault and the other party, the defendant was 80 to 90% at fault, could you then take the law as the judge instructs you and find that neither party was entitled to recover?

MR. THORP: Objection, Your Honor.

COURT: The objection is overruled.

EXCEPTION NO. 1

COURT: But, Members of the Jury, the Court states to you that under the law of North Carolina there is no rule by which a jury may allocate liability in the event the determination from the evidence is that both parties were negligent and that the negligence of each was the proximate cause of the loss caused by that party. But rather the law is that if each party is negligent and that negligence is the proximate cause of the loss complained by that party, you may not recover. For in such an event the contributory negligence of the party seeking recovery completely bars his right to recovery.

EXCEPTION NO. 2”

Judge McLelland promptly corrected the statement by defendant's counsel. We find no error. Suffice it to say as Justice Higgins stated for our Supreme Court in *Turner v. Turner*, 261 N.C. 472, 474, 135 S.E. 2d 12, 14 (1964):

“[H]owever, the variation from the script approved by this Court in such cases is too slight and too microscopic to have misled the jury or to have influenced the verdict. ‘New trials are not awarded because of technical errors. The error must be prejudicial.’ *Davis v. Ludlum*, 255 N.C. 663, 122 S.E. 2d 500.”

In the trial, we find

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

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**In re Foreclosure of Norton**

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IN THE MATTER OF THE FORECLOSURE OF R. WOODROW NORTON, JR.,  
UNMARRIED

No. 7830SC729

(Filed 5 June 1979)

**1. Mortgages and Deeds of Trust § 26.1— foreclosure hearing—failure to give notice to other owners**

Respondent was not prejudiced by petitioner's failure to give notice of a foreclosure hearing to other record owners of the realty securing the deed of trust being foreclosed as required by G.S. 45-21.16(b)(3).

**2. Mortgages and Deeds of Trust § 26.1— foreclosure hearing—waiver of notice**

Respondent waived notice of a foreclosure hearing by his presence at and participation in the hearing.

**3. Mortgages and Deeds of Trust § 4— deed of trust—description of land—reference to plat recorded later**

A deed of trust did not contain an insufficient description of the land offered as security because the plat to which the deed of trust referred for a specific description was not recorded until after the deed of trust was executed.

**4. Mortgages and Deeds of Trust § 4— description of land—reference to plat—point identifiable on ground**

A description in a deed of trust is not insufficient on the ground that the plat referred to contains no beginning point which would allow location of the land on the ground where the plat indicates that one corner of the land is also Corner No. 1 of the U.S.F.S. Tract No. 1028, a point which is identifiable upon the ground.

**5. Mortgages and Deeds of Trust § 5— insertion of plat and book page numbers after execution**

A deed of trust was not rendered void by the fact that an attorney, before recording it, inserted in it the book and page numbers where the plat referred to therein was to be recorded, since one who signs a deed of trust with blanks and gives it to another for use is bound by the instrument as completed.

**6. Mortgages and Deeds of Trust § 4— description of land—erroneous reference to plat and deed as recorded in Clerk's Office**

A deed of trust was not invalid because it referred to a plat and deed of the land conveyed as security as being recorded in the Clerk's Office rather than in the Office of the Register of Deeds.

APPEAL by respondent from *Thornburg, Judge*. Order entered 15 April 1978 in Superior Court, MACON County. Heard in the Court of Appeals 27 April 1979.

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In re Foreclosure of Norton

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Petitioner trustee seeks to foreclose on a deed of trust which secures a note in default. The Clerk of Superior Court of Macon County authorized the trustee to hold the foreclosure sale, and respondent appealed this order to Superior Court pursuant to G.S. 45-21.16(d).

At the hearing *de novo*, Randall Carver, president of the Rabun County Bank (Bank) of Clayton, Georgia, testified that on 12 May 1977 respondent borrowed \$49,000 from the Bank, securing the note with a deed of trust upon a parcel of land located in Otto, North Carolina. This note has been delinquent since 12 August 1977.

Charles Clay, a Georgia attorney, testified that he represented respondent in connection with the closing of the loan. Both parties offered exhibits into evidence. The trial court found a valid debt, a default, and a power of sale, and authorized the trustee to proceed with foreclosure. From this order respondent appeals.

*Downs & Cabe, by James U. Downs, for petitioner appellee.*

*Herbert L. Hyde, for respondent appellant.*

ARNOLD, Judge.

The trial court found as fact that

9. Notice has been given to all those parties entitled thereto under the terms of Article 2A, Chapter 45 of the North Carolina General Statutes, specifically including the record owner of the real estate, namely R. Woodrow Norton, Jr., and the court further finds that no other party claiming to be the record owner has intervened in this action or has caused any collateral action to be filed asserting their ownership thereto and that there was no evidence offered by R. Woodrow Norton, Jr., that there is any other record owner of the real estate which secures the above referred to debt other than him.

Respondent argues that this finding is not based upon the evidence.

Respondent offered into evidence a deed of 15 February 1966 conveying certain land in Smithbridge Township from Robert W.

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**In re Foreclosure of Norton**

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& Blanche Norton to Robert W. Norton, Jr. and Anita Myra Norton, with a reserved life estate in the grantors. The deed of trust executed by respondent conveys as security certain land in Smithbridge Township, "a part of the same property conveyed from Robert W. Norton, Sr. and wife, Blanche Norton to Robert W. Norton, Jr. and Anita Myra Norton by Warranty Deed dated February 15, 1966." Respondent contends that he has shown by his exhibit that he is not the only record owner of the land, and that petitioner has failed to comply with the requirements of G.S. 45-21.16(b)(3) that notice of hearing be given to "every record owner of the real estate," meaning "any person owning a present or future interest."

[1] Petitioner responds that there are deeds in existence from Robert and Blanche Norton and from Anita Myra Norton to respondent, apparently arguing that these deeds convey to respondent their interests in the property. However, these purported deeds do not appear in the record on appeal, so we do not consider them. We find that on the face of the record petitioner has failed to comply with the statutory notice requirements. We find, as well, that respondent cannot complain of this failure, as he has shown no prejudice to his rights by it.

[2] Respondent argues that he received no notice of the hearing, but the record shows that he was present at the hearing and participated in it. It is well-settled that a party entitled to notice may waive notice in this way. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971). Further, assuming that there are other record owners of the property, respondent has shown no injury to him by petitioner's omission of notice to them. On this assignment of error respondent cannot prevail.

[3] Respondent next argues that the deed of trust is invalid for failure to include a sufficient description of the land offered as security. We disagree.

The deed of trust executed by respondent on 12 May 1977 conveys to the trustee:

All that tract or parcel of land lying and being in Smithbridge Township, Macon County, North Carolina and being 73.8 acres as described on a plat of survey dated April 22, 1977 and prepared by Roy A. Terrell and Associates,

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In re Foreclosure of Norton

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North Carolina Registered Surveyor No. L-806, said plat being recorded in Plat Book 4, Page 143, Clerk's Office, Macon County Superior Court. Reference to said plat being made for the express purpose of incorporating its description herein.

Respondent apparently argues that because the plat was not actually recorded until 1 July 1977 it could not serve to provide the description for the deed of trust. The law of this jurisdiction holds otherwise. "Real estate is sufficiently described in a conveyance by reference for identification to another deed or record specifically mentioned therein which accurately describes it. The map or plat referred to need not be registered." *Smathers v. Jennings*, 170 N.C. 601, 604, 87 S.E. 534, 536 (1916) (cite omitted). The plat here was sufficiently identified to be incorporated by reference in the deed of trust.

[4] Respondent argues further that the deed of trust description fails because the plat contains no beginning point which would allow for locating the land on the ground. The plat indicates, however, that one corner of the tract is also Corner No. 1 of U.S.F.S. Tract No. 1028, a point which is identifiable upon the ground. We find that this is sufficient.

[5] The witness Clay testified that before recording the deed of trust he inserted in it the book and page numbers where the plat was to be recorded. Respondent argues that these insertions render the deed of trust null and void, but our Supreme Court held to the contrary in *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E. 2d 115, *cert. denied* 405 U.S. 977 (1971). One who signs a deed of trust with blanks and gives it to another for use is bound by the instrument as completed.

The trial court admitted into evidence the affidavit of the Register of Deeds of Macon County to the effect that "in Plat Book 4 on page 143 a map has been recorded that was prepared by Roy A. Terrell and Associates, North Carolina Registered Land Surveyors # L-806, reflecting a plat of survey of 73.8 acres in Smithbridge Township, Macon County, North Carolina, which plat is dated April 22, 1977." The court accepted this affidavit over respondents' objection on the express condition that a certified copy of the plat be furnished to the court. This was done. The respondent objects to the affidavit's reference to "a plat of survey," but there is no indication in the record that the trial



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**In re Foreclosure of Norton**

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court relied on this language as establishing that the plat was actually prepared from a survey. The court merely states that "[t]he description of the land in the said deed of trust referred to a recorded plat and survey of the land in question," and the deed of trust in fact uses this language. Respondent's objection has no merit.

Respondent's assertion that the trial court relied upon the findings made by the Clerk of Court is frivolous. The court in its findings of fact states only that the Clerk's order "was based on the necessary and requisite finding of facts as set forth in the North Carolina General Statutes 45-21.16(d)"; it does not indicate that it is in any way influenced by these findings, and in fact expressly states that "respondent has appealed for a de novo hearing, which this court heard."

[6] The deed of trust refers to the plat and deed admitted as respondent's exhibit 1 as being recorded in the "*Clerk's Office, Macon County Superior Court.*" The witness Clay, who prepared the deed of trust, testified that this was his error, caused by the fact that in Georgia, where he is licensed to practice, deeds and plats are recorded in the Clerk's Office rather than the Register of Deeds Office, and through habit he used the wrong designation. Respondent, though complaining of this error, has shown us no way in which he was prejudiced by the court's accepting it as a "typographical error," and we find no prejudice.

Respondent argues that he received no notice of the substitution of trustee, but the uncontradicted evidence is that notice was sent by certified mail to his last known address, and that the receipt was returned signed.

With regard to respondent's argument that the Notice of Foreclosure incorrectly calculated the interest due, we note only that if such an error was made, it would not invalidate notice of the foreclosure in the absence of a showing that respondent was prejudiced by the error.

Respondent has shown us no prejudicial error. The order of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

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**Strickland v. Tant**

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B. E. STRICKLAND AND MARGARET E. STRICKLAND, PETITIONERS v. ODELL C. TANT, WOODLAWN MEMORIAL GARDENS, INC., GETHSEMANE MEMORIAL GARDENS, INC., RESPONDENTS

No. 7810SC764

(Filed 5 June 1979)

**1. Cemeteries § 2— removal and reinterment of remains**

G.S. 65-13 does not provide the exclusive grounds for the disinterment of a body but speaks only to the situation where a body has been properly interred but for some reason justified by public interest or by some compelling private interests it is necessary to disinter, remove and reinter the body.

**2. Cemeteries § 2— burial in wrong plot—disinterment required—no responsibility of next of kin**

Evidence was sufficient to support the trial court's conclusion that petitioners were entitled to the unencumbered possession of burial plots described in their petition and that compelling reasons existed for requiring the removal of the remains of respondent's wife from the petitioners' plot; however, the trial court erred in requiring respondent, as next of kin of the deceased person, to remove her remains where it was clear from the record that respondent was not responsible for the burial in the plot owned by petitioners.

APPEAL by respondent Odell C. Tant from *Clark, Judge*. Judgment entered 9 June 1978 in Superior Court, WAKE County. Heard in the Court of Appeals on 2 May 1979.

The petitioners instituted this action against the respondents as a result of the burial of respondent Odell Tant's late wife in a burial lot owned by the petitioners. Petitioners prayed for an Order requiring the respondent Woodlawn Memorial Gardens, Inc. "to remove and disinter the remains of Mrs. Odell C. Tant at their own expense." Respondent Woodlawn Memorial Gardens, Inc., and respondent Odell C. Tant each filed an answer. The facts of this case are not in controversy. On 1 April 1963, the petitioners purchased and acquired title to two burial lots in Gethsemane Memorial Gardens, a private cemetery operated by the respondent Woodlawn Memorial Gardens, Inc. in Zebulon, North Carolina. On 24 June 1963, respondent Odell C. Tant and his wife, Alice F. Tant, purchased and acquired title to four burial lots in Gethsemane Memorial Gardens. The burial lots owned by the petitioners were known as Lot 74A, Spaces 1 and 2. The burial lots owned by the respondents were known as Lot 74, Spaces 1, 2, 3, and 4, Section C. The two burial lots adjacent to

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**Strickland v. Tant**

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those owned by the petitioners, Lot 74A, Spaces 3 and 4, are owned by the petitioner B. E. Strickland's brother and sister. On 8 May 1973, Alice F. Tant, the wife of the respondent, died, and on 10 May 1973, she was interred in Lot 74A, which was owned by the petitioners. Petitioners were not aware that Alice Tant had been buried in their lot until 10 April 1976. The respondent Odell Tant was not aware that his wife had been interred in the petitioners' space until he was so advised by Mr. Krause of Gethsemane Memorial Gardens. The burial arrangements were made by Screws and Hudson Funeral Home and persons other than the respondent Odell Tant. The respondent is willing to pay the petitioners for the fair market value of this lot or exchange lots; however, he is unwilling and has refused to consent to removal of the body of his late wife and its reinterment in spaces owned by him.

The petitioners and respondent Odell Tant moved for summary judgment, and on 9 June 1978 petitioners' motion for summary judgment was granted. The trial judge ordered respondent Odell Tant to remove the remains of his next of kin, Alice Tant, from the petitioners' Lot 74A and have them transferred to a suitable burial place. Respondent Odell Tant appealed.

*Manning, Fulton & Skinner, by Howard E. Manning, Jr., for petitioner appellees.*

*J. Michael Weeks for respondent appellant Odell C. Tant.*

*Johnson, Gamble & Shearon, by Samuel H. Johnson, for respondent appellee Woodlawn Memorial Gardens, Inc.*

HEDRICK, Judge.

[1] Respondent Odell Tant's single assignment of error is to the trial court's entry of summary judgment in favor of the petitioners. Respondent Tant first contends that G.S. § 65-13 "prohibits the disinterment, removal and reinterment of graves except as set forth in the statute." While we recognize that the disinterment of a body is generally not favored in law, we nevertheless do not believe that the statute provides the exclusive grounds for the disinterment of a body. The statute speaks to the situation where a body had been *properly* interred, but for some reason justified by the public interest [e.g., G.S. § 65-13(a)(1) by a

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**Strickland v. Tant**

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governmental agency when "removal is reasonably necessary to perform its governmental functions"] or by some compelling private interests [e.g., G.S. § 65-13(a)(2) by a church authority to erect a new church or expand existing church facilities] it is necessary to effect a disinterment, removal, and reinterment. G.S. § 65-13 nowhere provides for the situation where there has been an improper interment, and thus we think the statute is inapplicable to the case at bar. At oral argument, both petitioners and respondent Tant conceded that G.S. § 65-13 has no application in this case.

[2] Respondent Tant next contends that summary judgment for the petitioners was inappropriate because they have failed to show "compelling reasons" for the disinterment of his late wife's remains. In order for a party to be entitled to summary judgment, two things must be shown: (1) that there exists no genuine issue as to any material fact, and (2) 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). In its judgment, the trial court entered separate findings of fact and conclusions of law in accordance with Rule 52. Under Rule 56, however, the trial judge is not required to make findings of fact, but it is not error to do so where the findings of fact are merely a summary of the material facts not at issue. *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 233 S.E. 2d 687 (1977). The facts in the present case are uncontroverted; therefore, the sole question on this appeal is whether the petitioners are entitled to judgment against the respondent Tant as a matter of law.

In *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893 (1955), our Supreme Court, citing 25A C.J.S. *Dead Bodies*, § 4, recognized the general legal principle that the court can order a body disinterred and removed upon a showing of compelling reasons. In the present case, the respondent's wife has been buried in the plot owned by the petitioners, which is adjacent to an unoccupied lot owned by respondent Tant. The effect of Tant's refusal to have his late wife's remains removed to the lot owned by him is to completely deprive the petitioners of the use of their land for the purposes for which it was selected and purchased. In the present case, the value of such a plot to the petitioners obviously transcends any monetary valuation that might be attributed to it. Indeed, the lots possess a unique value

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to the petitioners, and the petitioners' injury can only be compensated by the right to the unencumbered use of their burial lots.

We hold that the uncontroverted facts established by the record support the conclusion that the petitioners are entitled to the unencumbered possession of the burial lots described in their petition, and that compelling reasons exist for requiring the removal of the remains of Alice Tant from the petitioners' lot. There is, however, no evidence in this record to support the trial court's Order that the respondent Odell C. Tant "cause the remains of his next of kin, Alice F. Tant . . . to be removed from the Petitioners' Lot 74A and transferred to a suitable burial place within ten (10) days . . ."

The trial judge apparently based his Order on the fact that the respondent Tant was the "next of kin" of the woman whose body occupies the burial lot in question. While the next of kin of a party deceased has certain obligations and duties with respect to the burial of the body, and likewise has certain rights with respect to preserving the sanctity of the grave and the protection of the body from mutilation and degradation, *see* 22 Am. Jur. 2d, *Dead Bodies* § 4 (1965), we find nothing in the law that imposes on the next of kin the duty of removing a dead body from its burial place absent some showing that such next of kin was responsible in some way for the body's interment in a lot owned by another. In the present case, it is clear that a mistake was made when Alice Tant's body was buried in the petitioners' lot. It is equally clear from this record that the respondent Tant did not participate in such mistake. It does not appear from this record who is responsible for the mistake.

It is undisputed that the State has a legitimate interest in the disposition of dead bodies and the preservation of the sanctity of the grave. *See* G.S. § 14-150. The State licenses funeral directors, G.S. § 90-210.25, and extensively regulates cemeteries such as the one operated by the respondent in the present case. *See* G.S. § 65-46 to -72. While the funeral director conducting the funeral of Alice Tant was not made a party to this proceeding, the cemetery where she is buried was made a party, filed an answer, and even filed a brief in this Court. Although the cemetery was a respondent, and the petitioners prayed for relief against the cemetery and not against the respondent Odell Tant,

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the judgment entered was against the respondent Tant and made no disposition of petitioners' claim against the cemetery.

For the reasons stated, the Judgment ordering the respondent Odell Tant to remove his wife's body from petitioners' burial lot and reinter same is vacated, and the cause is remanded to the superior court for further proceedings with respect to disposition of the claim against the respondent cemetery.

Vacated and remanded.

Chief Judge MORRIS and Judge WEBB concur.

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HERBERT NEIHAGE v. KITTRELL AUTO PARTS, INC. AND GLOBEMASTER, INC.

No. 7810SC632

(Filed 5 June 1979)

**Sales § 22— alleged negligent design and manufacture—summary judgment for defendant**

Summary judgment was properly entered for defendant in plaintiff's action for negligent design and manufacture of a steel punch where the defendant's uncontradicted evidence showed that it did not design or manufacture the punch and that it did not represent or hold itself out to the public as having designed and manufactured the punch.

APPEAL by plaintiff from *Smith (David I.), Judge*. Judgment entered 5 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 March 1979.

Plaintiff filed his complaint against defendant appellee Globemaster, Inc. and defendant Kittrell, and alleged that he was injured when striking a defective tool described as a "61412 Globemaster, Japan punch." Plaintiff alleged two grounds of recovery: (1) for breach of warranty and (2) for negligence. The complaint alleged that the steel punch in question was purchased by his employer, Atlantic Veneer Corporation, and was provided for his use by his employer. The only claim set forth against Kittrell by plaintiff was based upon the theory of breach of warranty.

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*Neihage v. Auto Parts, Inc.*

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Summary judgment was granted in favor of Kittrell, from which the plaintiff did not appeal. Plaintiff took a voluntary dismissal with prejudice on his claim for breach of warranty after Globemaster, Inc. moved for a partial summary judgment on that part of plaintiff's claim.

On the remaining claim, plaintiff contended that Globemaster represented or held out to the general public that it had designed and manufactured the steel punch in question and that his injury was caused by the negligence of Globemaster, in that said punch was negligently designed and manufactured and that Globemaster failed to warn or instruct plaintiff on the use of this dangerous instrument. Defendant moved for summary judgment as to plaintiff's cause of action on negligence on the grounds that it was not liable for the alleged negligent design and manufacture of the punch since it neither designed nor manufactured it. The motion was granted pursuant to G.S. 1A-1, Rule 56. Plaintiff appealed.

*Charles A. Parlato and Gene Collison Smith, for plaintiff appellant.*

*Maupin, Taylor & Ellis, by Armistead Maupin, Richard C. Titus, and John Williamson, for defendant appellee.*

ERWIN, Judge.

The record in this case on appeal presents one question for our determination: Did the trial court commit error in granting defendant's motion for summary judgment pursuant to G.S. 1A-1, Rule 56, of the Rules of Civil Procedure? We answer, "No."

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). The movant's materials in support of summary judgment must be carefully scrutinized, and the non-moving party's materials must be indulgently regarded. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). Any doubt must be resolved in favor of the party opposing the motion for summary judgment. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, cert. denied, 279 N.C. 619, 184 S.E. 2d 883 (1971). If the moving party for summary judgment successfully carries the burden of proof, the opposing party must, by affidavits or otherwise, set

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forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

The plaintiff alleged "[t]hat the said injury of the plaintiff was caused by the negligence of the defendant Globemaster, Inc. in that the said punch was negligently designed and manufactured, and the defendant failed to warn or instruct the plaintiff on the use of this dangerous instrumentality." Globemaster denied this allegation in its answer.

In his answers to interrogatories, plaintiff stated:

"The purpose the '61412 Globemaster Japan' punch was purchased was for general overall use. No instructions for the use of the punch were furnished with it. I received no instructions regarding limitations on the way the punch was to be used.

The complete and proper name of and/or identification of the punch which was involved in my accident was 61412 Globemaster Japan.

At the time of the accident I was using a punch 61412 Globemaster Japan and an approximately 16 oz. hammer made in Germany. I had been working on the project a few minutes before the accident occurred."

Walter Kittrell stated in his answer to plaintiff's interrogatories:

"[W]e sold them some punches but I cannot state that we sold the Globemaster punch referred to as 61412 Globemaster, Japan punch. Globemaster punches were purchased by Kittrell Auto Parts, Inc. directly from the company through its Atlanta, Georgia, distributing office. Kittrell Auto Parts, Inc. purchased the punches I have described from Dick Downing, Sales Agent, Wilson, North Carolina.

No literature describing these punches have been delivered to Kittrell Auto Parts, Inc. by the manufacturer or by a person from the corporation from whom Kittrell purchased the punches. Kittrell has no copies of any descriptive literature with regard to these punches."

Defendant's answers to plaintiff's interrogatories revealed:



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"Neither Globemaster, Inc., nor any subdivision or subsidiary of Globemaster, Inc. ever manufactured steel punches designated as '61412 Globemaster, Japan.' Globemaster, Inc., a subdivision or subsidiary of Globemaster, Inc. has sold steel punches designated as '61412 Globemaster, Japan.'

Globemaster never has manufactured this model or type of steel punch. Globemaster does not know whether said punch was being manufactured between 1969 and August of 1971. Globemaster does not know the name and address of the manufacturing firm or company who has or who is presently manufacturing this type of steel punch.

Globemaster does not know the type and method of manufacturing said steel punches and cannot describe in detail each individual step in the manufacture of said punches. . . .

Globemaster did not employ any stress analysis engineers to assist in the preparation of specifications and designs for this type of steel punch."

In his deposition, Richard Downing stated that: he was a salesman for Globemaster in Eastern North Carolina; he sold products, including Globemaster steel punches; all of these had the name "Globemaster" on the products; and he represented to the individuals he sold such products that these were products of Globemaster; Globemaster does not advertise in the eastern part of the State—"use any kind of advertisement, radio, TV or what-not. They expect to sell their products through salesmen."

Plaintiff did not offer any evidence contrary to that of defendant on the issue of advertisement by defendant and defendant's holding itself out to the general public. Plaintiff was required to come forward with some evidence to raise a question of fact to be tried. Plaintiff could not rely on the bare allegations of his complaint. *Coakley v. Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 244 (1971). To us, there was no genuine issue as to a material fact before the trial court on this issue.

Plaintiff concedes in his brief: "Since the uncontradicted evidence indicated that Kumeda, Kinzoku, a Japanese Company,

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had manufactured the subject punch, and Defendant Globemaster had not, Judge David Smith granted the Defendant's Motion for Summary Judgment on April 5, 1978 dismissing Plaintiff's claim in negligence against the Defendant." On appeal, he changes his position and now contends that defendant, as a supplier, failed to meet the standard of care regarding its alleged inspections of the punches and its total failure to warn of defects or of the useful life of the punch. Plaintiff further contends that Globemaster is to be judged by those rules applicable to a manufacturer of a defective product as well as a supplier of such a product. We note with interest that plaintiff did not propose to amend his complaint.

Edmund A. Perwien, Executive Vice-President of Globemaster, Inc., testified by deposition in part as follows:

"[S]omeone in our company has information with any testing that was done on that group of punches designated 61412 from the period 1968 through 1974. Sam Roitenberg in Mas Teramoto would have tested the punches. There were some people under Mas Teramoto. Tests were carried out at the time of delivery, at the time of delivery in Japan and the time of receipt of samples in this country. Mr. Roitenberg is in our office today.

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With regard to the testing that I indicated that I believe that two individuals did, there are no written results of those tests. Each punch was not inspected for defects. Representative samples will be tested from each style and size and outer case and then one out of maybe ten of the outer cases will have to be opened and one or two or ten or whatever punches inside the case will be checked. In other words, not 100 per cent because first of all you deface the punch and make it unsalable by testing it so you test a representative group and if you find them bad of course you test more and if you find them to be bad you reject them as unsatisfactory, the whole lot."

Defendant moved for summary judgment on the following grounds:

"2. The testimony of E. A. Perwien, Vice President of Globemaster, Inc., shows that Globemaster, Inc. did not

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manufacture punches of the type involved in this case, but purchased them from an independent and experienced manufacturer; that the punches were tested by Globemaster engineers before purchase in Japan, and later tested in the Globemaster warehouses, in Houston, Texas.

3. Globemaster, Inc. is not liable for alleged negligent design and manufacture, when, in fact, it neither designed nor manufactured the punch in question.

4. Globemaster, Inc. is not liable on any alleged failure to warn or instruct the plaintiff on the use of a simple hand tool, especially in view of the fact that there is no allegation in the complaint supporting the allegation that a punch is a dangerous instrumentality."

Plaintiff did not come forward with any evidence to offset the evidence of defendant. To us, the plaintiff failed to raise an issue as to any material fact, and defendant is entitled to judgment as a matter of law.

Judgment is affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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HERMAN CLAYTON MIDDLETON v. JAMES WOODROW MYERS AND LOU WILLIAMS, JR.

No. 7822SC782

(Filed 5 June 1979)

**1. Malicious Prosecution § 10; Rules of Civil Procedure § 56.3— affidavit setting out thoughts and feelings—consideration by court proper**

In an action for malicious prosecution where plaintiff alleged that defendants conspired to have drugs placed in his truck, the trial court did not err in considering one defendant's affidavit offered in support of his summary judgment motion which set out material which defendant thought or felt, since the affidavit was not tendered to show the truth of the things alleged but to show defendant's motivation in contacting a police officer who was the other defendant.

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**2. Malicious Prosecution § 13.3; Rules of Civil Procedure § 56.2— evidence of good faith—summary judgment—shifting burden of proof**

In an action for malicious prosecution where defendant by his affidavit presented evidence to show his good faith or lack of malice, the burden shifted to plaintiff to go forward with an affirmative showing that a material issue of fact existed as to this essential element, and this plaintiff failed to do. Furthermore, there was no merit to plaintiff's argument that defendant who moved for summary judgment was required not only to show that he was entitled to judgment from the evidence presented to the court, but also that there could be no other evidence from which a jury could reach a different conclusion as to a material fact.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 16 June 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 May 1979.

On 3 March 1975 plaintiff was arrested on drug charges by Lexington police officers, one of whom was defendant Myers. The subsequent criminal proceedings were dismissed. Plaintiff alleges that "[a]s a result of proceedings had in the criminal prosecution, it was disclosed and learned that some unknown persons had placed certain illegal drugs in a motor vehicle owned by the plaintiff." He alleges that defendants conspired to have the drugs placed there and to bring about this malicious prosecution. He also alleges that defendants by causing this malicious prosecution have injured him in his vocation as a high school teacher, damaged his reputation, and cost him \$4500 in conducting his defense. He seeks \$250,000 compensatory and \$250,000 punitive damages.

Defendant Williams moved to quash service of process, to dismiss for failure to state a claim, and for summary judgment, attaching an affidavit in support of these motions. After a hearing on the motions at which defendant Myers testified for plaintiff, the trial court found that plaintiff's complaint failed to state a claim for relief, and that defendant Williams was entitled to summary judgment. From the order entering summary judgment for defendant Williams, plaintiff appeals.

*Wilson, Biesecker, Tripp and Wall, by Joe E. Biesecker, for plaintiff appellant.*

*Rosbon D. B. Whedbee for defendant appellee.*

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**Middleton v. Myers**

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ARNOLD, Judge.

Defendant's affidavit in support of his motions stated that he had overheard three unidentified young people in a restaurant say that a teacher named Middleton had plenty of drugs for sale. Defendant Williams previously had been talking to defendant Myers about local drug problems, and he recalled that the name Middleton had been mentioned then. Accordingly, he contacted Myers later that day, and

I asked him if he remembered our previous conversation about a person named Middleton. He replied, "Yes, we have had several reports that he has been dealing." Officer Myers asked me where I got my information (as to overhearing the conversation) and I told him I preferred not to go into further detail. Officer Myers told me they had been surveilling him (Middleton) a long time and I told him that if this was the same man that I had heard the young men discuss, I felt reasonably certain one or more of the young men would be contacting him that same night. Officer Myers asked if I was sure. I told him I would not swear there would be any contact or purchases, but from the total conversation which I had overheard, it seemed to me to be almost certain. I again asked if I would be involved and was assured I would not be. Officer Myers asked if I knew where the drugs were, and I replied, "I have no absolute or definite proof." He asked, "Doesn't he drive a truck?" I said, "I don't know but that's as good a place to start as any, since the young men I overheard talking mentioned he made deliveries. If you have additional information as you say, that might further confirm what I overheard and have told you. It appears to me that there must be a whole lot of truth that he is really dealing in drugs, but I will leave this up to you."

I further stated to Officer Myers: "I feel it is my civic duty to give you this information and I hope it will help prevent or stop some of the drug problems in our community."

Defendant did not know the plaintiff prior to that day.

[1] Plaintiff contends that defendant's affidavit in support of his motion should not have been considered by the trial court because (1) it does not state that the facts it contains are based on

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the affiant's personal knowledge, and (2) it is based on hearsay. G.S. 1A-1, Rule 56(e) requires that supporting affidavits be made "on personal knowledge," but it does not require that the affidavit state specifically that this is the case. Nor did the court require such a specific statement in *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). There portions of the affidavit were found incompetent because they declared that plaintiff was "advised and informed" of the matters involved. Here the affidavit appears on its face to be based on Williams' personal knowledge. It is necessary to remember that the case before us is not a criminal prosecution of the plaintiff for the possession of illegal drugs, but a civil action for malicious prosecution. The affidavit was tendered not to show that the plaintiff had drugs in his possession, a matter upon which defendant Williams had no personal knowledge, but to show the occurrences that led Williams to contact defendant Myers. Williams had personal knowledge of the conversation he overheard.

The same distinction applies to plaintiff's reliance on *Peterson v. Winn-Dixie of Raleigh, Inc.*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). In that case, the plaintiff testified on deposition that she *thought* that soft drink cartons had fallen on her because they were improperly stacked; this testimony was ruled inadmissible in opposition to a summary judgment motion because such testimony would not have been competent evidence at trial. Here, defendant's statements about what he thought or felt are not intended to show that those things were actually the case, but rather that he had those thoughts and feelings, and the statements would be admissible at trial to show his motives. The trial court did not err in considering defendant's affidavit.

[2] Plaintiff also argues that issues of material fact exist. We disagree. An action for malicious prosecution is based upon malice in causing process to issue. *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955). Defendant Williams by his affidavit presented evidence to show his good faith, or lack of malice. This carries the burden placed upon him by Rule 56(e), and shifts to plaintiff the burden of going forward with an affirmative showing that a material issue of fact exists as to this essential element. *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975). In opposition to the motion, plaintiff presented the testimony of defendant Myers. This testimony, considered in plaintiff's favor as it must be,

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shows that Williams made some statement to Myers about plaintiff having drugs in his truck; that, asked how he knew that, Williams responded only, "If I say they will be there, they will be there"; and that Williams made no statement to Myers that he had overheard any conversation. This falls far short of showing malice on Williams' part.

Plaintiff also argues that defendant has failed to satisfy the requirement of *Goode v. Tait, Inc.*, 36 N.C. App. 268, 270, 243 S.E. 2d 404, 406, *cert. den.* 295 N.C. 465, 246 S.E. 2d 215 (1978), that the moving party show not only that he would "be entitled to judgment from the evidence [presented to the court], but . . . also . . . that there can be no other evidence from which a jury could reach a different conclusion as to a material fact." However, we believe that *Goode v. Tait, Inc.* was incorrect in placing such a burden upon the moving party, since our Supreme Court in the recent case of *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979), has on facts nearly identical to *Goode* reached the opposite result. The plaintiff in *Goode* sought damages for personal injury sustained when a stack of water pumps and tanks he was unloading fell against him. He testified by deposition that he did not know what caused the stacks to fall. To support its motion for summary judgment, the defendant relied on the pleadings and the plaintiff's deposition. This Court held that the deposition was an insufficient basis for summary judgment, since "there still could be a triable issue because there could be other evidence that the pumps and tanks were negligently stacked." *Goode v. Tait, Inc.*, *supra* at 270, 243 S.E. 2d at 406. The plaintiff in *Moore* sued to recover for personal injuries he sustained when bales of fiber he was unloading fell on him. The defendant rested its motion for summary judgment on the pleadings and the depositions of plaintiff and his supervisor, William Boyd. Neither deposition indicated negligence on defendant's part, and plaintiff in his deposition testified that he noticed nothing unusual about the bales and did not know what caused them to fall. The Supreme Court held that the forecast of evidence in these two depositions "establish[es] a lack of negligence on the part of either defendant and entitle[s] both defendants to judgment as a matter of law unless forestalled by a forecast of evidence by plaintiff . . . showing some negligent act on the part of one or both defendants proximately causing plaintiff's injury." *Moore v. Fieldcrest Mills*,

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*Inc., supra* at 473, 251 S.E. 2d at 423. No burden was placed on the moving party to prove that there could be *no* other evidence from which the jury could reach a different conclusion.

As the evidence before the court established the nonexistence of one essential element of plaintiff's case, defendant Williams was entitled to summary judgment. *Moore v. Fieldcrest Mills, Inc., supra*. The order of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

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NORTHWESTERN DISTRIBUTORS, INC. v. N. C. DEPARTMENT OF  
TRANSPORTATION

No. 7810IC623

(Filed 5 June 1979)

**State § 7.1— action under Tort Claims Act—concurring negligence by two employees—only one employee named in affidavit**

In an action under the Tort Claims Act to recover for damages to plaintiff's truck when it collided with a Department of Transportation dump truck which blocked both lanes of the highway near a curve so that the view of plaintiff's driver was obstructed when there were no warning signs closer than 2.6 miles, the negligence of the dump truck driver in the manner in which he stopped his dump truck across the highway concurred in causing the collision with the negligence of his foreman who directed him where to dump his load of dirt and who had the duty of posting adequate warning signs, and plaintiff's affidavit naming only the dump truck driver as the negligent employee was sufficient to support its claim without also naming the foreman who had the duty of posting warning signs.

APPEAL by plaintiff from Order of North Carolina Industrial Commission entered 10 May 1978. Heard in the Court of Appeals 28 March 1979.

Plaintiff filed a claim with the North Carolina Industrial Commission under the Tort Claims Act (Chap. 143, Art. 31, General Statutes of North Carolina) for recovery of damages to its truck as a result of a collision in Alleghany County on 8 September 1976.



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The evidence for the plaintiff tended to show that at 10:50 a.m. John C. Brooks was driving plaintiff's truck in an easterly direction on Highway 93. About 2.6 miles west of the point of collision, the following road signs appeared along the highway: "Road Construction Ahead," "One Lane Road Ahead," and "Flagman—500 Feet." About 1.3 miles beyond these three road signs defendant was using a motor grader for work on the road. There were no additional signs or other warning devices on the highway for motor vehicles traveling in an easterly direction.

About 2.6 miles east of the three signs and 1.3 miles east of the motor grader and 200 feet east of a sharp curve defendant's dump truck operated by Joe Bill Moxley was stopped across the highway blocking both the travel lanes of the highway. Moxley was defendant's employee and was acting within the course and scope of his employment. There was no flagman and no warning signs or other warning devices in the vicinity of the obstructing truck, which could be seen by eastbound traffic for only 200 feet because of the curve.

Brooks drove plaintiff's truck around the curve at a speed of about 30 to 35 miles per hour, saw defendant's truck about 200 feet away, and braked and geared down the truck in trying to stop but was unable to do so. Plaintiff's truck was damaged in the amount of \$1,550.67.

The evidence for the defendant tends to show that Joe Bill Moxley at the time of the collision was dumping the dirt from his truck at a place on the highway designated by a foreman. He did not know if there were warning signs west of the dumping site.

Chief Deputy Commissioner Forrest H. Shuford II awarded damages to plaintiff as claimed. Upon application for review the Full Commission reversed and set aside the award to the plaintiff.

*Attorney General Edmisten by Assistant Attorney General Sandra M. King for the State.*

*Moore & Willardson by Larry S. Moore and John S. Willardson for plaintiff appellant.*

CLARK, Judge.

Plaintiff's claim is based on its affidavit alleging negligence on the part of Joe Bill Moxley, defendant's employee who stopped

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the truck across the highway. Commissioner Shuford and the Full Commission found that plaintiff was not contributorily negligent. But the Full Commission found that defendant's employee Moxley was not negligent since at the time of the collision he was dumping dirt from the truck "into a field chosen by the foreman and . . . was acting under these instructions." The Full Commission in a "Comment" added:

" . . . If the employee had authority to post signs or other warnings or any duty to post such signs or warnings, this is not shown by the record. The Tort Claims Act requires a plaintiff to name in his affidavit the particular employee upon whose alleged negligence his claim is based. Plaintiff selected Moxley as the negligent employee, but we can find no negligent act on his part. *Floyd v. Highway Commission*, 241 N.C. 461; *Mason v. Highway Commission*, 7 N.C. App. 644."

The Full Commission has taken the position that the negligence of defendant consisted solely of the failure to warn the plaintiff of the obstruction on the highway, that defendant's driver Joe Bill Moxley had no duty to warn, and that plaintiff's claim must fail because Moxley, rather than the employee who had the duty to post signs or warnings, was named as the negligent employee in the claimant's affidavit as required by G.S. 143-297(2).

Though North Carolina has adopted the view that the Tort Claims Act must be strictly construed (*see* Note 33 N.C.L. Rev. 613 (1955)), the Full Commission in the case before us defeated the legislative purpose by replacing the rule of strict construction with one of technical stringency. Under the Act, negligence, contributory negligence and proximate cause, as well as the applicability of the doctrine of respondeat superior, are to be determined under the same rules as those applicable to litigation between private individuals. *Barney v. Highway Comm.*, 282 N.C. 278, 192 S.E. 2d 273 (1972).

Clearly, plaintiff's evidence established that the defendant Department of Transportation was negligent in blocking the traveled portion of the highway near a curve so that the view of plaintiff's driver was obstructed when there were no warning signs closer than 2.6 miles. Defendant's employees were actually engaged in road construction, and under G.S. 20-168 the provisions of G.S. 20-161(a) (relating to parking on a highway) and other

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provisions of Chapter 20, Art. 3, North Carolina General Statutes are not applicable, subject to statutes excepted in G.S. 20-161(b). Nevertheless, under the Tort Claims Act driver Moxley and other employees were required to use reasonable care while so engaged in working on the highway, and this failure to do so would constitute negligence. Decisions involving litigation between private individuals support the conclusion that under these circumstances the defendant was negligent in violating the common law duty of due care, though those decisions also involved violations of G.S. 20-161. See *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19 (1966); *Hughes v. Vestal*, 264 N.C. 500, 142 S.E. 2d 361 (1965); *Chandler v. Forsyth Royal Crown Bottling Co.*, 257 N.C. 245, 125 S.E. 2d 584 (1962); *Pender v. National Convoy and Trucking Co.*, 206 N.C. 266, 173 S.E. 336 (1934); *Wilson v. Miller*, 20 N.C. App. 156, 201 S.E. 2d 55 (1973).

The Full Commission concluded that defendant's employee Joe Bill Moxley was not negligent because he was dumping dirt under instruction from the foreman. A servant who obeys the commands of his master is not liable for injury to third persons unless he knew or had reason to believe that the act or acts were hazardous and liable to occasion injury to some third person. 57 C.J.S., Master and Servant, § 577 (1948). The only evidence offered by defendant relating to dumping instructions was the testimony of Moxley that his foreman instructed him where to dump the truck, and the testimony of Owen G. Carpenter that he showed Moxley where to put the dirt. Moxley stopped his truck so as to block both travel lanes of the highway near a curve. This was a hazardous act. Though instructed where to place the dirt, it does not appear that in doing so he was instructed, or that it was necessary, to block both travel lanes. Nor does it appear that either Moxley or Carpenter knew, or made any effort to determine, whether warning signs were placed on the highway west of the work site. In our opinion this evidence is not sufficient to support the finding that Moxley innocently obeyed the orders of his supervisor.

The purpose of G.S. 143-297(2), requiring a claimant under the Tort Claims Act to name in the affidavit the negligent employee of the State agency, is to enable the agency to investigate the employee actually involved rather than all employees. *Tucker v. State Highway and Public Works Commission*, 247 N.C. 171, 100

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S.E. 2d 514 (1957); *Mason v. State Highway Commission*, 7 N.C. App. 644, 173 S.E. 2d 515 (1970). In his affidavit plaintiff named Joe Bill Moxley. His negligent conduct in stopping the truck across the highway was a direct and proximate cause of the collision and the resulting damage to plaintiff's vehicle. His negligence combined and concurred with that of the employee who had the duty of posting adequate signs or other warnings on the highway. The name of Joe Bill Moxley, the driver of the truck, and other information in plaintiff's affidavit gave to defendant sufficient notice of which employee or employees were involved so that defendant could properly confine its investigation. Under these circumstances we do not find that plaintiff was required to determine and to name in his affidavit in addition to Moxley the particular employee who had the duty of posting signs or other warnings.

The order of the Full Commission is reversed and the cause is remanded to the Commission for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge ARNOLD concur.

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STATE OF NORTH CAROLINA v. HOWARD McLAURIN, JR.

No. 7916SC71

(Filed 5 June 1979)

**1. Criminal Law § 102— prosecutor's comment to judge—no prospective jurors present—no prejudice to defendant**

There was no merit to defendant's contention that he was deprived of due process by the prosecutor's remark to the trial court that defendant's voluntary manslaughter case was back for retrial after having started out as a first degree murder case, since there was no evidence that any prospective jurors were present or heard the remarks.

**2. Criminal Law § 114— jury instructions—witness's credibility—no expression of opinion**

The trial court did not express an opinion as to the credibility of a witness when he instructed the jury that the evidence tended to show that a prior statement of the witness was inconsistent, and the judge's slight inaccuracy in stating that the evidence tended to show that the statement was made at an

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earlier trial instead of to a police officer should have been called to his attention at the time.

3. Criminal Law § 138.6— sentencing hearing—no continuance

Defendant was not entitled to a continuance of his sentencing hearing for the purpose of preparing a record of his "background and standing" since commission of the crime three and one-half years earlier.

4. Criminal Law § 138— severity of sentence—no punishment for appeal

That a judgment not recommending defendant for work release was entered after defendant gave notice of his intent to appeal was not sufficient, standing alone, to show that it was entered to punish defendant for exercising that right.

APPEAL by defendant from *Wood, Judge*. Judgment entered 15 August 1978 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 24 April 1979.

Defendant was charged with the murder of Paul E. McIntosh. He was originally tried for murder and convicted of voluntary manslaughter but, pursuant to the decision in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), a new trial was granted in an opinion reported at 33 N.C. App. 589, 235 S.E. 2d 871 (1977). On 14 August 1978, defendant was placed on trial for voluntary manslaughter. The jury found him guilty of voluntary manslaughter, and judgment imposing a prison sentence was entered. From this judgment, defendant appealed.

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

*L. Wayne Sams, for defendant appellant.*

VAUGHN, Judge.

[1] The record in this case relates the following exchange between the prosecutor and the trial judge.

“MR. WEBSTER: Howard McLaurin, Jr.

THE COURT: What number is that case?

MR. WEBSTER: Your Honor, this is the first case on the calendar for trial this morning. Mr. Sams represents him. I don't see him either. Probably talking to his client.

THE COURT: Is the case ready for jury trial?

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MR. WEBSTER: Yes, sir.

THE COURT: Do you have the file out there?

MR. WEBSTER: Yes, sir, I do. Started out for a first degree murder trial, Your Honor. It's back for re-trial."

The record also contains the affidavit of defendant's attorney stating that he was not present during this exchange. The defendant contends that the comment by the prosecutor concerning defendant's prior conviction deprived the defendant of due process. Nothing in this record shows that prospective jurors were present or heard these remarks. In *State v. Taylor*, 294 N.C. 347, 240 S.E. 2d 784 (1978), a cardboard box was sitting on the clerk's table, twelve to fourteen feet from the jury. The side of the box read "State v. Taylor—Murder—Guilty—Death—9-17-75." This language referred to a prior trial in which defendant had been found guilty. A *voir dire* hearing was held on defendant's motion for a mistrial. The trial judge concluded that it was unlikely that the jurors were able to read the box and denied defendant's motion. The Supreme Court affirmed, finding that the record failed to show any deliberate prosecutory misconduct or that the improper evidence was actually communicated to the jury. We find, in the instant case, that there was also no evidence of prosecutorial misconduct or that any member of the jury that tried the case heard this remark. We, therefore, overrule this assignment of error.

[2] Defendant next contends that the trial court expressed an opinion as to the credibility of a witness in violation of G.S. 15A-1232. In charging the jury, the trial judge made the following statement:

"Evidence has been received tending to show that at an earlier trial the witness, Geraldine McLaurin, made a statement which conflicted with her testimony at this trial. You must not consider such earlier statements as evidence of the truth of what was said at that earlier time, because it was not made here, under oath, at this trial. If you believe that such earlier statement was made and that it does not conflict with the testimony of Mrs. McLaurin at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness' truthfulness in

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deciding whether you will believe or disbelieve her testimony at this trial.”

At trial, a prior inconsistent statement made to a police officer was introduced. No statement was used which was made at a prior trial. Defendant argues that it was prejudicial error for the judge to state that the prior statement was in conflict with the trial testimony and that the statement was made at an earlier trial. Defendant's assignment of error is without merit. The judge expressed no opinion on the evidence. He merely recapitulated what the evidence tended to show in order to explain the application of the law thereto. He did not say that the prior statement was inconsistent, he said that the evidence *tended* to show that the statement was inconsistent. His slight inaccuracy in stating that the evidence tended to show that the statement was made at an earlier trial instead of to a police officer should have been called to his attention at the time. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). The assignment of error is overruled.

[3] When the judge announced that he was ready to proceed with sentencing, counsel for defendant stated,

“I would like to ask the Court if we might postpone sentencing until a record can be made on the background and standing of Howard McLaurin since this incident, since this happened some three and a half years ago. This happened in March of 1974.”

On appeal, defendant argues that he was denied a sentencing hearing as provided for by G.S. 15A-1334. The argument is without merit. It is clear that the court heard everything counsel was prepared to present. Whether to allow a continuance of the sentencing hearing lies within the discretion of the judge upon a showing of what he determines to be good cause. No abuse of discretion has been shown.

[4] Defendant further contends, in substance, that the judge increased his sentence after he gave notice of appeal and penalized him for the exercise of his right to appeal. It is elementary that the right of appeal is presently absolute. *State v. Lowry*, 10 N.C. App. 717, 179 S.E. 2d 888 (1971). The trial judge may not impose a penalty because a defendant elects to exercise that right. *State v. Reynolds*, 20 N.C. App. 479, 201 S.E. 2d 586 (1974). We are

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certain that Judge Wood is aware of these longstanding principles and will not presume that he ignored them in the absence of a showing to the contrary. Indeed, the presumption is that the judgment was entered on proper considerations. The trial judge can increase the sentence he has earlier given or indicated he would give if the record does not sustain the suggestion that, in so doing, he was penalizing the defendant for exercising his right to appeal. *State v. Bostic*, 242 N.C. 639, 89 S.E. 2d 261 (1955). The record in this case does not sustain the suggestion. In the first place, we suspect that this experienced trial judge had few doubts that this indigent defendant, with nothing to lose and all to gain, would appeal at public expense without regard to the severity of the prison sentence imposed. Furthermore, the trial judge made it clear at the outset that, but for the restriction imposed upon him by G.S. 15A-1335, he would impose a more severe sentence than was imposed at the first trial. He made it clear that he intended to impose the maximum sentence that he could impose in the light of G.S. 15A-1335. These statements were part of a rambling discussion between the judge, defense counsel and the district attorney, including, among other things, an exchange of views of the defendant's parole eligibility if he were to be sentenced to not less than five years nor more than five years compared with the sentence the prisoner received at the first trial, not less than five years nor more than ten. The judge indicated that he was going to impose a sentence of not less than five years nor more than five years and opined that defendant's parole eligibility would be the same as under the original sentence. The district attorney expressed the notion that such a sentence would make defendant eligible for parole immediately. The judge again pointed out that he felt that the sentence was too lenient and that he felt a maximum sentence of twenty years would be appropriate, but that since he was so limited, he might as well recommend work release. Defense counsel stated that he had been instructed to give notice of appeal. The judge then stated that he was going to strike out the sentence and enter the same sentence that had been entered at the first trial. Formal judgment and commitment was then entered. That, in fact, was the only judgment that was entered. The closest other thing to an entry of judgment occurred in the middle of the conversation between bench and bar when the judge said,



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“Let the following judgment be entered: It is adjudged that the defendant be imprisoned for a term of not less than five—I’m going to do this one service, and I’m thinking about the children. Instead of not less than five years nor more than five years, the prior sentence was not less than five nor more than ten; and the Court will recommend him for work release, provided he support his three children.”

Obviously, the judge did not intend for the foregoing to be his judgment in the case. At most, the record discloses that the judge considered giving a sentence that would, in his opinion, allow defendant earlier consideration for work release. The judgment finally entered did not allow for that provision. That it was entered after defendant gave notice of his intent to appeal, is not sufficient, standing alone, to show that it was entered to punish defendant for exercising that right.

We find no error in the trial or judgment.

No error.

Judges CLARK and CARLTON concur.

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COASTAL READY-MIX CONCRETE CO., INC., PETITIONER-APPELLEE v. BOARD OF COMMISSIONERS OF THE TOWN OF NAGS HEAD, CHARLES D. EVANS, MAYOR, JOSEPH E. POOL, COMMISSIONER, DONALD W. BRYAN, COMMISSIONER, RONALD E. SCOTT, COMMISSIONER, AND J. FRED HILL, COMMISSIONER, RESPONDENT-APPELLANTS

No. 781SC654

(Filed 5 June 1979)

**Municipal Corporations § 30.6— entitlement to conditional use permit**

The evidence supported the trial court’s determination that petitioner had met all the requirements of a town ordinance to obtain a conditional use permit for a ready-mix concrete plant and that it was, therefore, entitled to such permit.

APPEAL by respondents from *Fountain, Judge*. Judgment entered 20 April 1978 in Superior Court, DARE County. Heard in the Court of Appeals 3 April 1979.

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Petitioner Coastal Ready-Mix Concrete Co., Inc. (Ready-Mix) applied to respondent Board of Commissioners of the Town of Nags Head (the Commissioners) for a conditional use permit to allow petitioner to locate its concrete plant on a site of 2.97 acres, which is within a C-2 Commercial Zone. The Nags Head Planning Board thoroughly reviewed petitioner's request and recommended approval. The Commissioners received evidence from petitioner for a conditional use permit on 4 January 1978. At this hearing, the petitioner presented evidence which tended to establish that petitioner had met all of the requirements and conditions necessary under the pertinent sections of the Nags Head Zoning Ordinance to be granted a conditional use permit.

On the question, whether or not the petitioner met the 35 foot height limitation in a C-2 Commercial Zone, the evidence offered tended to show that the 35-foot limitation was violated only by the concrete plant's conveyor and appurtenant structure which was a mechanical bin.

A question arose as to whether or not the petitioner had met the requirements of the subdivision ordinance and the public access requirements included therein. Petitioner offered evidence tending to show that the only property to be transferred to it was that called for in the site plan which consisted of 2.97 acres. The Commissioners denied petitioner's application for a conditional use permit.

On 16 January 1978, Judge Fountain allowed petitioner's application for writ of certiorari, and after a hearing before him, entered judgment that petitioner has shown as a matter of law that it was entitled to the conditional use permit. Judge Fountain directed that the respondents issue such permit. From this judgment, respondents appealed.

*White, Hall, Mullen, Brumsey & Small, by Gerald F. White, for petitioner appellee.*

*Kellogg & White, by Thomas N. Barefoot, for respondent appellants.*

ERWIN, Judge.

On this appeal, respondents contend that the trial judge erred in its conclusion that petitioner was entitled to a conditional

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use permit as a matter of law that would allow petitioner to locate its concrete plant in a C-2 General Commercial District in the Town of Nags Head. We agree with the judgment entered by the trial court and affirm.

The zoning ordinance in question is Section 7.06 C(4) of the Town of Nags Head, which provides:

"C. Conditional Uses

The following uses shall be permitted subject to the requirements of this district and additional regulations and requirements imposed by the Board of Commissioners as provided in Article X.

\* \* \*

- (4) Manufacture, storage and sales of ready mix concrete, concrete products and storage and sales of building materials provided that the following conditions are met:
- a. The site must contain at least two (2) acres.
  - b. The site must be no less than 200 feet from a major thoroughfare.
  - c. No portion of a structure or processing area may be located within 50 feet of the site boundary, and no material storage area within 25 feet of the site boundary.
  - d. The boundaries of the site must be fenced no less than six (6) feet in height and buffered with dense natural vegetation which is not less than ten (10) feet in height. Where natural vegetation does not provide sufficient screening, the boundaries of the site must be planted with dense vegetation which will reach a mature growth of eight (8) to ten (10) feet within three (3) years. Suitable plant types shall be those recommended by the U.S. Department of Agriculture for the coastal area, such as *Eleagnus Pungens*, *Euonymus Japonicus*, *Pinus Thunbergi*, *Pittosporum Tobira*, Wax Myrtle and Bayberry.

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- e. The Planning Board may recommend to the Board of Commissioners any additional conditions it may determine are appropriate to insure that the off-site effects of the operation are kept at a minimum."

Section 7.07 provides for a height limitation of 35 feet in a C-2 General Commercial District.

The record reveals that the following reasons were given by the Commissioners for denying the application:

1. It will denigrate the property values of the surrounding properties and subsequently the tax base of the town which furnishes the wherewithall to operate the town for the benefit of the citizens.

2. It is an inappropriate use in relatively close proximity to the Outer Banks Health Center, and to the Nursing Home previously approved by the Board.

3. The operation of a ready-mix concrete plant is not in harmony with the surrounding area and surrounding uses of the Zoning Ordinance, and therefore, not in keeping with the Comprehensive Land Use Plan or Section 1.03 of the Zoning Ordinance.

4. The site cannot be properly screened from adjoining property as apparently intended with the requirement of Section 10.04 C(4)(d), and the mere erection of screening devices from the majority of activity of Nags Head on a level plain does not constitute the intent of the ordinance requiring screening.

5. The activity, as proposed, does not, in fact, comply with Section 7.07 of the Zoning Ordinance in height in that the so-called bins are structures and not appurtenances.

6. The site plan shows a silo (which it has been testified has been intended for future use) of an indeterminate height, and therefore the site plan could not be approved, at least without the removal of the silo from the site plan.

7. The site falls under the requirements of the Subdivision Ordinance and as presented does not follow the provisions of the Subdivision Ordinance requiring public access.

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**Concrete Co. v. Board of Commissioners**

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8. Under Section 10.04 F, the Zoning Ordinance requires the Board of Commissioners to consciously address public interest in that it states in part that 'the Board of Commissioners may impose such reasonable and appropriate conditions and safeguards upon these Conditional Use permits as to insure that the spirit and intent of this ordinance is preserved and that such Conditional Use will not adversely affect the public interest'."

Petitioner and respondents joined in a stipulation that the silo, referred to in the evidence and record of proceedings herein, shall be deleted from petitioner's site plan and that reference to such silo is therefore not before the court in the consideration of this cause.

In *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E. 2d 129, 136 (1974), Justice Sharp (now Chief Justice) stated for the Supreme Court:

"When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. See *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *Utilities Commission v. Tank Line*, 259 N.C. 363, 130 S.E. 2d 663 (1963)."

The record further reveals that: (1) A public hearing was held as required by law on this application on 7 December 1977. (2) Harry Lange, Building Inspector of the Town of Nags Head, testified on 4 January 1978:

"This is the site plan for Coastal Ready-Mix Concrete and the Planning Board, in reviewing this, found the site plan to comply with all of the requirements of the ordinance, except one, and that was the fact that the material stock piles shown on the plan do not actually scale to comply with the property lines as required and based on this, the Engineer has prepared a bisect, which you have, which reflects the 25-foot setback from the property lines, as required by the

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Concrete Co. v. Board of Commissioners

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ordinance. The Planning Board has approved this, with the condition that the stock piles be at least 25 feet, which is required by the ordinance, and that all lighting be directed to the center of the site, to keep any lighting from any adjacent property. . . .

. . . There is sufficient water available, and to the best of my knowledge all requirements have been complied with."

(3) The applicant's sworn testimony tended to establish that all of the requirements of the zoning ordinance were complied with, there being no evidence contra. (4) The testimony of those who opposed the granting of the permit did not relate to whether or not the applicant had complied with ordinances but related to the unsightliness, the noise factor, the potential for creating dust, and the general deterioration of the surrounding area if the permit were granted and the plant constructed. (5) Petitioner's site plan showed a 60-foot street on the southern track of the property, which will be dedicated as a public street as petitioner develops its plans. Petitioner's agent stated before the respondent: "I don't know whether you want to do it now or later, but I want to make it clear that there is no problem about dedicating the 60-foot easement that is required. It will be done. . . . it will be a street."

After the stipulation as set out above, which removed the question of possible violation of Section 7.07 and with the record before him, Judge Fountain's order was clearly proper and fully supported by competent evidence that petitioner had met all the requirements of the zoning ordinances of respondents. *Cf. Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E. 2d 879 (1963).

Judgment affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

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**In re Foreclosure of Deed of Trust**

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IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY LORRAINE CORPORATION AND SOUTHEASTERN BUSINESS COLLEGE, INC. DATED JUNE 6, 1967, AND RECORDED IN BOOK 808, PAGE 264, DURHAM COUNTY REGISTRY TO WADE H. HARGROVE, SUBSTITUTE TRUSTEE FOR SMALL BUSINESS ADMINISTRATION

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY DAVID W. STITH AND LORRAINE J. STITH, RECORDED IN BOOK 897, PAGE 304, DURHAM COUNTY REGISTRY TO WADE H. HARGROVE, SUBSTITUTE TRUSTEE FOR SMALL BUSINESS ADMINISTRATION

No. 7814SC699

(Filed 5 June 1979)

**Mortgages and Deeds of Trust § 24— failure to pay taxes—foreclosure proper**

Deeds of trust were subject to foreclosure for default of payments and for failure to pay ad valorem taxes on the property as grantors covenanted to do in the deeds of trust where the deeds of trust designated a specific time, three months, after nonpayment of taxes when default would be deemed, and taxes for several years had been due and payable for a period of more than three months when the trustee paid them.

APPEAL by respondents from *Lee, Judge*. Order entered 1 May 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 April 1979.

This case involves the foreclosure and sale of properties under two deeds of trust securing two promissory notes given on 6 June 1967 and 5 December 1967 in the principal amounts of \$75,000 and \$25,000, respectively. The annual rate of interest was 5½ percent. The first note was to be paid in monthly installments of \$824 beginning six months from the date of the note and continuing until fully paid. The second note was to be paid in monthly installments of \$277 beginning three months from the date of the note and continuing until fully paid. Three deeds of trust were given to secure the debt of the two notes. Petitions for foreclosure involved the first and third deeds of trust.

The first deed of trust was given by The Lorraine Corporation and Southeastern Business College, Inc. (Grantors) on 6 June 1967 to the trustees for the benefit of the Small Business Administration (SBA) as security for payment of the first note of

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In re Foreclosure of Deed of Trust

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\$75,000. On 7 June 1967, David W. Stith and Lorraine J. Stith executed a separate guaranty agreement that guaranteed payment of this first note.

A second deed of trust was given by The Lorraine Corporation on 5 December 1967 to the trustees for the benefit of SBA as security for payment of the second note of \$25,000. David W. Stith and Lorraine J. Stith, who owned and operated Lorraine Corporation and Southeastern Business College, Inc., expressly guaranteed payment of this second note by endorsing the face of the promissory note. The property given in both the first and second deeds of trust was the same.

The SBA accelerated payments under the above notes on 4 May 1970 for failure to make monthly payments, but foreclosure proceedings were not commenced at that time. In March 1974, a third deed of trust was given by David W. Stith and Lorraine J. Stith to the trustees for the benefit of SBA as security for payment of both the first and second notes, a total principal of \$100,000. The property conveyed as security was different from that given in the first and second deeds of trust. Upon agreement of the parties by a letter of 31 May 1974, the loans were reinstated on the terms that the combined loan payments would be \$600 per month from 1 February 1974 through 1 July 1974; \$1,000 per month from 1 August 1974 through 1 November 1974; \$1,200 per month from 1 December 1974 through 1 March 1975; and \$1,500 per month from 1 April 1975 to maturity. After 1 November 1974, appellants submitted payments of \$1,000 per month and contend the agreement of 31 May 1974 was subsequently modified, reducing payments to \$1,000 per month until maturity. Between 19 January 1976 and 29 March 1976, no payments were received by SBA. On 17 March 1976, appellee gave notice of default and accelerated payments.

The deeds of trust contain covenants that the grantors pay all taxes upon the property. If the grantors failed to meet this obligation, the trustee could satisfy the same, and the money so advanced plus interest would become a part of the secured debt. Ad valorem taxes became due and payable on the secured property in the amount of \$17,767.68. Payment of taxes was never made by appellants and a tax foreclosure suit was brought by the city and county governments of Durham on 24 November 1976. Appellants did not respond to this suit and SBA paid the taxes on 22 February 1977 under the terms of the deeds of trust.



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**In re Foreclosure of Deed of Trust**

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Appellee brought these foreclosure proceedings before the Clerk of the Superior Court of Durham County and an order of foreclosure was entered on 31 May 1977. From this order, appellants appealed to Superior Court. An order of foreclosure was entered by Judge Lee in Superior Court, Durham County, on 1 May 1978.

*United States Attorney H. M. Michaux, Jr., by Assistant United States Attorney Benjamin H. White, Jr., for appellee.*

*Malone, Johnson, DeJarmon & Spaulding, by T. Mdoana Ringer, Jr., for appellants.*

MARTIN (Harry C.), Judge.

We hold the first deed of trust was properly subject to foreclosure for default of payments. The trial court entered findings of fact that no payments were received by the SBA from 19 January 1976 until 17 March 1976 when SBA notified the grantors and guarantors that the loans were in default and had been accelerated. The findings of fact by a trial judge are conclusive on appeal if there is competent evidence in the record to support them. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). There is ample evidence in the record to support the above findings of fact.

We hold the third deed of trust was properly subject to foreclosure for default of payments and for failure to pay the taxes on the property. As stated above, the trial court entered findings of fact to the effect that payments were in default and this is conclusive on appeal if there is supporting competent evidence in the record. *Id.*

Additionally, petitioner was entitled to foreclosure of the third deed of trust for failure of grantors to pay the ad valorem taxes as they had covenanted to do in the deed of trust. In *Oliver v. Piner*, 224 N.C. 215, 29 S.E. 2d 690 (1944), a foreclosure action for grantors' failure to pay the taxes on the land was not sustained. The Court in *Oliver* reasoned that the provisions of the deed of trust were not specific or definite as to a fixed time when non-payment of taxes would constitute default. This case is not controlling here. The third deed of trust provides:

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In re Foreclosure of Deed of Trust

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[S]hould they [grantors] fail or neglect to pay all taxes and assessments which are or may be levied against or which may constitute a lien upon said land within three months after the same shall have become due and payable, then in either one or more of such events all of said notes shall immediately become due and payable at the option of the holders thereof, . . .

The deed of trust designates a specific time after nonpayment of taxes when default shall be deemed. Ad valorem taxes become due and payable on the first day of September of the fiscal year for which the taxes are levied. N.C. Gen. Stat. 105-360(a). There is evidence in the record that the delinquent taxes accrued over several years. The taxes for prior years, and even the taxes for the year 1976, had been due and payable for a period of more than three months when the SBA paid the ad valorem taxes on 22 February 1977. The deed of trust was subject to foreclosure for failure to pay the required taxes.

The uncontradicted evidence showed respondents received \$100,000 in loans from an agency of the United States in 1967. As of 18 November 1976, they owed \$111,909.92, including accumulated interest at the very favorable rate of 5½ percent. No payments have been made on this indebtedness since 19 January 1976. Interest of \$14.99 is accumulating daily.

Every consideration has been extended to the respondents by the officials of the SBA and United States Government. The rights of the respondents have been zealously protected by the courts of North Carolina. It is time for this foreclosure to proceed.

The findings of Judge Lee are amply supported by competent evidence in the record, and sustain the order allowing the foreclosure. Respondents' assignments of error are without merit. The order of the trial court is

Affirmed.

Judges PARKER and MITCHELL concur.

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**Boehm v. Board of Podiatry Examiners**

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DR. DONALD P. BOEHM, PETITIONER v. NORTH CAROLINA BOARD OF  
PODIATRY EXAMINERS, RESPONDENT

No. 7810SC791

(Filed 5 June 1979)

**1. Physicians, Surgeons and Allied Professions § 7— review of order of Board of Podiatry Examiners— whole record test**

The "whole record" test applies to judicial review of an order of the N. C. Board of Podiatry Examiners, G.S. 150A-51(5), and the Board's order must be affirmed if, upon consideration of the whole record as submitted, the facts found by the Board are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences may be drawn.

**2. Physicians, Surgeons and Allied Professions § 6— findings by Board of Podiatry Examiners— supporting evidence**

Findings by the N. C. Board of Podiatry Examiners that petitioner had collected or attempted to collect fees from Blue Cross through misrepresentation and had engaged in conduct not in keeping with the standards of the profession of podiatry were supported by competent, material and substantial evidence in view of the entire record and were conclusive on appeal.

**3. Physicians, Surgeons and Allied Professions § 6— suspension of podiatrist's certificate— acts prior to 1 July 1975— applicability of G.S. 90-197**

The N. C. Board of Podiatry Examiners had authority under former G.S. 90-197 to suspend petitioner's certificate to practice podiatry for misconduct in collecting and attempting to collect fees from an insurer through misrepresentation committed prior to 1 July 1975, the date that statute was rewritten and recodified as G.S. 90-202.8.

APPEAL by petitioner from *Clark, Judge*. Judgment entered 28 February 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 22 May 1979.

Petitioner, Donald P. Boehm, was duly notified to appear before the North Carolina Board of Podiatry Examiners to answer charges of misconduct alleged against him. Boehm did not reply in writing to the charges, although he was entitled to do so under the statute.

At the hearing, the Board's evidence tended to show Boehm presented claims to North Carolina Blue Cross and Blue Shield that resulted in his receiving larger payments than he was actually entitled to receive. These actions took place from July 1974 to March 1975, and involved about twenty claims of his patients.

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**Boehm v. Board of Podiatry Examiners**

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Basically, the claims sent to Blue Cross contained charges for pathological procedures not actually performed by petitioner, or anyone else on his behalf.

Petitioner filed a plea in bar, asserting that the alleged acts occurred in 1974 and 1975 and that N.C.G.S. 90-197 governed the conduct of podiatrists during this period and that it was repealed effective 1 July 1975, being replaced on that date by N.C.G.S. 90-202.8. Petitioner contends he is being tried under a statute adopted after his alleged conduct. The Board overruled the plea in bar and entered an order finding petitioner had collected or attempted to collect fees from Blue Cross through misrepresentation and had engaged in conduct not in keeping with the standards of the profession of podiatry. Petitioner's license to practice podiatry was suspended for ninety days, and he was placed on probation under certain conditions for a period of two years thereafter.

Upon appeal to the superior court for review under the Administrative Procedure Act, the court affirmed the ruling of the Board and entered judgment accordingly. Petitioner appeals.

*Farris, Thomas & Farris, by Robert A. Farris and Robert A. Farris, Jr., for petitioner appellant.*

*Broughton, Wilkins, Ross & Crampton, by J. Melville Broughton, Jr. and William G. Ross, Jr., for respondent appellee.*

MARTIN (Harry C.), Judge.

Petitioner argues two assignments of error, first, the court erred in overruling his plea in bar, and second, the court erred in the entry of the judgment affirming the order of the Board.

[1] In reviewing the Board's order, the proceedings were conducted by the judge without a jury, upon the record made before the Board, and the briefs and oral arguments of the parties. N.C. Gen. Stat. 150A-50. The legislature has adopted the "whole record" test for application by the court in reviewing the Board's order. N.C. Gen. Stat. 150A-51(5). This requires the Board's judgment to be affirmed if upon consideration of the whole record as submitted, the facts found by the Board are supported by competent, material and substantial evidence, taking into account any

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contradictory evidence, or evidence from which conflicting inferences could be drawn. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). This test is distinguishable from both *de novo* review and the "any competent evidence" standard of review. Under the "whole record" test the reviewing court cannot replace the Board's judgment between two reasonably conflicting views, even though the court could have reached a different conclusion had the matter been before it *de novo*. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977).

The record on appeal indicates that petitioner produced five witnesses, including himself, and respondent Board produced four witnesses. However, the record on appeal does not contain the substance of what the witnesses testified, except as stated in the findings of fact by the Board. The appellant has failed to bring forward into the record on appeal the evidence before the Board, therefore, all the findings of fact made by the Board are deemed supported by material, competent and substantial evidence. *Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E. 2d 406 (1970); *Davis v. Davis*, 11 N.C. App. 115, 180 S.E. 2d 374 (1971).

[2] We hold the findings of fact by the Board are supported by competent, material and substantial evidence in view of the entire record, and they are conclusive upon appeal. *In re Berman*, 245 N.C. 612, 97 S.E. 2d 232 (1957); *In re Hawkins*, 17 N.C. App. 378, 194 S.E. 2d 540, *cert. denied*, 414 U.S. 1001, 38 L.Ed. 2d 237 (1973).

[3] Petitioner contends his plea in bar should have been sustained because the Board applied N.C.G.S. 90-202.8 to the acts in question when it was not effective until 1 July 1975. This statute authorizes the Board to suspend a license to practice podiatry and invoke such probation terms as it deems fit and proper where the Board is satisfied the practitioner has "obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit." N.C. Gen. Stat. 90-202.8(a)(11).

The statute in effect during 1974 to July 1975, N.C.G.S. 90-197, did not contain this specific provision. This statute sets out four grounds for revocation of a certificate to practice

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podiatry, and also authorizes the Board to *suspend* such certificate for not more than six months on account of misconduct which would not, in the judgment of the Board, justify revocation of the certificate.

Petitioner contends that by the enactment of N.C.G.S. 90-202.8, the legislature repealed N.C.G.S. 90-197 and therefore, he cannot be held accountable for acts committed prior to the effective date of N.C.G.S. 90-202.8. We do not agree. Chapter 672 of the Session Laws of 1975 is entitled, "An Act to Rewrite Article 12 of Chapter 90 of the General Statutes Concerning Licensure of Podiatrists." The act proceeds to state, "Chapter 90, Article 12 of the General Statutes is hereby rewritten as follows." The new statute is thereafter set forth. The act does not contain any provision repealing N.C.G.S. 90-197, but rewrites and recodifies it.

We hold the Board had authority after 1 July 1975 to suspend petitioner's certificate to practice podiatry for acts committed by petitioner prior to that date. The legislature authorized the Board to suspend a podiatrist's certificate for misconduct which did not come within one of the four specific categories for revocation but was of the same general character and nature. The four specific categories involve conduct which was unprofessional, immoral and dishonorable in its general character or nature. The principle of *ejusdem generis* applies. *Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211 (1959). The conduct of petitioner set out in the order of the Board is certainly unprofessional, immoral and dishonorable, and of the same kind, character and nature as those specifically enumerated in N.C.G.S. 90-197.

This authority granted to the Board by the legislature did not terminate 1 July 1975 upon the adoption of N.C.G.S. 90-202.8, but continued for any such misconduct committed prior to that date. See *Rice v. Rigsby* and *Davis v. Rigsby*, 259 N.C. 506, 131 S.E. 2d 469 (1963); N.C. Gen. Stat. 12-4. The trial court properly denied the plea in bar.

In this Court, petitioner raises for the first time the question of the constitutionality of N.C.G.S. 90-197. Having failed to raise this question in the trial court, petitioner may not on appeal attack the statute on that ground. The appellate court will not decide a constitutional question which was not raised or con-

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sidered in the trial court. *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971).

The judgment of the superior court is

Affirmed.

Judges PARKER and MITCHELL concur.

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LINDA OUTLAW AND JACK A. WILLIFORD, GUARDIAN AD LITEM FOR STEPHANIE GWEN OUTLAW, A MINOR v. PLANTERS NATIONAL BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF RALEIGH LEE HARDEN, DECEASED, KIM DENISE HARDEN, VICKIE LYNN HARDEN AND RALEIGH LEE HARDEN, JR.

No. 786SC718

(Filed 5 June 1979)

**Descent and Distribution § 8; Constitutional Law § 23.7— illegitimate child— statutes governing intestate succession upon father's death— constitutionality**

G.S. 29-19 and the other statutes referred to therein, insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father in accordance with those applicable statutes, establish a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the orderly disposition of property at death and do not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution.

APPEAL by petitioners from *Browning, Judge*. Judgment entered 14 June 1978 in Superior Court, BERTIE County. Heard in the Court of Appeals 26 April 1979.

The petitioners, the mother and the guardian ad litem of the minor child Stephanie Gwen Outlaw, filed a petition before the trial court alleging that the minor child is entitled to share in the estate of her putative father, Raleigh Lee Harden, who died testate. No provision was made for the child in Harden's will which was dated before the child's birth. The respondents, the legitimate children of Raleigh Lee Harden named as beneficiaries under the will, defended on the ground that the petitioners had

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failed to establish the illegitimate child's right under G.S. 29-19 to share in the testator's estate as though the testator had died intestate.

The matter came before the trial court upon the following stipulated facts. The petitioner, Linda Outlaw, is the mother of Stephanie Gwen Outlaw who was born out of wedlock on 5 January 1975. Raleigh Lee Harden died testate on 1 October 1977. The will of Raleigh Lee Harden was dated 11 March 1974 and was duly probated on 11 October 1977. That will contained no provision with reference to Stephanie Gwen Outlaw.

The petitioners introduced the affidavit of Linda Outlaw stating that Stephanie Gwen Outlaw was the child of Raleigh Lee Harden and that Harden paid bills incurred by reason of the birth of the child and continued to recognize her as his own until his death. Other affidavits tended to support the contention of the petitioner, Linda Outlaw, that Raleigh Lee Harden was the father of Stephanie Gwen Outlaw, contributed to her support and treated the child as his own. The petitioners conceded that no evidence was available tending to show that Raleigh Lee Harden was ever judicially determined to be the father of Stephanie Gwen Outlaw or that he otherwise complied during his lifetime with the provisions of G.S. 29-19.

The trial court entered judgment in which it found facts, concluded that the requirements of G.S. 29-19 had not been met and allowed the respondents' motion for summary judgment. The petitioners appealed.

*Pritchett, Cooke & Burch, by W. L. Cooke, for petitioners appellants.*

*Cherry, Cherry & Flythe, by Thomas L. Cherry and Larry S. Overton, for respondents appellees.*

*Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, as amicus curiae.*

MITCHELL, Judge.

The petitioners assign as error that part of the judgment in which the trial court concluded that the respondents were entitled to summary judgment in their favor by virtue of the failure of



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the petitioners to show compliance with G.S. 29-19. In support of this assignment, the petitioners contend that the statute is unconstitutional in that it unreasonably discriminates between the rights of legitimate and illegitimate children to inherit from their fathers and violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

By virtue of G.S. 28A-22-2 and G.S. 31-5.5, a child born after the execution of its father's will is entitled to inherit an interest equal to the interests of a child born prior to the execution of the will and as though the father had died intestate. Under the provisions of G.S. 29-19, illegitimate children take an intestate share of the estate of their mother as though they were the legitimate children of the mother. G.S. 29-19 further provides, however, that an illegitimate child shall be entitled, for purposes of intestate succession, to share in its father's estate only if he "has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16" or "has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer . . . and filed during his own lifetime and the child's lifetime" according to law. The statute additionally requires that written notice of the basis of an illegitimate child's claim be given the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to the putative father's creditors. The statutes referred to within the previously quoted portions of G.S. 29-19 require that civil actions to establish the paternity of the putative father be commenced within three years after the birth of the illegitimate child or within three years of the last payment for support of the child by the putative father, but in no event after the death of the putative father.

In their brief, the petitioners rely heavily upon the case of *Trimble v. Gordon*, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S.Ct. 1459 (1977). In that case, the Supreme Court of the United States held that the Equal Protection Clause of the Fourteenth Amendment was violated by an Illinois statute providing that an illegitimate child could inherit from its father only if the father had acknowledged the child and the child had been legitimated by the intermarriage of the parents. The Court in *Trimble* relied upon

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the proposition that classifications based on illegitimacy are constitutionally invlaid if they are not substantially related to permissible state interests and held that the Illinois statute was not substantially related to such interests.

After the filing of the briefs on appeal in the present case, the Supreme Court of the United States decided the case of *Lalli v. Lalli*, --- U.S. ---, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978). In that case the Court found constitutional a New York statutory provision that allowed an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction had entered an order declaring paternity during the father's lifetime. The Court found the New York statute substantially related to the permissible interest of the State in providing for the just and orderly disposition of property at death. In its opinion in *Lalli*, the Court distinguished its prior holding in *Trimble* as follows:

The Illinois statute in *Trimble* was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. [The New York statute] does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

--- U.S. at ---, 58 L.Ed. 2d at 514, 99 S.Ct. at 527.

We find that G.S. 29-19 and the other statutes referred to therein, insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father and otherwise in accord with those applicable statutes, establish a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the just and orderly disposition of property at death. *Lalli v. Lalli*, --- U.S. ---, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978). In addition to allowing an illegitimate child to inherit if there has been a final adjudication of paternity during the father's lifetime, as did the New York statute under review in *Lalli*, G.S. 29-19 per-

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mits the illegitimate child to inherit, if, in the alternative, the father has acknowledged the child as his own in an executed or acknowledged written instrument. The provision for this alternative method of establishing paternity, renders G.S. 29-19 even more constitutionally sound, in our view, than the New York statute under review in *Lalli* which the Court held constitutional. Therefore, we find that the statutory scheme established by G.S. 29-19 and the other statutes referred to therein does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Lalli v. Lalli*, --- U.S. ---, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978); See *Parham v. Hughes*, --- U.S. --- L.Ed. 2d ---, 99 S.Ct. 1742 (1979) (wrongful death statute allowing mother to recover for illegitimate child's death but not allowing father to recover unless he has legitimated the child and there is no mother). *But cf. Caban v. Mohammed*, --- U.S. ---, --- L.Ed. 2d ---, 99 S.Ct. 1760 (1979) (statute requiring consent of mother, but not father, as prerequisite to adoption of illegitimate child).

The judgment of the trial court must be and is hereby

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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EDWIN C. BRYSON, SR., TRUSTEE IN BANKRUPTCY FOR GEORGE W. KANE, INC.  
v. ALFRED GARDNER HUTTON AND WIFE, RAMONA ROOT HUTTON

No. 7814SC510

(Filed 5 June 1979)

**Quasi Contracts and Restitution § 1.2— contract between husband and employer—occupancy of house by wife—insufficient evidence of unjust enrichment**

Where there is a contract between two persons for the furnishing of goods or services to a third, the latter is not liable on an implied contract simply because he has received such services or goods; therefore, evidence was insufficient to establish plaintiff's claim against defendant wife for unjust enrichment where it tended to show that defendant husband's employer supplied materials and labor valued at \$54,000 for the building of a house on a lot owned by defendants as tenants by the entirety; defendant wife did not enter

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into any agreement with her husband's employer; and the employer knew who owned the land but elected to make the advances solely on the personal credit of its employee and knowingly proceeded to improve the value of the land without obtaining a security interest in the land or the personal obligation of defendant wife.

APPEAL by defendant, Ramona Root Hutton, from *Martin (John C.)*, Judge. Judgment entered 18 January 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 March 1979.

On 9 July 1975, plaintiff instituted this action seeking to recover the value of materials and labor furnished by George W. Kane, Inc. The evidence tends to show that defendant, Alfred Hutton, was employed by George W. Kane, Inc., which had a policy of allowing certain employees to build homes using the company's personnel or credit to provide labor and materials. Mr. Hutton apparently arranged for the company to provide labor and materials to build a home on land which he and his wife owned as tenants by the entirety. The home was completed at a cost of \$82,052.19, a payment of \$28,000.00 was made, and the balance due since July, 1974, is \$54,052.19. The account was in Mr. Hutton's name alone and none of plaintiff's witnesses had dealt with Mrs. Hutton. There was no evidence presented that Mrs. Hutton expected to be charged for the construction.

Mr. and Mrs. Hutton moved into the home in July, 1974. On 14 April 1975, Mr. Hutton delivered a quitclaim deed to Mrs. Hutton for all of his right, title and interest in the property upon which their home was built. Both defendants were living in the house when this suit was started. The Huttons separated during the summer of 1977 and Mr. Hutton moved to Georgia. Mrs. Hutton continued to live in the home.

Issues of implied contract and unjust enrichment were submitted to the jury as to the male defendant. The jury found that he impliedly contracted with George W. Kane, Inc., that he breached that contract, and that plaintiff was damaged in the amount of \$54,052.19. The only issues submitted as to Mrs. Hutton related to unjust enrichment. The jury found that she had been unjustly enriched and that plaintiff was entitled to recover \$54,052.19 as a result of that unjust enrichment. Judgment was then entered against defendants, jointly and severally, for

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\$54,052.19. Although both defendants gave notice of appeal, only Mrs. Hutton has perfected her appeal.

*Mount, White, King, Hutson, Walker & Carden, by W. H. Lambe, Jr., and E. Lawson Moore, for plaintiff appellee.*

*Blackwell M. Brogden, Jr., for defendant appellant, Ramona Root Hutton.*

VAUGHN, Judge.

Defendant contends that the evidence, when taken as true and considered in the light most favorable to the plaintiff, was insufficient to take the case to the jury. The question is, therefore, whether the evidence was sufficient to establish plaintiff's claim of unjust enrichment against Mrs. Hutton.

"The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. . . .

"The action is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." (Citations omitted.) *R. R. v. Highway Commission*, 268 N.C. 92, 95-96, 150 S.E. 2d 70 (1966).

It is clear, however, that where there is a contract between two persons for the furnishing of goods or services to a third, the latter is not liable on an implied contract simply because he has received such services or goods. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962).

The Restatement of Restitution § 110 (1937) provides "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." The Restatement distinguishes this situation from one in which the benefit is conferred as a result of mistake or fraud. This section is illustrated by the following example. A purchases an engagement ring for his fiancée, B, from a jewelry store and promises to make periodic payments. The store agrees

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to deliver the ring to B. The jewelry store retains no security interest in the ring. A makes the first payment and the jewelry store delivers the ring to B. A then fails to make anymore payments. The jewelry store may not recover the ring from B.

This illustration is similar to the situation in the present case. Plaintiff's evidence shows that Mr. Hutton established an account with his employer, George W. Kane, Inc., to provide materials and labor for the construction of his home. The land on which this home was built was owned by Mr. and Mrs. Hutton as tenants by the entirety. The plaintiff's evidence fails to show that Mrs. Hutton entered into any agreement with the company. There is no suggestion that plaintiff was mistaken as to the ownership of the land. Plaintiff elected to make the advances solely on the personal credit of its employee, Mr. Hutton. It knowingly proceeded to improve the value of the land without obtaining a security interest in the land or the personal obligation of Mrs. Hutton, a tenant by the entirety in the land upon which the house was to be constructed. It may not now call upon a court of equity to rescue it from those business decisions which, in retrospect, appear to have been somewhat less than prudent.

Plaintiff relies on *Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966). That case, however, is easily distinguishable. In *Homes*, defendant's mother contracted with plaintiff to build a house on defendant's land. Plaintiff, mistakenly believing that defendant's mother owned the land, built the house. Defendant claimed ownership and rented the house to a tenant. Defendant refused to allow plaintiff to remove the house although plaintiff offered to restore the land to its original condition. The Court ruled that where a builder constructs a house through a reasonable mistake, and the landowner elects to keep the house rather than have it removed, the landowner must pay the value by which his property has been increased. See also *Wade, Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183 (1966).

For the reasons stated, the judge should have granted Mrs. Hutton's motion for a directed verdict. Her motion for judgment notwithstanding the verdict was also denied. We, therefore, vacate the judgment that was entered against Mrs. Hutton and remand the case for entry of a directed verdict in her favor.

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**Davis v. Zoning Board of Adjustment**

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Vacated and remanded.

Judges HEDRICK and CARLTON concur.

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W. CLEVE DAVIS, PETITIONER v. THE ZONING BOARD OF ADJUSTMENT OF UNION COUNTY, N. C. CONSISTING OF CHARLES YANDLE, CHAIRMAN OF THE BOARD, LEON MOORE, VICE CHAIRMAN OF THE BOARD, OREN PIGG, CHARLES MCGEE, JACK HAYWOOD, MEMBERS AND WILLIE McDOW AND CLARK RUMMAGE, ALTERNATES, RESPONDENTS

No. 7820SC715

(Filed 5 June 1979)

**Appeal and Error § 9— appeal rendered moot by zoning ordinance amendments**

Appeal from a county zoning board of adjustment is dismissed where the questions presented have been rendered moot by amendments to the county zoning ordinance.

APPEAL by petitioner from *Walker (Hal H.), Judge*. Judgment entered 17 April 1978 in Superior Court, UNION County. Heard in the Court of Appeals on 25 April 1979.

The uncontraverted facts disclosed by the record in this case are as follows:

In the Spring of 1977, the petitioner purchased a 22.9 acre tract of land in Union County that was located in the R-20 residential zone. Prior to its purchase by the petitioner, the land had been used as a pasture for cattle. On 2 August 1977, petitioner began building a house to be used as his personal residence, on the property. In addition, the petitioner built pens for his fifteen dogs immediately behind his residence. The petitioner intended to use the property as a cattle farm, and he planned to use his dogs in connection with the raising of cattle. On 27 October 1977, the petitioner received a letter from the Director of the Union County Department of Inspection informing him that his keeping of the fifteen dogs constituted a kennel under the definition of "kennel" in Section 41.34 of the Union County Zoning Ordinance and that he was therefore in violation of Section 41.53 of the Zoning Ordinance which limited the keeping of household pets to two. The letter stated, "This matter must be cleared up and the kennel disposed of by no later than November 16, 1977."

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**Davis v. Zoning Board of Adjustment**

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The provisions of these sections of the Union County Zoning Ordinance which were in effect at that time were as follows:

41.34 KENNEL. Any activity involving the permanent or temporary keeping or treatment of a greater number of animals than permitted in residential occupancy.

41.53 RESIDENTIAL OCCUPANCY. Those activities customarily conducted in living quarters in an urban setting, and excluding such activities as the keeping of livestock or fowl, activities resulting in noise which constitutes a nuisance in a residential area, and activities which involve the storage, visible from off the lot, of motor vehicle parts, machinery or parts, junk or scrap materials, and excluding the keeping on any lot of more than two household pets per family, but this shall not be construed to prevent the keeping of the litter of a house hold pet until able to be separated from their mother.

On 4 November 1977, petitioner appealed to the Union County Zoning Board of Adjustment. After a hearing, the Board upheld the zoning enforcement officer's decision, and sent the following letter to the petitioner:

Dear Mr. Davis:

The Union County Zoning Board of Adjustment, meeting in regular session on Monday, January 9, 1978, took action on your appeal. The Zoning Board did uphold the zoning enforcement officer's interpretation of the Union County Zoning Ordinance.

Therefore, we have no alternative but to ask that the kennel be dissolved by January 24, 1978. Under the zoning ordinance, you are allowed to maintain two household pets.

Your cooperation in this matter will be greatly appreciated.

Yours truly,

CHARLES YANDLE, CHAIRMAN  
UNION COUNTY ZONING BOARD  
OF ADJUSTMENT

Mrs. Wanda S. Helms  
Secretary to the Board



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**Davis v. Zoning Board of Adjustment**

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Pursuant to G.S. § 153A-345(e), Mr. Davis petitioned the superior court for a writ of certiorari to review the decision of the Zoning Board of Adjustment. On 17 April 1978, the court entered an Order affirming the decision of the Board. Petitioner appealed.

*Love and Milliken, by John R. Milliken, for petitioner appellant.*

*Griffin, Caldwell & Helder, by Thomas J. Caldwell and H. Ligon Bundy, for respondent appellees.*

HEDRICK, Judge.

After the record and briefs were filed in this case, the parties filed in this Court the following stipulation:

On October 9, 1978, the Union Board of Commissioners adopted certain amendments to the Union County Zoning Ordinance which all parties agree could have a definite effect on the case on appeal.

The amendments are hereby offered as exhibits to the Court under Rule 9c(2) of the Rules of Appellate Procedure for whatever effect on the case on appeal that the Court deems them to have.

Attached to the stipulation is a copy of the amendments that is certified to be a true copy by Barbara W. Moore, Clerk, Union County Zoning Board of Adjustment, and which provides:

Section 1. The Union County Zoning Regulations as embodied in the Zoning Ordinance are hereby amended as follows:

. . .

3. Amend Section 41.34  *kennel* to read as follows:

"Any activity involving the permanent or temporary keeping or treatment of animals for commercial purposes. Commercial purposes shall include but not be limited to the following: Animal hospitals, veterinarian's offices, and storage of pets belonging to someone other than the owner or operator of the premises for monetary gain. Incidental

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**Davis v. Zoning Board of Adjustment**

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breeding and offering the resultant litter for sale shall not constitute the operation of a kennel.”

4. Amend Section 41.53 Residential Occupancy by deleting this section in its entirety.

Petitioner, in his brief, challenges the constitutionality of Sections 41.34 and 41.53 of the Union County Zoning Ordinance as they existed prior to their amendment on 9 October 1978.

By filing on 10 January 1979 the stipulation and amendment to the zoning ordinance, the parties suggest that the questions raised on this appeal are moot. We think the following rule is applicable:

When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

*State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 290, 221 S.E. 2d 322, 324 (1976); 1 Strong's N. C. Index 3d, *Appeal and Error* § 9, at 216 (1976).

In the case now before us all questions raised have been rendered moot by the amendments to the Union County Zoning Ordinance. We conclude that the petitioner is no longer an aggrieved party inasmuch as the ordinance that was the basis of the letter asking petitioner “to dissolve his kennel” no longer has any force and effect. Thus, the appeal is dismissed and the costs will be taxed against the respondent.

Dismissed.

Chief Judge MORRIS and Judge WEBB concur.

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**State v. Ransom**

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STATE OF NORTH CAROLINA v. JACKIE MARION RANSOM

No. 7812SC1165

(Filed 5 June 1979)

**1. Assault and Battery § 14.5— assault with knife with intent to kill—sufficiency of evidence of intent to kill**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, evidence was sufficient to permit the jury reasonably to infer an intent to kill where it tended to show that defendant instigated an affray; the victim tried to withdraw; and defendant then cut a five inch long slash across the victim's face.

**2. Assault and Battery § 15.6— self-defense—jury instruction proper**

The trial court's instruction properly charged the jury with respect to the law of self-defense under circumstances where they might find that the defendant had no intent to kill or did not use a deadly weapon, and the instruction would not be misinterpreted by the jury to mean that defendant had the right to self-defense only if no deadly weapon was used or if he had no intent to kill.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 8 September 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 March 1979.

Defendant was indicted on two counts of felonious assault with intent to kill inflicting serious injury, a violation of G.S. 14-32(a). The first count arose out of the alleged felonious assault upon Timothy Beasley, and the second count charged defendant with the felonious assault upon Richard W. Bales. Defendant was arraigned and pled not guilty to both charges. The defendant's trial resulted in a verdict of guilty as charged with respect to the first count, and guilty of the lesser included misdemeanor offense of assault with a deadly weapon in violation of G.S. 14-33(b)(1) on the second count. From entry of judgment committing defendant to 12 years imprisonment on the first count and two years imprisonment on the second count, defendant appeals.

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

*Assistant Public Defender, Twelfth Judicial District, James R. Parish, for defendant appellant.*

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*State v. Ransom*

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MORRIS, Chief Judge.

[1] The defendant brings forward on appeal two assignments of error. The remaining assignments of error have been voluntarily abandoned. Defendant first contends that, because of the absence of evidence of intent to kill, the trial court erred in not dismissing, upon defendant's motion, the charges in the first count relating to the more serious offense of assault with a deadly weapon with intent to kill inflicting serious injury.

An intent to kill, being a state of mind of the defendant not easily susceptible of proof, ordinarily must be proved by circumstantial evidence from which a jury may reasonably infer intent. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). The nature of the assault, the manner in which it was made, and the surrounding circumstances are all matters from which an intent to kill may be inferred. *State v. Marshall*, 5 N.C. App. 476, 168 S.E. 2d 487 (1969). The mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). Therefore, our inquiry concerns whether there were sufficient circumstances attendant with the assault which would permit a jury reasonably to infer an intent to kill.

As we noted above, the State is entitled to rely on reasonable inferences from the circumstances surrounding the assault in order to prove an intent to kill. The evidence is brief, but shows an escalating confrontation between defendant and Beasley instigated, according to the State's evidence, by the defendant. The defendant knocked Beasley to the floor with his fists, pulled out a pocketknife, and started toward Beasley. At this moment Bales interfered and tried to stop defendant, but was himself stabbed in the stomach. In the meantime, Beasley stood up and, apparently upon seeing defendant's knife, attempted to withdraw from the affray. The record indicates that Beasley raised his hands and said something like, "I quit," "Cool it," or "I'm cool" in an attempt to calm the defendant and let him know that he, Beasley, had had enough. When he did so, defendant caught him with his guard down and cut a five-inch long slash across his face as defendant was leaving the restaurant.

Beasley attempted to withdraw from the affray, yet defendant persisted in pursuing the conflict. The nature of the cut in-

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**State v. Ransom**

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dicates that the injury could have been much more severe, if not fatal, had defendant cut Beasley's neck instead of his cheek. We cannot say as a matter of law that the foregoing evidence, taken in the light most favorable to the State, fails as a matter of law to support a reasonable inference of defendant's intent to kill Timothy Beasley.

[2] The remaining assignment of error refers to a portion of the court's charge directed to the defendant's right of self-defense. That portion of the charge appears in the record as follows:

"If you find from the evidence and beyond a reasonable doubt that the defendant assaulted Timothy Beasley and or assaulted Richard W. Bales but do not find that he, the defendant, used a deadly weapon or had an intent to kill, that assault would be excused as being in self-defense if the circumstances at the time that he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from bodily injury or offensive physical contact and the circumstances did create such belief in the defendant's mind, even though, he was not thereby put in actual danger of death or great bodily harm. However, the force used cannot have been excessive."<sup>1</sup>

Defendant contends that the charge is confusing and suggests that it could be misinterpreted by the jury to mean that defendant had the right to self-defense only if no deadly weapon was used or if he had no intent to kill. The quoted paragraph of the charge, read out of context, might be susceptible of such a misconstruction. However, in our opinion, it would be clear to a jury which had heard the previous instructions which submitted charges on the lesser included offenses of simple assault, G.S. 14-33, and assault with a deadly weapon inflicting serious injury, G.S. 14-32(c), that this portion of the charge on self-defense instructed them with respect to the law of self-defense under circumstances where they might find that the defendant had no intent to kill or did not use a deadly weapon.

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1. North Carolina Pattern Jury Instructions—Criminal 308.45.

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**State v. Ransom**

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We find that the instruction accurately states the law with respect to the right of self-defense and, when read in context with the charge as a whole, could not have mislead the jury.

No error.

Judges CLARK and ARNOLD concur.

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STATE OF NORTH CAROLINA v. JACKIE MARION RANSOM

No. 7912SC102

(Filed 5 June 1979)

**Criminal Law § 138.1 – more severe sentence than accomplice who entered plea bargain**

The trial court did not penalize defendant for pleading not guilty and exercising his right to a trial by imposing on defendant a sentence of 25 years upon his conviction of armed robbery when it had imposed a sentence of only 13 years on an accomplice who entered into a plea bargaining agreement and testified for the State in defendant's trial.

APPEAL by defendant from *Herring, Judge*. Judgment entered 13 September 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 April 1979.

Defendant was charged with armed robbery. The State's evidence tends to show that on 12 July 1977, Williams Grocery Store in Fayetteville was robbed by two men, one using a gun. Charles Ray Carter confessed to having robbed the store and, in return for a plea bargaining agreement, testified at defendant's trial. Carter stated that he met defendant on 12 July 1977 at a friend's trailer. Defendant mentioned that he needed some money so he drove Carter and another man, Dailon Ray, to Williams Grocery Store. Defendant handed the gun to Carter and told Carter and Ray that he would wait in the car. Carter and Ray robbed an employee of the store and left with the defendant. They later divided the money.

Defendant's evidence tends to supply an alibi. He was convicted of armed robbery and sentenced to twenty-five years.

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**State v. Ransom**

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*Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.*

*Assistant Public Defender James R. Parish, for defendant appellant.*

VAUGHN, Judge.

Defendant brings forward only one assignment of error. He contends that the trial court erred in imposing an active sentence of twenty-five years which was almost twice the sentence imposed on Carter who pleaded guilty. In exchange for testifying, Carter entered into a plea bargaining agreement wherein he received a sentence of thirteen years to run concurrently with a sentence he was serving in South Carolina. Defendant claims that the disparity in the sentences reflects a penalty for pleading not guilty and exercising his right to trial. If the sentence rendered is within the statutory limits, this Court presumes that the trial court acted fairly in imposing the judgment. *State v. Harris*, 27 N.C. App. 385, 219 S.E. 2d 306 (1975). In *State v. Sligh*, 27 N.C. App. 668, 219 S.E. 2d 801 (1975), defendant was also given a sentence greatly in excess of that given to his co-defendant who entered into a plea bargaining arrangement. The Court upheld the sentence, finding that "[t]he fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge." (Citations omitted.) *State v. Sligh, supra*, at 670. In the instant case, the sentence imposed was within the statutory limit and defendant, therefore, has no grounds to object. We find no error.

No error.

Judges CLARK and CARLTON concur.

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**Ragland v. Moore**

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AURELIA JANE RAGLAND v. MICHAEL GEORGE MOORE AND CLEVE  
GEORGE MOORE

No. 789SC714

(Filed 5 June 1979)

**Automobiles §§ 62.2, 83.4— pedestrian crossing at place other than crosswalk—  
motorist speeding— summary judgment improper**

In an action to recover for personal injuries sustained by plaintiff pedestrian when she was struck by defendants' vehicle, the trial court erred in allowing defendants' motion for summary judgment where the evidence raised jury questions as to defendant's negligence in speeding and as to plaintiff's contributory negligence in stepping out into the highway in front of defendants' automobile.

APPEAL by plaintiff from *Lee, Judge*. Judgment entered 6 March 1978 in Superior Court, PERSON County. Heard in the Court of Appeals 25 April 1979.

This is an action for personal injuries in which the plaintiff has alleged she was injured by the negligence of Michael George Moore who was operating an automobile owned by Cleve George Moore and used as a family purpose automobile. The defendants made a motion for summary judgment. The defendants relied on the deposition of plaintiff and an affidavit by Michael George Moore. Plaintiff testified by deposition that she got out of an automobile on 5 June 1976 at 12:15 a.m. on Route 49 in Person County and stood on the shoulder of the road across from her residence. She could see the automobile operated by Michael George Moore approaching as she started across the road towards her home. She testified further that she "was over half-way across the road" when "I started running because I recognized that the car was going faster than I thought it was." "I had one foot on the gravel and the other on the pavement when I was hit." In answer to a question as to whether in her opinion the approaching vehicle was exceeding the posted speed limit, the plaintiff said "[t]hat he was speeding." The court allowed the defendants' motion for summary judgment.

*Fellers and Link, by Carlton E. Fellers, for plaintiff appellant.*

*Newsome, Graham, Strayhorn, Hedrick, Murray, Bryson and Kennon, by O. William Faison, for defendant appellees.*



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**Ragland v. Moore**

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WEBB, Judge.

The appellate courts of this state have passed on summary judgments on numerous occasions. See *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971); *Goode v. Tait, Inc.*, 36 N.C. App. 268, 243 S.E. 2d 404, *discretionary review denied*, 295 N.C. 465 (1978), and *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). In *Moore v. Fieldcrest Mills, Inc.*, *supra*, the Supreme Court stated the rule in terms of a forecast of evidence. This case states the rule to be that if the moving party presents papers which forecast such evidence as would require a directed verdict for the movant at trial, the party opposing the motion must file papers which forecast evidence which would prevent a directed verdict at trial. If the opposing party fails to do this, the movant is entitled to summary judgment in his favor. This test is substantially the same as the one delineated in *Haithcock v. Chimney Rock Co.*, *supra*, and it effectively overrules *Goode v. Tait, Inc.*, *supra*. The question raised by this appeal is whether on the evidence as forecast in this case, the defendant would be entitled to a directed verdict if this evidence were offered at trial. We hold that on the evidence as forecast the defendant would not be entitled to a directed verdict and summary judgment was improperly entered.

There have been many appellate cases involving pedestrians who were struck by vehicles while crossing a roadway. It is the duty of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle. A failure to do so is contributory negligence. If the only inference that can be drawn from the evidence is that this contributory negligence is a proximate cause of the accident, a pedestrian cannot recover. See *Foster v. Shearin*, 28 N.C. App. 51, 220 S.E. 2d 179 (1975). Before reaching the question of contributory negligence, in the case sub judice we note that there was evidence of negligence on the part of the defendant Michael George Moore. The plaintiff testified that in her opinion he was speeding. This is enough evidence to make it a jury question as to whether the speed of the defendant Michael George Moore was a proximate cause of the accident. *Landini v. Steelman*, 243 N.C. 146, 90 S.E. 2d 377 (1955). As to whether the plaintiff's failure to yield the right of way must be held contributory negligence as a matter of law, we believe the cases hold that if a pedestrian steps into a roadway in

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**Ragland v. Moore**

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such a manner that the only reasonable inference the jury can make is that the accident is unavoidable regardless of the vehicle driver's negligence the pedestrian cannot recover. See *Foster v. Shearin*, *supra*; *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964); *Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967); *Holland v. Malpass*, 255 N.C. 395, 121 S.E. 2d 576 (1961); *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589 (1955); *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975), and *Downs v. Watson*, 8 N.C. App. 13, 173 S.E. 2d 556 (1970). If a pedestrian enters a roadway at a position at which the jury could reasonably find the accident is unavoidable, it is a jury question as to whether the negligence of the pedestrian is a proximate cause of the accident. *Landini v. Steelman*, *supra*; *Goodson v. Williams*, 237 N.C. 291, 74 S.E. 2d 762 (1953), and *Citizens National Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323 (1952). In *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968), the Court held that a directed verdict should have been allowed in defendant's favor not because the plaintiff stepped into the path of an oncoming automobile, but because he did not make a sufficient effort to avoid the accident when he determined the automobile was proceeding at a speed greater than he had at first estimated. In *Brooks v. Boucher*, 22 N.C. App. 676, 207 S.E. 2d 282, *cert. denied*, 286 N.C. 211 (1974), which is relied on by the appellees, the pedestrian started across a street and was struck as he was halfway across. It was held contributory negligence as a matter of law that he did not keep a lookout for approaching traffic after he was in the street and so avoid the collision. At the point he stepped in front of the automobile, the only inference the jury could draw was that negligence of the plaintiff was a proximate cause of the collision. Applying the principles evolved from the cases cited above to the facts of this case, we hold the jury could find that the defendant Michael George Moore was negligent in speeding and that this was a proximate cause of the accident. We also hold that the jury could find the plaintiff was negligent in entering the highway in front of the automobile and this was a proximate cause of the accident. According to the evidence as forecast, the plaintiff did not enter the roadway at a point at which an accident was unavoidable regardless of the negligence of Michael George Moore. According to the evidence, it is a jury question as to whether the automobile driven by Michael George Moore was a sufficient distance from the plaintiff at the time she entered the

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roadway so that the accident would not have been proximately caused by the plaintiff's negligence if Michael George Moore had not been speeding. The issue of negligence and contributory negligence should be submitted to a jury.

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

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**STARMOUNT COMPANY v. CITY OF GREENSBORO**

No. 7818SC283

(Filed 5 June 1979)

**Appeal and Error § 6.9— order that plaintiff not be required to answer interrogatories—premature appeal**

Trial court's order that plaintiff not be required to answer certain interrogatories did not affect a substantial right of defendant where defendant had received answers to other interrogatories which gave it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy and the information denied to defendant was not crucial to its defense; therefore, a purported appeal from the trial court's order is dismissed as premature.

APPEAL by defendant from *Walker (Ralph A.), Judge*. Judgment entered 4 January 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals at Winston-Salem 5 December 1978.

This lawsuit involves a tract of land owned by the plaintiffs in Greensboro. The plaintiff has alleged facts which it contends show that (1) its property has been the subject of inverse condemnation by the defendant; (2) it has been deprived of its constitutional rights in regard to the property; (3) the defendant has breached its contract with plaintiff; (4) the City is estopped from denying its liability to the plaintiff, or in the alternative, (5) it is entitled to a declaratory judgment giving it the right to use the property without interference from the City. Plaintiff has made allegations which show it owns a tract of land located partly in the City of Greensboro which it cannot develop as it wants to do because the City has for many years planned to build a thorough-

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Starmount Co. v. City of Greensboro

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fare through the tract and will not approve any subdivision plans which do not reserve a part of the tract for the thoroughfare. The defendant served interrogatories on the plaintiff. The plaintiff answered them in part, objected to some of them and made a motion that it not be required to answer some of them until a later time. On 22 September 1977, Judge Crissman entered an order in which he sustained some of the objections and overruled some of them. He further ordered that the plaintiff not be required to answer any interrogatories not already answered and to which objections had not been overruled. Pursuant to the interrogatories, the plaintiff furnished the defendant copies of all correspondence in its possession pertaining to the land in controversy, all documents in its possession pertaining to the land in controversy and memoranda of all conversations of its agents in regard to the said land. Judge Crissman ordered that the plaintiff not be required to answer a series of questions that required the plaintiff to state the legal and factual basis for certain of the allegations in the complaint. The defendant then resubmitted interrogatories which were identical to those Judge Crissman had excused the plaintiff from answering except that it omitted the word "legal" from each interrogatory. Judge Walker ordered that the plaintiff not be required to answer these interrogatories. The defendant appealed from Judge Walker's order and the plaintiff made a motion to dismiss the appeal.

*Brooks, Pierce, McLendon, Humphrey and Leonard, by Hubert Humphrey and Edward C. Winslow III, for plaintiff appellee.*

*Miles and Daisy, by James W. Miles, Jr., for defendant appellant.*

WEBB, Judge.

At the outset, we are faced with a motion to dismiss this appeal as being from interlocutory orders of the trial court and, as such, fragmentary and premature. G.S. 1-277(a) provides:

An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; . . . .

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**Harrell v. Construction Co.**

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The question before this Court is whether the order of Judge Walker affected a substantial right claimed by the defendant. There are few cases to which we can look for precedent. In *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E. 2d 597 (1977), the Supreme Court held an appeal from the refusal to let a party take a deposition was not premature if there was a chance the deponent might give evidence crucial to the defense of the case. We do not believe the information denied the defendant in the case sub judice is crucial to its defense. The defendant has received answers to interrogatories which give it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy. From an examination of the record, we cannot say any of the interrogatories which were not answered by plaintiff would have provided defendant with information which was not given it by those that were answered. We hold the superior court did not abuse its discretion in not requiring these interrogatories be answered and the appeal should be dismissed. Defendant will have its exceptions to the ruling of the superior court on an appeal.

In light of our decision in this case, we do not pass on the question of whether the defendant, by filing the second set of interrogatories, was asking one superior court judge to overrule another superior court judge.

Appeal dismissed.

Judges CLARK and MITCHELL concur.

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DAVID HARRELL, T/A HARRELL SAND AND SEPTIC COMPANY v. W. B. LLOYD CONSTRUCTION COMPANY

No. 786DC814

(Filed 5 June 1979)

**1. Quasi Contracts and Restitution § 2.1— construction services—quantum meruit—sufficiency of evidence**

In plaintiff's action for damages which was based on the theory of *quantum meruit*, the trial court properly denied defendant's motions to dismiss

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where plaintiff established the existence of an implied contract for defendant to pay plaintiff for services rendered in the construction of a building, and plaintiff further established that defendant did not pay plaintiff for all services rendered and thereby breached the implied contract.

**2. Quasi Contracts and Restitution § 2.2— quantum meruit—reasonable value of plaintiff's services—damage award improper**

The trial court's award of damages was improper in plaintiff's action based on *quantum meruit* because it was not supported by competent evidence of the reasonable value of plaintiff's services but was based entirely on plaintiff's statement of what it was charging for the services.

APPEAL by defendant from *Long, Judge*. Judgment entered 1 June 1978 in District Court, HERTFORD County. Heard in the Court of Appeals 23 May 1979.

This is a civil action for damages on the theory of *quantum meruit*. Defendant corporation was contractor for construction of the mental health building in Hertford County. Plaintiff, a partnership, alleged in its complaint and defendant admitted in its answer that in the construction of the above described building, plaintiff rendered services to defendant by use of a backhoe, hauling, tractor work, delivery of sand, and bulldozer. Plaintiff's services were rendered during a period from 10 September 1976 up through and including 4 March 1977. The total amount allegedly billed to defendant for plaintiff's services was \$4,574.50. Defendant remitted a payment of \$1,000 and plaintiff sues for the alleged balance of \$3,574.50.

At the close of plaintiff's evidence at trial in district court, without a jury, defendant moved for an involuntary dismissal of plaintiff's claim. N.C. Gen. Stat. 1A-1, Rule 41(b). This motion was overruled. Defendant rested without offering any evidence and renewed the motion for involuntary dismissal. Again, this motion was denied.

The trial judge entered judgment for plaintiff and awarded the requested amount of \$3,574.50 as damages. From entry of this judgment, defendant appeals.

*Cherry, Cherry and Flythe, by Larry S. Overton and Thomas L. Cherry, for plaintiff appellee.*

*Smith, Anderson, Blount & Mitchell, by James G. Billings and James K. Dorsett III, for defendant appellant.*

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MARTIN (Harry C.), Judge.

We conclude plaintiff's action is one in *quantum meruit*. Plaintiff did not allege an express contract, nor was evidence of an express contract offered. *Quantum meruit* is an equitable principle that allows recovery for services based upon an implied contract. The law implies a promise to pay for services rendered by one party to another where the recipient knowingly and voluntarily accepts the services and there is no showing that the services were gratuitously given. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582 (1963).

[1] Defendant contends the trial court erred in denying its motion to dismiss. Plaintiff established the existence of an implied contract for defendant to pay plaintiff for services rendered. Plaintiff further established that defendant did not pay plaintiff for all services rendered and thereby breached the implied contract. Defendant accepted plaintiff's work and paid plaintiff \$1,000, contending it was payment in full. However, plaintiff's evidence indicated additional work was performed after this payment. Where plaintiff establishes an implied contract and its breach, plaintiff is entitled at least to nominal damages. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Gales v. Smith*, 249 N.C. 263, 106 S.E. 2d 164 (1958). Therefore, the trial court's denial of defendant's motions to dismiss was proper.

[2] Defendant contends the trial court's award of damages was error because plaintiff's exhibit A (ledger sheets showing an account of work plaintiff contends it performed) was erroneously admitted and relied upon by the court. We hold the trial court's award of damages was improper because it is not supported by competent evidence of the reasonable value of plaintiff's services. Plaintiff must allege and prove that the services were rendered and accepted, and the value thereof. *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). The measure of damages under an implied contract is the reasonable value of the services accepted and appropriated by the defendant. *Turner v. Furniture Co.*, 217 N.C. 695, 9 S.E. 2d 379 (1940); *Forbes v. Pillmon*, 22 N.C. App. 69, 205 S.E. 2d 600 (1974).

The general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are

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reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than on the use to be made of the result or the benefit to the person for whom the services are rendered. [Citations omitted.]

*Turner v. Furniture Co.*, *supra* at 697, 9 S.E. 2d at 380.

“Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule.” The amount to be paid is not the value of the services to the recipient, [citation omitted] nor should his financial condition be taken into consideration in determining the value of the services performed. [Citation omitted.] Many factors serve to fix the market value of an article offered for sale. Supply, demand, and quality (which is synonymous with skill when the thing sold is personal services) are prime factors. The jury [here the trial judge], when called upon to fix the value, must base its decision on evidence relating to the value of the thing sold. Without some evidence to establish that fact, it cannot answer. To do so would be to speculate. [Citations omitted.]

*Cline v. Cline*, 258 N.C. 295, 300, 128 S.E. 2d 401, 404 (1962); *Burns v. Burns*, 4 N.C. App. 426, 167 S.E. 2d 82 (1969). Plaintiff did not offer evidence as to the reasonable value or market value of its services, but merely stated what it was charging for these services as shown on plaintiff’s exhibit A.

New trial.

Judges PARKER and MITCHELL concur.



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**Fogleman v. Fogleman**

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HADIE NORMAN FOGLEMAN v. ARNOLD ALTON FOGLEMAN

No. 7818DC680

(Filed 5 June 1979)

**1. Divorce and Alimony § 16.5— alimony action—issues of abandonment and indignities—acts by defendant after separation**

In this action for alimony without divorce, evidence of defendant's actions six and eight months after the parties separated was not probative of the issues of abandonment and indignities and was properly excluded by the court.

**2. Divorce and Alimony § 16.5— alimony action—exclusion of evidence of financial status**

In an alimony action in which the court submitted only the issues of abandonment and indignities to the jury, plaintiff was not prejudiced by the court's refusal to admit evidence of the financial status of the parties since, even if plaintiff was a dependent spouse, she would not have been entitled to alimony because the jury found that defendant had not abandoned plaintiff or committed indignities against her.

**3. Divorce and Alimony § 16.7— alimony action—instructions—right to alimony upon abandonment—harmless error**

In this action for alimony without divorce, plaintiff was not prejudiced by the court's statement in the charge that "the law provides that upon such abandonment the abandoned spouse may be granted alimony."

**4. Divorce and Alimony § 16.7— constructive abandonment—instruction on wilful failure to provide support—harmless error**

The jury could not have been misled by the court's one reference in the charge to "wilful failure to provide support" as an example of constructive abandonment when there was no evidence of such wilful failure where the court fully explained defendant husband's contentions as to constructive abandonment by the wife.

Judge MARTIN (Robert M.) dissents.

APPEAL by plaintiff from *Yeattes, Judge*. Judgment entered 22 February 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 23 April 1979.

Plaintiff wife brings this action for alimony both pendente lite and permanent, the use of the family home, and counsel fees, alleging indignities and abandonment. Defendant denied the allegations and averred constructive abandonment on the part of the plaintiff.

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**Fogleman v. Fogleman**

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On 1 December 1977 a hearing on plaintiff's motion for relief pendente lite was held. Plaintiff was found to be the dependent spouse and was awarded \$100 per week, the use of the family home, and \$750 in counsel fees.

At jury trial of the action on 13 February 1978 the court ruled, over plaintiff's objection, that the issue of whether the plaintiff was the dependent spouse would not be submitted to the jury, and that no evidence as to the income, expenses or financial status of the parties would be permitted in evidence. Only the issues of abandonment and indignities were submitted to the jury. The jury found that defendant had neither abandoned plaintiff without just cause nor made her life burdensome, and the trial court dismissed plaintiff's action. Plaintiff appeals.

*Cahoon & Swisher, by Robert S. Cahoon, for plaintiff appellant.*

*W. Marcus Short for defendant appellee.*

ARNOLD, Judge.

[1] Plaintiff argues that the trial court erred in excluding certain parts of her testimony. The excluded testimony would have shown that defendant was seen at the house of another woman six months after he separated from the plaintiff; that eight months after the separation defendant closed their joint bank account; and that six months after the separation defendant told plaintiff that she must work to support herself. This evidence was excluded as being too remote in time.

We find no error in the trial court's ruling. The issues presented to the jury were (1) whether defendant had abandoned plaintiff without just cause, and (2) whether during the marriage defendant had offered such indignities as to make plaintiff's condition intolerable and her life burdensome. Evidence of defendant's actions six and eight months after the separation, without more, would not have been probative of these issues. This assignment of error must fail.

[2] The plaintiff next assigns error to the trial court's refusal to admit any evidence of the financial status of the parties. She contends that she was severely prejudiced by this ruling, since in the

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**Fogleman v. Fogleman**

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absence of evidence of her need for support her suit would have appeared to the jury as merely a vindictive attack upon her husband. Moreover, she says that Art. I, Sec. 25 of the North Carolina Constitution entitles her to have the jury decide these matters.

This Court held in *Bennett v. Bennett*, 24 N.C. App. 680, 211 S.E. 2d 835 (1975), that the questions of who is the dependent and who the supporting spouse are for the trial judge to determine. We need not discuss today the constitutionality of that decision, since in the case *sub judice* a determination that plaintiff was entitled to a jury trial on these issues would not affect the ultimate result.

An award of alimony requires not only a finding that the petitioning party is the dependent spouse, but also a finding that one of the conditions enumerated in G.S. 50-16.2 exists. Here, the issues of abandonment and indignities, G.S. 50-16.2(4) and (7), were submitted to the jury, and the jury found that neither condition existed. Thus, even had the jury determined that plaintiff is the dependent and defendant the supporting spouse under G.S. 50-16.1(3) and (4), plaintiff would not have been entitled to alimony.

We do not find that plaintiff's position before the jury on the issues that were submitted was prejudiced by the omission of the financial evidence. As defendant points out, much evidence that showed the parties' financial conditions came in during the course of the trial. There was evidence that plaintiff worked at the P. Lorillard plant, but missed much work from illness; that defendant worked for Western Electric and also sold insurance; that defendant drove a 1975 Mercedes and provided for plaintiff a 1976 Mercedes; that the family home contains 4320 square feet and is located on a 140-acre tract; that the parties owned a camper and two farm tractors; that plaintiff had \$1050 in bonds; and so forth.

[3] Finally, plaintiff assigns error to the charge to the jury. In the first challenged portion the trial judge, instructing on abandonment, stated, "The law provides that upon such abandonment the abandoned spouse may be granted alimony." The plaintiff argues that she was prejudiced by this instruction, since the jury may have believed that she would automatically receive alimony and may have been reluctant to place such a burden on the

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State v. Smith

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defendant. While we agree with the plaintiff that it would have been better for the trial court to have omitted this extraneous and possibly prejudicial sentence, reading the charge as a whole, and in light of the considerable evidence presented by both parties on the issue of abandonment, we find that the plaintiff was not prejudiced.

[4] Nor do we find prejudicial error in the second challenged portion of the charge, where the trial court explained constructive abandonment as "either affirmative acts of cruelty or the wilful failure, such as a wilful failure to provide adequate support or as to provide other requirements of the home." The court went on to explain the husband's contentions as to constructive abandonment, and we believe that in context the jury could not have been misled by the court's one reference to "wilful failure to provide support," of which there was no evidence.

In the judgment of the trial court there is

No error.

Judge CLARK concurs.

Judge MARTIN (Robert M.) dissents

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STATE OF NORTH CAROLINA v. DAVID LEE SMITH

No. 7920SC132

(Filed 5 June 1979)

**1. Searches and Seizures § 40— warrant to search for marijuana— box containing methamphetamine— seizure proper**

Where a detective searched defendant's apartment pursuant to a warrant to search for marijuana, the detective seized a box filled with drug paraphernalia which was in plain view, and a later inventory of the box revealed methamphetamine in foil packets, the trial court did not err in determining that the box was properly seized either as containing instrumentalities of crime or as evidence having a nexus with criminal behavior.

**2. Criminal Law § 114.2— jury instructions— no expression of opinion**

The trial court did not express an opinion by instructing the jury that "these offenses occurred on or about the 25th of May," instead of "these offenses allegedly occurred."

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**3. Criminal Law § 138.7— sentencing hearing—witness called by court**

The trial court did not violate G.S. 15A-1334 by calling a detective on its own motion to testify at defendant's sentencing hearing.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 21 September 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 2 May 1979.

Defendant was indicted for possession of more than one ounce of marijuana and for possession with intent to sell methamphetamine. At trial the State presented evidence that Detective Campbell of the Moore County Sheriff's Department searched defendant's residence pursuant to a search warrant. On voir dire Campbell testified that he found the marijuana for which the warrant was issued in a bedroom drawer, and that he also seized an open box containing pipes, roach clips and other marijuana paraphernalia which was in plain view in the living room. An inventory of the box the next day disclosed methamphetamine in four tiny foil packets.

Defendant conceded that the search warrant was valid and that the search was properly conducted as to the marijuana, but moved to suppress evidence of the methamphetamine as improperly seized. The court concluded that the box and its contents were properly seized under the plain view doctrine, and denied defendant's motion. At the close of the State's evidence, defendant's motion to dismiss was denied.

Defendant was found guilty of possession of both marijuana and methamphetamine, and sentenced to 4-5 years on the marijuana charge and two years consecutive, suspended on condition, on the methamphetamine charge. He appeals.

*Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.*

*Seawell, Pollock, Fullenwider, Robbins and May, by Bruce T. Cunningham, Jr., for defendant appellant.*

ARNOLD, Judge.

[1] The defendant argues that evidence of the methamphetamine should have been suppressed because the box which contained it was not properly seized. His contention is that since Detective

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Campbell did not discover the methamphetamine until a later inventory of the box, he did not know the box contained contraband and therefore had no reason to seize it. Detective Campbell's uncontradicted testimony is that he saw in the open box "various paraphernalia such as pipes which contained residue" and "a glass bottle which contained seeds, marijuana seeds." Thus, under our holding in *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E. 2d 350 (1974), cert. denied 286 N.C. 420, 211 S.E. 2d 800 (1975), this box was properly seized as containing either "instrumentalities of crime," the narcotics paraphernalia, or evidence having a nexus with criminal behavior. Defendant's argument is unavailing.

[2] Defendant argues further that the trial court expressed an opinion in violation of G.S. 15A-1222 when he charged the jury that "[t]hese offenses occurred on or about the 25th of May." Though it might have been better had the trial court said "these offenses *allegedly* occurred," we find no prejudicial error. Nor do we find merit in defendant's other assignments of error to the charge.

Defendant contends that hearsay testimony was improperly admitted at the sentencing hearing. He relies on *State v. Locklear*, 34 N.C. App. 37, 237 S.E. 2d 289 (1977), to support his position, but that decision has been reversed by the Supreme Court, saying that "trial judges have a broad discretion . . . in making a judgment as to proper punishment . . . [and] must not be hampered in the performance of that duty by unwise restrictive procedures." 294 N.C. 210, 213, 241 S.E. 2d 65, 67 (1978). There was no error in the admission of the testimony.

[3] Defendant also contends that the trial court violated G.S. 15A-1334 by calling Detective Campbell on its own motion to testify at the sentencing hearing. However, that statute says clearly that no one other than certain named persons may comment to the court on sentencing "unless called as a witness by the defendant, the prosecutor, or the court." G.S. 15A-1334(b) (emphasis added).

Evidence relating to defendant's last assignment of error was excluded from the record on appeal by order of the trial court. Therefore, there is no basis for considering that assignment of error.

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**State v. Sutton**

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

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

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STATE OF NORTH CAROLINA v. ALONZO SUTTON

No. 792SC113

(Filed 5 June 1979)

**Criminal Law §§ 9.1, 113.7— instructions—aiding and abetting—actual or constructive presence at crime scene**

The trial court erred in giving the jury an instruction which would permit the jury to find defendant guilty of armed robbery as an aider and abettor if it found that defendant's only participation was the furnishing of an automobile to the actual robber prior to the robbery and that defendant was not actually or constructively present at the scene of the robbery.

APPEAL by defendant from *Cowper, Judge*. Judgment entered 26 April 1978 in Superior Court, WASHINGTON County. Heard in the Court of Appeals on 30 April 1979.

Defendant was charged in a proper indictment with armed robbery. Upon his plea of not guilty, the State presented evidence tending to show the following:

On 23 November 1977, at approximately 7:45 a.m., a brown paneled station wagon with New York license plates pulled into the Zip Mart convenience store in Plymouth, North Carolina. Thurman Dixon and another man not the defendant entered the Zip Mart and purchased two soft drinks. Shortly after 8:00 a.m., a man identified as Thurman Dixon entered the store carrying a handgun and wearing a woman's stocking over his head. Dixon led the only employee present in the store to the back of the building and shut her in the bathroom. He then took the contents of a safe, including approximately \$1,400 in rolled bills in a blue Branch Banking and Trust Company bag and some rolls of coins. Approximately thirty minutes after the robbery, several police officers arrived at Thurman Dixon's mobile home. The mobile home

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State v. Sutton

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had two bedrooms, one occupied by Dixon and his wife, and one by the defendant. A search of the bedroom occupied by the defendant revealed approximately \$630 in bills located between a mattress and box springs, and a green jacket belonging to the defendant that contained a panty hose stocking and several rolls of coins. In Dixon's bedroom, the officers found a blue Banch Banking and Trust Company bag containing \$74 in change. A brown Ford station wagon with New York license plates that was identified as belonging to the defendant was also found outside the mobile home.

Defendant presented evidence tending to show the following:

The defendant had recently driven from New York and had brought the \$630 found between the mattress with him on that trip. The rolled coins found in the green jacket also belonged to him, and he carried them to pay tolls in his work as a truck driver. Defendant had nothing to do with the robbery. He had loaned his car out the night before the robbery and did not know when it was returned.

Defendant was found guilty as charged. From a judgment imposing a prison sentence of thirty years, defendant appealed.

*Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.*

*Hutchins, Romanet, Thompson & Hilliard, by Charles T. Busby, for defendant appellant.*

HEDRICK, Judge.

By his first two assignments of error, the defendant contends that the trial judge incorrectly instructed the jury with regard to the law of aiding and abetting and then incorrectly applied the law to the facts of the case. Defendant argues that the instructions given would permit the jury to find him guilty of aiding and abetting without finding that he was either actually or constructively present at the scene of the crime. We agree.

After charging the jury with regard to the legal principle of aiding and abetting, the trial judge gave the following instruction:

[S]o I charge you that if you find, beyond a reasonable doubt . . . that if [the defendant] was not physically present, that



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he shared the criminal purpose of Thurman Dixon and to the knowledge of Dixon assisted him by furnishing a motor vehicle and planning the crime and thereby aided him, it would be your duty to return a verdict of guilty of armed robbery as to Alonzo Sutton.

This instruction is erroneous because it would permit the jury to find the defendant guilty of aiding and abetting if they found that his only participation was the furnishing of the automobile to Dixon prior to the time that Dixon committed the crime, even though the jury also found that the defendant was not present during the commission of the offense and had no knowledge that the crime would be committed. "[P]resence, either actual or constructive, is indispensable to the position of a principal in the second degree." *State v. Wiggins*, 16 N.C. App. 527, 530, 192 S.E. 2d 680, 682 (1972). When a person is not actually present at the scene of the offense, to be guilty of aiding and abetting he must have the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and be near enough to render such assistance, and he must communicate this intent to the perpetrators. *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E. 2d 352, 357 (1975); *State v. Gregory*, 37 N.C. App. 693, 247 S.E. 2d 19 (1978); *State v. Williams*, 28 N.C. App. 320, 220 S.E. 2d 856 (1976). If the jury finds that the defendant was neither actually nor constructively present at the scene of the crime, the evidence in this case would permit the jury to find him guilty at most, of being an accessory before the fact. *State v. Wiggins, supra*. For error in the instructions, the defendant is entitled to a new trial.

We find it unnecessary to discuss defendant's remaining assignment of error since it is unlikely to recur at a new trial.

New trial.

Chief Judge MORRIS and Judge WEBB concur.

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**Craver v. Craver**

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CAROLYN A. CRAVER v. ORVILLE BRUCE CRAVER

No. 7822SC462

(Filed 5 June 1979)

**Tenants in Common § 3— tenant in possession by court order—repairs—cost not apportioned**

A tenant in common in possession of property by court order who makes repairs to the property may not charge a proportional part of the costs of the repairs to the co-tenant.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 23 January 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 28 February 1979.

The plaintiff filed a complaint in which she alleged that she and defendant owned as tenants in common a certain tract of real estate in Lexington Township of which she has possession pursuant to a judgment for alimony. She alleged further that she has made expenditures in the amount of \$14,480.91 on the property which "were reasonably necessary in order to repair, renovate, preserve, protect and rehabilitate said property." She also alleged that she had made demand on the defendant for a contribution of one-half this amount which he had refused. She prayed that she have a judgment against the defendant for one-half the expenditures. The defendant filed an answer in which he admitted the plaintiff's allegations as to the ownership and possession of the property, but denied the plaintiff had made the repairs as alleged. The defendant made a motion for summary judgment and relied solely on the pleadings. Judge Collier granted the defendant's motion.

*Wilson, Biesecker, Tripp and Wall, by Joe E. Biesecker, for plaintiff appellant.*

*Grubb, Penry and Penry, by J. Rodwell Penry, Jr., for defendant appellant.*

WEBB, Judge.

The motion in this case was purportedly made under Rule 56. There is nothing in the record for us to consider except the pleadings. We shall consider the motion as if it were made under

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Rule 12(c) for judgment on the pleadings. See *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E. 2d 68 (1974).

This appeal brings to the Court the question of whether a tenant in common in possession of property by court order may make repairs to the property and charge a proportional part of the costs of the repairs to the co-tenant. This question has not been previously decided in the state. In *Jenkins v. Strickland*, 214 N.C. 441, 199 S.E. 612 (1938), at the time of a sale for partition of real property a co-tenant was allowed the value of the improvements she had placed on the property. In *Holt v. Couch*, 125 N.C. 456, 34 S.E. 703 (1899), a co-tenant was allowed credit in the division of the property for the value of improvements he had made to the property as well as money he had paid to maintain the property. In each of the cases the tenant made the claim at the time of partition and in neither case did the co-tenant have the right to exclusive possession of the property. We do not believe either is precedent for this case. James A. Webster, Jr., in his *Real Estate Law in North Carolina*, § 109, p. 118 (1971) says:

“If repairs become necessary to the common property and one co-tenant pays for such necessary repairs which are made to preserve the property, he is entitled to contribution from his fellow co-tenants in a court of equity. While North Carolina is not clear on the point, in most jurisdictions a co-tenant who is in possession of the common property is not entitled to compensation for expenditures made for repairs to the common property while he is in possession. In such cases the value of the possession and enjoyment of the common property is deemed to compensate the repairing co-tenant.”

On the facts of this case, we adopt the reasoning of Professor Webster. We hold that the plaintiff is not entitled to compensation for expenditures made for repairs to the common property while she was by law entitled to exclusive possession of the property. The question of what the plaintiff's position would be upon a partition of the property is not before us.

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

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**Fowler v. Chaircraft, Inc.**

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LONNIE B. FOWLER, EMPLOYEE-PLAINTIFF v. CHAIRCRAFT, INCORPORATED,  
EMPLOYER-DEFENDANT AND CITY INSURANCE COMPANY, CARRIER-DEFENDANT

No. 7810IC546

(Filed 5 June 1979)

**Master and Servant § 55.3— workmen's compensation—back injury—accident**

The evidence, though conflicting, was sufficient to support findings by the Industrial Commission that plaintiff upholsterer slipped as she turned to pick up a chair and hurt her back and that her injury therefore resulted from an accident.

APPEAL by defendants from the North Carolina Industrial Commission opinion and award of 8 March 1978. Heard in the Court of Appeals 8 March 1979.

Plaintiff seeks compensation for a back injury allegedly sustained while working for defendant, Chaircraft, Inc. A hearing was held before a Deputy Commissioner who denied an award on 4 October 1977. The evidence at that hearing tended to show that on 27 May 1976, plaintiff was working for Chaircraft upholstering chairs. She had been employed for over four years and her normal duty was building diners but she had been upholstering chairs for several days prior to 27 May 1976. In upholstering, plaintiff had to turn ninety degrees to lift up the chair cushion and put it on her work table and then had to pick up the chair, carry it over a co-worker's head and put it on the table. Around 9:00 a.m. on that date plaintiff was turning to pick up a chair. The evidence is conflicting as to what exactly happened. Plaintiff testified that when she turned she stumped her toe on her co-worker's mat and had to catch the chair to keep from falling. She then went to lift the chair and immediately felt a sharp pain in the lower center of her back. She told her co-worker that she had hurt her back and her co-worker lifted plaintiff's chairs for the remainder of that work day. Plaintiff worked the following day but testified that she was in pain. In an earlier statement to the defendants, plaintiff did not maintain that she had slipped. Plaintiff underwent surgery on 24 January 1977 to correct a herniated disc. The parties stipulated that plaintiff has a ten percent permanent partial disability. The Deputy Commissioner's denial of an award was reversed by the Full Commission which found that plaintiff's injury was an accident which arose out of and in the course of employment. From this finding, defendants appeal.

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**Fowler v. Chaircraft, Inc.**

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*West and Groome, by Ted G. West and J. Michael Correll, for plaintiff appellee.*

*Hedrick, Parham, Helms, Kellam, Feerick and Eatman, by Edward L. Eatman, Jr., for defendant appellants.*

VAUGHN, Judge.

Defendants contend that the Full Commission erred in finding that plaintiff sustained a compensable injury because the evidence was insufficient to support this finding. "Findings of Fact of the Industrial Commission are binding on appeal when supported by any competent evidence, even though there be evidence which would have supported a contrary finding." *Hardin v. Trucking Co.*, 29 N.C. App. 216, 219, 223 S.E. 2d 840 (1976); *Larue v. Austin-Berryhill, Inc.*, 25 N.C. App. 408, 213 S.E. 2d 391, cert. den., 287 N.C. 466, 215 S.E. 2d 624 (1975); *Benfield v. Troutman*, 17 N.C. App. 572, 195 S.E. 2d 75, cert. den., 283 N.C. 392, 196 S.E. 2d 274 (1973). "The Commission is the judge of the credibility of the witnesses and the weight to be given the evidence." *Rosser v. Wagon Wheel, Inc.*, 19 N.C. App. 507, 511, 199 S.E. 2d 150, cert. den., 284 N.C. 424, 200 S.E. 2d 660 (1973).

Defendants claim the evidence was insufficient to show that this injury was accidental. An accident does not result from the completion of normal and customary duties in the usual way but rather involves interruption of the work routine and unusual conditions. *Gray v. Storage, Inc.*, 10 N.C. App. 668, 179 S.E. 2d 883 (1971). The evidence was contradictory as to whether plaintiff slipped as she turned to pick up the chair. The Full Commission found that plaintiff had slipped and, as she attempted to pick up the chair, she hurt her back. Since the evidence supported the finding that there was an accident arising out of and in the course of the employment, the Commission's conclusion that this was a compensable injury was proper. The Commission, therefore, did not err in awarding compensation to plaintiff.

Affirmed.

Judges CLARK and CARLTON concur.

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**Conner v. Insurance Co.**

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ELSIE M. CONNER, ADMINISTRATRIX OF THE ESTATE OF JOSEPH C. CONNER, DECEASED v. OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA

No. 786DC789

(Filed 5 June 1979)

**Insurance § 27.1— credit life insurance—no renewal after expiration—no grace period**

A credit life insurance policy which expired on 2 December 1976 and contained no provisions for extension or renewal was not in effect on and after its expiration date notwithstanding the "grace period" provision of G.S. 58-211, since no payment for any premium was or could have been due after the expiration date and no extension of the period of coverage arose.

APPEAL by plaintiff from *Long (Nicholas), Judge*. Judgment entered 6 June 1978 in District Court, HERTFORD County. Heard in the Court of Appeals 22 May 1979.

This action was instituted when the plaintiff filed a complaint seeking to recover the benefits of a credit life insurance policy covering the life of the plaintiff's intestate. The defendant, the Occidental Life Insurance Company of North Carolina, admitted the existence of the policy but denied that it was in effect at the time of the insured's death. When the case was called for trial, it was submitted to the trial court upon a stipulated set of facts. After considering those facts, the pleadings and the arguments of counsel, the trial court concluded that the policy was not in effect at the time of the death of the insured and entered judgment in favor of the defendant. From the entry of that judgment, the plaintiff appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

*Cherry, Cherry & Flythe, by Joseph J. Flythe, for plaintiff appellant.*

*Ragsdale, Liggett & Cheshire, by Joseph B. Cheshire, V, for defendant appellee.*

MITCHELL, Judge.

The plaintiff's sole assignment of error on appeal is that the trial court erred in concluding that the insurance policy in ques-

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**Conner v. Insurance Co.**

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tion was not in effect at the time of the insured's death. The policy had an effective date of 3 May 1976 and an expiration date of 2 December 1976 with no provisions for extensions or renewals. Although the insured died nine days after the expiration date of the policy, the plaintiff contends that the insurance policy was still in effect at that time by virtue of the terms of G.S. 58-211. We do not agree.

G.S. 58-211 requires that all group life insurance policies delivered in this State must contain:

(1) A provision that the policyholder is entitled to a grace period of 31 days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy.

This requirement does not apply in the present case.

At the time of the insured's death on 11 December 1976, the policy had expired. At that time, no premium was due. The quoted provision in G.S. 58-211 only extends the time in which a premium may be paid; it does not extend the period of coverage. Since the insurance policy expired on 2 December 1976 and contained no provisions for extension or renewal, no payment for any premium was or could have been due after that date and no extension of the period of coverage arose. The policy was not in effect on and after that date notwithstanding the provisions of G. S. 58-211. Therefore, the plaintiff's assignment of error is overruled and the judgment of the trial court is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

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**State v. Crouch**

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STATE OF NORTH CAROLINA v. LESTER ALLEN CROUCH

No. 7925SC172

(Filed 5 June 1979)

**Criminal Law § 155.1— record on appeal—time for filing—appeal dismissed**

For failure of defendant to file the record on appeal within ten days after the certification by the Clerk of Superior Court, defendant's appeal is dismissed.

APPEAL by defendant from *Browning, Judge*. Judgment entered 4 October 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals 22 May 1979.

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

*Ingle and Joyner, by John D. Ingle, for defendant.*

MARTIN (Harry C.), Judge.

Defendant was convicted of operating an automobile while under the influence of intoxicating liquors, and sentence was imposed. Defendant appealed. The record on appeal was certified by the Clerk of Superior Court on 27 December 1978, however, appellant did not file the record on appeal in the Court of Appeals until 26 February 1979.

It is required that appellant file the record on appeal within ten days after the certification by the Clerk of Superior Court. Rule 12(a), North Carolina Rules of Appellate Procedure. Failure to so do subjects the appeal to dismissal. The Rules of Appellate Procedure are mandatory. *State v. Lesley*, 33 N.C. App. 237, 234 S.E. 2d 476 (1977); *Ledwell v. County of Randolph*, 31 N.C. App. 522, 229 S.E. 2d 836 (1976).

For defendant's failure to comply with the Rules of Appellate Procedure, the appeal is

Dismissed.

Judges PARKER and MITCHELL concur.



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**Mortgage Corp. v. Insurance Co.**

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**NATIONAL MORTGAGE CORPORATION v. AMERICAN TITLE INSURANCE COMPANY**

No. 7815SC587

(Filed 19 June 1979)

**1. Insurance § 148— title insurance—defect not created by insured—denial of coverage improper**

In an action to recover under a title insurance policy issued by defendant, coverage was not excluded by language in the policy that it did not insure against loss or damage by reason of "Defects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the insured claiming loss or damage . . ." since the defect in the title under consideration occurred because of innocent conduct by the insured in authorizing an improper disbursement of loan proceeds.

**2. Insurance § 148— title insurance—no bad faith of insured—denial of coverage improper**

The trial court erred in denying recovery under a title insurance policy based on a policy provision that "Pending disbursement of the full proceeds of the loan secured by the Deed of Trust . . . this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith and without knowledge of any defects in, or objections to, the title, up to the face amount of the policy" since there was no evidence in the record to suggest any bad faith conduct on the part of the plaintiff, its conduct in authorizing an unusual procedure for disbursement of loan proceeds being at the most negligent conduct.

**3. Insurance § 148; Estoppel § 8— title insurance—equitable estoppel—insufficiency of evidence**

Equitable estoppel did not apply to preclude plaintiff from recovering under a title insurance policy where plaintiff lender initially purchased the policy precisely to insure the priority of its lien against unforeseen defects; a defect arose because of the unlawful conduct of a third party to whom plaintiff had entrusted, wisely or not, much of its investment; any improper conduct on the part of plaintiff was at most negligent management of its funds; and plaintiff was not reaping benefits from any misconduct but would, should it be entitled to recover, merely be recovering the balance due of the loan made to the third person.

**4. Insurance § 148— defense by insurer—reservation of rights**

An insured is not required to accept a defense by insurer rendered under a "reservation of rights," and the insurer's conditional tender of defense does not absolve it of its contractual duty to defend an action for loss within the coverage of the policy.

Judge CLARK dissenting.

APPEAL by plaintiff from *McKinnon, Judge*. Judgment entered 28 January 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 26 March 1979.

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**Mortgage Corp. v. Insurance Co.**

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National Mortgage Company, a Delaware corporation with its principal offices located in Washington, D. C., initiated this action 13 April 1976 against American Title Insurance Company, a Florida corporation, to recover, under the terms of a title insurance policy issued by defendant, an amount equal to the balance due on a note secured by a certain deed of trust and the costs of defending an action to prohibit foreclosure under that deed of trust. This and several other lawsuits arose out of a transaction between National Mortgage Company and Jonas W. Kessing Company. Plaintiff and Jonas W. Kessing Company (Kessing) entered into a limited partnership known as Village Associates of Chapel Hill wherein plaintiff, as limited partner, made a construction loan to Kessing, as a general partner and a limited partner, for a proposed project to be constructed on the property of M. A. Abernethy and wife, Minna K. Abernethy, in downtown Chapel Hill. Construction was never begun, and Kessing subsequently defaulted. Plaintiff thereafter was prohibited from foreclosing under its deed of trust on the Abernethy property when its deed of trust was declared to have conveyed "no valid lien, encumbrance, secured interest, or interest of any kind" in a previous action entitled *M. A. Abernethy and wife v. National Mortgage Corporation et al., defendants, and National Mortgage Corporation, third party plaintiff v. American Title Insurance Company, third party defendant*, in Orange County, No. 74CvS68.

The facts of this case are in all material aspects undisputed. The essential facts are: On 30 June 1969, National Mortgage Corporation consummated a \$250,000 loan to Jonas Kessing Company secured by a deed of trust on three tracts of land, Tracts I and II consisting of a vacant lot on Franklin Street in Chapel Hill owned by M. A. Abernethy and wife, Minna K. Abernethy. The defendant in this action issued an interim title insurance binder to plaintiff insuring the title to Tracts I and II as of 30 June 1969, subject to certain terms set forth in that binder. On 8 July 1969, M. A. Abernethy and wife, Minna K. Abernethy, executed a "Subordination Agreement" purportedly giving plaintiff a first lien on the fee in the property in order to induce plaintiff to lend money to Kessing for the erection of shops and a theater on the property then held by Kessing as assignee under a lease from the Abernethys. Thereafter the defendant, in consideration of the payment of the \$487.50 premium, issued its policy of title in-

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**Mortgage Corp. v. Insurance Co.**

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insurance in favor of plaintiff insuring its first lien status on the property described in the deed of trust, subject to certain terms and conditions.

Disbursement of the loan proceeds was authorized by plaintiff to be made according to the schedule proposed by Jonas W. Kessing. The first \$125,000 was to be used to pay necessary closing costs and to cancel a second mortgage on the Castilian Apartments property, the third tract of land securing the deed of trust. The balance of the proceeds was then to be paid to Village Associates of Chapel Hill "to be placed in an interest-bearing account in a local bank in Chapel Hill" with periodic payments to the contractor of 90% of his expenses upon approval by the supervising architect. The attorney employed by Kessing to perform the legal services necessary to obtain the loan, Ted R. Reynolds of Reynolds and Farmer of Raleigh, recognized that the proposed disbursement was unusual for a construction loan and contacted Mr. Green, the president of plaintiff, to so inform him. Mr. Green, nevertheless, authorized disbursements as proposed, and Mr. Reynolds completed the disbursements 24 July 1969.

No construction or improvement was ever begun on the Abernethy property, and Jonas W. Kessing apparently misappropriated the \$125,000 disbursed to the limited partnership Village Associates of Chapel Hill. The loan came into default, and foreclosure was commenced by National Mortgage Corporation. The loan transaction was declared to have been usurious and non-interest-bearing in the decision of *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), because of the limited partnership arrangement. Foreclosure was prevented when judgment was entered in favor of the Abernethys in the related action mentioned above declaring the subordination agreement null and void and ruling that the deed of trust conveyed no security interest in the Abernethy property. The unpaid principal due on the loan remains \$79,282.26. The Abernethy lot had a fair market value of \$120,000 as of 15 January 1974.

National Mortgage Corporation provided its own defense in the previous action initiated by the Abernethys. American Title Insurance Company's tender of defense of the action with "reservation of rights" was rejected by National Mortgage Corporation,

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Mortgage Corp. v. Insurance Co.

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which thereafter filed a third party complaint against American Title Insurance Company. That third party action was voluntarily dismissed by plaintiff and reinstated in the form of the case under consideration.

The trial court in this case determined that the irregular disbursement scheduled authorized by National Mortgage Corporation caused the loss suffered by plaintiff, thus excluding coverage under the policy. The court's determination was based on certain language excluding loss or damage by reason of "[d]efects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the insured claiming loss or damage." Furthermore, the trial court determined that the disbursements of the funds under those conditions was not a disbursement made in "good faith" as required by the policy.

From entry of summary judgment in favor of defendant, plaintiff appeals.

*Allen, Hudson and Wright, by James Allen, Jr., for plaintiff appellant.*

*Midgette, Page and Higgins, by Keith D. Lembo, for defendant appellee.*

MORRIS, Chief Judge.

Plaintiff's assignment of error presents two questions on appeal. First, did certain language of the policy of title insurance exclude coverage under the facts of this case? Second, is the defendant insurer liable for expenses incurred by plaintiff in defense of the Abernethy action brought to declare the deed of trust invalid?

Exclusions

[1] Defendant relies on two separate provisions of the policy of title insurance to exclude coverage for plaintiff's losses. Defendant first relies on language in the "American Land Title Association Standard Loan Policy" outlining conditions and stipulations appearing on page three of the policy:

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**Mortgage Corp. v. Insurance Co.**

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“3. *Exclusions from the Coverage of this Policy.* This policy does not insure against loss or damage by reason of the following: . . .

(d) Defects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the Insured claiming loss or damage. . . .”

Defendant's contention is that plaintiff's improper disbursement of the loan proceeds was the causal factor in the loss of the lien of the deed of trust. They point out that the lien was declared ineffectual by the judgment in the Abernethy case for the reason that the proceeds were not disbursed for the purpose of erecting permanent improvements. In that case, the owners of the fee were found to have subordinated their fee interest in the real estate only to the extent that the loan proceeds were disbursed in payment for the erection of permanent improvements. Plaintiff, on the other hand, contends that the exclusion applies only if the act causing the loss is the result of some dishonest, illegal or inequitable dealing by the insured. Plaintiff asserts that protection from loss due to the possible negligent creation of a defect by the insured is one of the reasons for purchasing title insurance. Plaintiff concedes that recovery would not be permitted if the plaintiff had knowingly created the title defect.

Although there were apparently no controlling cases in North Carolina, the overwhelming weight of authority supports plaintiff's position that the policy language does not exclude coverage for losses suffered by this insured. A fundamental rule in the interpretation of insurance policies requires that an ambiguity in the words of the policy must be resolved in favor of the insured. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978); *Pleasant v. Insurance Co.*, 280 N.C. 100, 185 S.E. 2d 164 (1971); *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967). In applying a similar rule of construction, the courts in other jurisdictions have consistently concluded that policy language essentially identical to that of the policy language quoted above excludes coverage for losses incurred because of the insured's own conduct only when it is a result of some dishonest, illegal, or inequitable dealings by the insured. *See generally* Annot., 98 A.L.R. 2d 527 (1964). Where a defect in the title occurs

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because of innocent conduct by the insured, coverage should not be excluded by the language embodied in the "Conditions and Stipulations" of section 3(d) of the policy before the Court. See, e.g., *Laabs v. Chicago Title Insurance Company*, 72 Wis. 2d 503, 241 N.W. 2d 434 (1976); *Arizona Title Insurance & Trust Company v. Smith*, 21 Ariz. App. 371, 519 P. 2d 860 (1974); *Hansen v. Western Title Insurance Company*, 220 Cal. App. 2d 531, 33 Cal. Rptr. 668 (1963). On the other hand, where the insured has been involved in a fraudulent or unconscionable scheme, recovery should be denied based on similar policy language. See, e.g., *Keown v. West Jersey Title and Guaranty Company*, 161 N.J. Super. 19, 390 A. 2d 715 (1978); *Conway v. Title Insurance Co.*, 291 Ala. 76, 277 So. 2d 890 (1973); *Feldman v. Urban Commercial, Inc.*, 87 N.J. Super. 391, 209 A. 2d 640 (1965); *Taussig et al. v. Chicago Title & Trust Co.*, 171 F. 2d 553 (7th Cir. 1948); *First Nat'l Bank & Trust Co. v. New York Title Insurance Company*, 171 Misc. 854, 12 N.Y.S. 2d 703 (1939).

The precise meaning of the phrase "created, suffered, assumed or agreed to" has been considered in the recent case of *Arizona Title Insurance & Trust Company v. Smith*, *supra*. That case, in accordance with the unanimity of authority, holds that the word "created" requires an affirmative act deliberately bringing about the defect. The word "suffered" implies a failure to exercise a power with the intention that the defect be created. *Accord.*, *Hansen v. Western Title Insurance Company*, *supra*. The terms "assumed" or "agreed to" appear clearly inapplicable to the conduct of the plaintiff in the case at bar. The record is uncontradicted that the lender specifically demanded that as a precondition to the loan that the fee owners subordinate their interest to that secured by the insured's deed of trust. The insured, in this case, cannot be said to have "assumed" or "agreed to" a defect (the failure of the subordination agreement to remain effective) when it specifically sought to have the fee interest subordinated to its leasehold interest in order to obtain the loan and the title insurance. It follows that plaintiff has not "created, suffered, assumed or agreed to" the defect in title invalidating plaintiff's deed of trust by authorizing an improper method of disbursement. Mere negligence does not constitute "creation". *Keown v. West Jersey Title & Guaranty Co.*, *supra*.

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[2] Schedule B of the title insurance policy excludes loss or damage by reason of failure to comply with certain conditions added by the insurer to apply specifically to the transaction under consideration. The fifth condition provides in typewritten form:

"5. Pending disbursement of the full proceeds of the loan secured by the Deed of Trust described in Schedule 'A' hereof, this policy insures only to the extent of the amount actually disbursed, but increases as each *disbursement is made in good faith* and without knowledge of any defects in, or objections to, the title, up to the face amount of the policy." (Emphasis added.)

The trial court relied on the foregoing underscored policy language as an additional or alternative ground for denying recovery. The correctness of that judgment depends upon the correct interpretation to be given the phrase "good faith" in contradistinction to "bad faith". The Court in *Bundy v. Credit Co.*, 202 N.C. 604, 163 S.E. 676 (1932), in the process of reviewing a jury instruction defining "in bad faith", offered the following explanation of the phrase:

"Bad faith cannot be defined with mathematical precision. . . . Certainly, it implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack." 202 N.C. at 607, 163 S.E. at 677; *see also Polikoff v. Service Co.*, 205 N.C. 631, 172 S.E. 356 (1934).

That court approved the trial court's instruction stating that "the phrase 'in bad faith' imports that the transaction involved was dishonestly conceived and consummated with knowledge of a fraudulent design or deception." We find no evidence in the record to suggest any bad faith conduct on the part of this plaintiff. To the contrary, it appears that plaintiff was the object of bad faith conduct on the part of Jonas W. Kessing who breached the agreement for disbursement of funds as proposed in his letter to the plaintiff. Plaintiff's conduct in authorizing the unusual disbursement procedure is at most negligent conduct. Defendant has failed to satisfy his burden of placing plaintiff within the fifth exclusion contained in the policy. *See Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837 (1964) (burden on insurer to show exclusion).

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Equitable Estoppel

[3] Additionally, defendant urges this Court to apply the doctrine of equitable estoppel to prevent what it characterizes as an opportunity for the plaintiff to reap benefits from its own improper conduct at the expense of the defendant, who is characterized as an innocent party. We cannot agree that the record supports defendant's characterization of the transaction, and we find no grounds for the application of equitable estoppel. Initially, plaintiff purchased the policy of title insurance precisely to insure the priority of its lien against unforeseen defects. The defect arose because of the unlawful conduct of a third party to whom plaintiff had entrusted, wisely or not, much of its investment. Any improper conduct on the part of the plaintiff was at most negligent management of its funds. Furthermore, plaintiff is not reaping benefits from any misconduct. The unpaid balance due on the loan remains at \$79,282.26, excluding interest in accordance with *Kessing v. Mortgage Corp.*, *supra*. Should plaintiff be entitled to recover, it would merely be recovering the balance of the loan made to Kessing. Finally, it can hardly be said that defendant in this action is "innocent". Defendant is in the business of insuring against the risk of loss incurred through unanticipated defects in title to real property.

The basis of the doctrine of equitable estoppel was well expressed in the case of *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911). The elements thereafter were outlined as follows:

"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." 154 N.C. at 365-66, 70 S.E. at 826-27.

The Court treated the doctrine as a "species of fraud", although it is apparent that neither bad faith, actual fraud, nor intent to deceive is necessary to invoke equitable estoppel. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). The basis of the



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principle, however, is the taking of inconsistent positions which essentially amount to a fraud upon the party who has relied to its detriment upon the original conduct. See *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979); *Bizzell v. Equipment Co.*, 182 N.C. 98, 108 S.E. 439 (1921). The facts of this case simply present no grounds for the application of the doctrine of equitable estoppel. Defendant cites *Feldman v. Urban Commercial, Inc.*, 78 N.J. Super. 520, 189 A. 2d 467 (1963), as authority for applying equitable principles to preclude plaintiff's recovery. The defect in title in that case arose upon the application of the equitable doctrine of unclean hands by which the trial court barred plaintiff's action for foreclosure under the mortgage, because the mortgage itself was declared by the court to amount to an unconscionable scheme by plaintiff improperly to shift the major portion of the risk of its investment to the redevelopment agency. Here, as noted above, plaintiff has not affirmatively created his own defect. The conduct of plaintiff's partner, wrongful as against plaintiff as well as the fee owners of the property, created the defect in plaintiff's title. Moreover, the doctrine of unclean hands applied in *Feldman* is inapplicable here where plaintiff is not seeking an equitable remedy against defendant. Cf. *Trust Co. v. Realty Corporation*, 215 N.C. 526, 2 S.E. 2d 544 (1939).

Expenses of Defending Abernethy Case

[4] The record indicates and plaintiffs concede that there was no absolute refusal on the part of the insurer to defend the action. American Title Insurance Company offered to defend the suit with a "reservation of rights". National Mortgage Corporation, however, asserted that such a reservation would create a possible conflict of interest since there was a dispute between insurer and insured as to whether there was coverage for the loss under the policy. National Mortgage Corporation chose to defend itself and cross-claimed against American Title Insurance Company for indemnity and expenses incurred in defending the Abernethy case. That cross-claim was subsequently dismissed voluntarily and reinstated in the form of the present action.

The general rules applying to the duty of the insurer to defend are essentially undisputed. The duty of the insurer to defend under an indemnity policy arises if the facts alleged, if true, impose liability on the insured within the coverage of the policy.

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*Insurance Co. v. Insurance Co.*, *supra*; see also *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968). See generally 9 Appleman, *Insurance Law and Practice* § 5216. A breach of the insurance contract occurs if the insurer wrongfully refuses to defend on the grounds that the claim is not within the policy's coverage, and the insurer becomes liable for all damages resulting to the insured because of the breach of contract, including all expenses incurred in defending the action. *Insurance Co. v. Insurance Co.*, 277 N.C. 216, 176 S.E. 2d 751 (1970); see generally Annot., 49 A.L.R. 2d 694 (1956). However, in the present case the insurer did not unconditionally refuse to defend the action, but insisted that it would defend only with a reservation of rights. Such a reservation of rights is generally required to prevent the insurer from being estopped to deny coverage under the policy once the defense is conducted with knowledge of facts taking the loss outside the coverage of the policy. *Early v. Insurance Co.*, 224 N.C. 172, 29 S.E. 2d 558 (1944); see generally Annot., 38 A.L.R. 2d 1148 (1954); Note, 68 Harv. L. Rev. 1436 (1955). We are faced with the question whether the insurer is absolved from his duty to defend, and the liability for the expense thereof, by tendering a defense of the action under reservation of its rights after it is finally determined that the loss was within the coverage of the policy.

It has been held that the insured is not required to accept a conditional tender of defense of an action. This result has generally been reached where the courts have refused to require an insured to sign a "non-waiver agreement". *Babcock & Wilcox Company v. Parsons Corporation*, 430 F. 2d 531 (8th Cir. 1970); *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W. 2d 623 (1951). The "non-waiver agreement" is a device intended to have the same legal effect as a "reservation of rights". The distinction is that the former takes the form of a bilateral agreement, whereas the latter is merely a unilateral notice given by the insurer, that the insurer intends to proceed without waiving its right ultimately to contest coverage. See *Motorists Mutual Insurance Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E. 2d 874 (1973). Such a refusal is sometimes justified because of the insured's fear that the insurer may not be motivated to provide a vigorous defense despite its duty to use good faith in its undertaking.

The insurer who refuses to defend an action against its insured where coverage is in dispute does so at its own risk. See

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7A Appelman, Insurance Law & Practice, § 4686. The insurer's conditional tender of defense does not absolve it of its contractual duty to defend an action for loss within the coverage of the policy. Just as an insured is not required to accept a defense conditioned upon entering into a "non-waiver agreement", he is not required to accept a defense rendered under a "reservation of rights". *Sears v. Interurban Transportation Co.*, 14 La. App. 343, 125 So. 748 (1930). See also *Pennsylvania Threshermen & Farmer's Mutual Casualty Insurance Co. v. Robertson*, 157 F. Supp. 405 (M.D.N.C. 1957); *United States Fidelity & Guaranty Co. v. Baker*, 24 Ala. App. 274, 134 So. 894 (1931). Compare, *Insurance Co. v. Harrison-Wright Co.*, 207 N.C. 661, 178 S.E. 235 (1935). Plaintiff was entitled to reject the conditional offer by the defendant to defend the Abernethy case and still seek indemnity for the costs of defending that action.

The judgment of the trial court with respect to both coverage under the policy and liability for the cost of defending the Abernethy case is

Reversed.

Judge ARNOLD concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

Plaintiff made a construction loan of \$250,000 to Village Associates, with knowledge that these funds were borrowed for the specific purpose of the construction of improvements on the Abernethy lots. Plaintiff knew that the construction of improvements was a condition contemplated by the lease agreement and the subordination agreement. The lease agreement provided in pertinent part:

"10a. The Lessor agrees to subordinate and subject its fee simple title in and to the premises to the lien of any mortgages or deeds of trust placed on the premises by the Lessee to secure construction and permanent financing, including primary financing, for the erection, furnishing and equipping of improvements on the premises provided that under no circumstances shall the maturity date of any such mortgage or deed of trust extend beyond the fifty-ninth year of the

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term hereof, and at the request of the Lessee will execute any mortgage deed of trust or subordination agreement to effectuate the provisions of this paragraph.

10b. The Lessor shall not be personally responsible for the payment of any such indebtedness secured by the Lessee for the erection of improvements on the premises, and that such financing shall not exceed the actual cost of the aforementioned improvements and equipment."

On 12 July 1969, Jonas W. Kessing wrote a letter to Richard F. Downham, Attorney for the plaintiff, which stated that the total loan proceeds would be paid immediately to Village Associates, \$125,000 to be placed in an account to be held for construction of the buildings on the Abernethy lot, the remainder to be disbursed for closing costs and to pay the second mortgage on the Castilian Apartments. Mr. Downham responded on 14 July 1969, to the effect that the disbursement schedule was acceptable to plaintiff. On 24 July 1969, Reynolds, the Attorney for Jonas W. Kessing Co. and agent for the plaintiffs, telephoned the plaintiff's offices and informed the president of National Mortgage Co., Mr. Green, that the disbursement schedule was unusual in that it disbursed all the funds prior to beginning construction. Mr. Green informed Reynolds to proceed with the disbursements.

The plaintiff clearly agreed to disburse funds for purposes other than the construction of buildings on the Abernethy lot with knowledge that this was contrary to the express terms of the lease between Kessing and the Abernethys and the terms of the subordination agreement. The plaintiff also agreed to the unorthodox disbursement scheme which endangered the security of the mortgage on the Abernethy property.

In *Brick Realty Corp. v. Title Guarantee & Trust Co.*, 161 Misc. 296, 291 N.Y.S. 637 (1936), the court held that a title insurance company was not obligated to defend a suit brought by the mortgagor's wife in which she claimed that the mortgagor fraudulently schemed to wipe out her dower rights. The court noted that the title insurance company did not insure the defendant against the consequences of his own acts. See *Feldman v. Urban Commercial, Inc.*, 87 N.J. Super. 391, 209 A. 2d 640 (1965). From the facts before us, the conclusion is inescapable that the defect in the title arose because plaintiff agreed to distribute

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funds for purposes other than construction of buildings on the Abernethy lots in violation of the terms of the lease and subordination agreement and because plaintiff jeopardized its security by agreeing to the unusual disbursement scheme. The defendant insurance company did not insure plaintiff against the consequences of its own reckless acts, and was therefore not liable for any loss occasioned thereby.

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AMOS E. REED v. ROYCE BYRD

No. 7810SC687

(Filed 19 June 1979)

**1. State § 12— State employees—demotion for just cause—private investigation of superior—refusal to cooperate in investigation**

As used in the statute providing that no State employee may be reduced in pay or position except for "just cause," the term "just cause" would include either the undertaking of a private investigation of a superior or the refusal to answer questions in a departmental investigation.

**2. State § 12— State employee—authority of State Personnel Commission to reinstate demoted employee**

The provisions of G.S. 126-37 giving the State Personnel Commission the authority to restore a State employee to a position from which he has been demoted must be read in conjunction with G.S. 126-35 which forbids demotion without just cause, and the Commission therefore does not have the power to restore a State employee to a position from which he has been demoted without some finding that the employee has been treated wrongfully.

**3. State § 12— State employees—demotion for refusal to cooperate in investigation—no finding of justification—no authority by Personnel Commission to reinstate**

The State Personnel Commission did not have the authority to reinstate an employee of the Department of Corrections to the position from which he was demoted where the Commission found upon competent evidence that the employee refused to cooperate in a departmental investigation and the Commission made no finding that the refusal to cooperate was justified.

Judge MARTIN (Robert M.) dissenting.

APPEAL by petitioner from *McLelland, Judge*. Judgment entered 2 June 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1979.

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The respondent, Royce Byrd, has been for many years an employee of the Department of Corrections and in 1977 he was a Correctional Sergeant at the McDowell Prison Unit. In 1977 he was demoted and transferred for violating the chain of command and for failure to assist in an investigation by the Division of Prisons. On 24 June 1977 a hearing was held by the State Personnel Commission.

The evidence at the hearing was that respondent felt that one of his superiors in the Department was harassing him. Pursuant to rumors he had heard, respondent began a surveillance of the superior to determine whether the superior was having an affair with a female employee of the Department. He recorded his observations and obtained copies of certain motel receipts and telephone bills during the course of the surveillance. In December 1975, the respondent discussed the situation with Grady Waycaster, Supervisor of the McDowell Unit. Mr. Waycaster caused an investigation to be commenced by the State Bureau of Investigation as to the possible misuse of State property by respondent's superior.

In January 1976, Ralph Edwards, Director of Prisons, learned of the SBI investigation and instructed H. M. Lilly, Geographic Command Manager, to make an investigation for the Division of Prisons. Lilly questioned the respondent who admitted making personal observations of his superior and the female prison employee. Respondent refused to divulge the source of the copies of the receipts and telephone bills, giving as his reason that he felt he was being prosecuted rather than his superior. Subsequently, he told Edwards that he had received the bills and receipts anonymously through the mail. Shortly after the interviews with Lilly and Edwards, respondent was transferred and demoted because of his error in conducting a personal investigation, failing to report what he knew through the chain of command, and failing to assist the Department in its investigation.

The State Personnel Commission made findings of fact in accordance with the evidence and concluded respondent had exercised poor judgment when he undertook to monitor the off-duty activities of his superior, but that it was unreasonable to expect respondent to follow his chain of command in reporting the alleg-

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ed misconduct because his superior was in that chain of command. The State Personnel Commission made no conclusion as to the facts supporting the Department of Corrections' determination that the respondent had failed to assist the Department in an investigation. The State Personnel Commission ordered the respondent reinstated to his former rank and pay grade. Amos Reed, Secretary of the Department of Corrections, petitioned the Superior Court of Wake County for review. On 2 June 1978 the superior court entered an order affirming the action of the State Personnel Commission.

*Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for petitioner appellant.*

*Hatcher, Sitton, Powell and Settlemeyer, by Claude S. Sitton, for respondent appellee.*

WEBB, Judge.

Chapter 126 of the General Statutes established a State Personnel System. The State Personnel Commission was created by G.S. 126-2. G.S. 126-4 provides:

Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:

\* \* \*

- (6) The appointment, promotion, transfer, demotion and suspension.

\* \* \*

- (9) The investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified.

G.S. 126-35 provides:

No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or posi-

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tion, except for just cause. . . . The employee, if he is not satisfied with the final decision of the head of the department, . . . may appeal to the State Personnel Commission.

G.S. 126-37 provides:

The State Personnel Commission is hereby authorized to reinstate any employee to the position from which he has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority.

Pursuant to G.S. 126-4, the State Personnel Commission has established rules and policies governing the investigation of complaints by employees and the issuing of binding corrective orders. The rules and policies set forth certain things which are causes for suspension or dismissal, but do not set forth any matters which will be considered as justification for wrongful acts.

[1-3] The question posed on this appeal is whether under the statutes and policies adopted pursuant thereto the State Personnel Commission exceeded its authority in ordering the reinstatement of respondent in light of the evidence and its findings of fact. We hold the Commission exceeded its authority. Looking first at the statutes, G.S. 126-35 provides no employee may be reduced in "pay or position, except for just cause." The statute does not define "just cause," but giving the words their ordinary meaning, we believe it would include either the undertaking of a private investigation of a superior or the refusal to answer questions in an investigation within the Department. The Commission has made a finding of justification for undertaking the surveillance, but has not made any conclusion as to the refusal to cooperate. We are left then with a finding supported by the evidence that the respondent has refused to cooperate in a departmental investigation. This would be just cause for a reduction in pay or position under G.S. 126-35. G.S. 126-37 gives the State Personnel Commission power to grant relief to employees by reinstating them to positions from which they have been removed. The clause which gives the Commission this power does not say the employee must have been wrongfully removed in



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order for the Commission to exercise this power. Other clauses in the section use the terms "wrongfully denied" and "correct the abuse" in stating the conditions which must be met in order for the Commission to enter an order affecting an employee's status. We do not believe the General Assembly intended that the State Personnel Commission would have the power to restore a State employee to a position from which he had been demoted without some finding that the employee had been treated wrongfully. We believe G.S. 126-37 must be read in conjunction with G.S. 126-35 which forbids demotion without just cause. The conclusion of the Commission is that the respondent did not act unreasonably in not following the chain of command. There was no conclusion as to his failure to cooperate in the investigation. Assuming the conclusion of the Commission was proper, it leaves a finding of fact by the Commission that the respondent failed to cooperate with his superiors with no conclusion that this was justified in any way. On this finding of fact it cannot be said the defendant was demoted wrongfully or without just cause. Based on this finding we hold the Commission could not under G.S. 126-37 reinstate respondent to the position from which he had been demoted.

G.S. 126-4 gives the Commission the power with the approval of the Governor to establish policies under the act. We are not faced with the question of whether the Commission can establish a policy with the approval of the Governor under which it can excuse improper conduct by an employee because it has made and the Governor has approved no such policy. Since the Governor must approve policies under the statute, the Commission does not have the power to alter such policies by ad hoc decision in each case. The Commission must follow the policy which has been set and as it was approved by the Governor.

In this case the Commission has found, based on competent evidence, that Royce Byrd refused to cooperate in a departmental investigation. The Commission did not make any finding of justification for this and we can find no evidence of justification in the record. We hold that under the statute and policies adopted thereto, this was wrongful conduct and just cause for demotion. The Commission does not have the power to order the reinstatement of respondent Royce Byrd under the circumstances. We make no decision as to the Commission's conclusion that the respondent was justified in not going through the chain of com-

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mand because it is not necessary for a decision in this case. Nor do we pass on what the result would be if the Commission had made a policy with the approval of the Governor that it could order an employee reinstated although it finds he has done something wrongful. That question is not before us.

The petitioner has not sought to have us consider whether the unfettered discretion which the respondent Byrd contends the General Assembly has granted to the Commission by enacting the statutes previously referred to herein would constitute an unconstitutional delegation of the legislative power of the General Assembly to the Commission in violation of Article I, § 6 and Article II, § 1 of the Constitution of North Carolina. For this reason, we need not consider that issue.

We hold the superior court was in error in affirming the order of the State Personnel Commission. On the evidence and facts found by the Commission, the Department of Corrections was justified in the action it took in regard to respondent. We reverse and order this case returned to the Superior Court of Wake County for the entry of an order consistent with this opinion.

Reversed and remanded.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I dissent from my learned brethren of the majority upon three grounds. I explore them in detail below.

First, I dissent from the majority's attempt to do a thing which they had no authority to do: namely, to enter a factual conclusion and a conclusion of law based thereon which is precisely contrary to the findings of the administrative tribunal below. The majority's opinion, at page 629, *ante*, states that "[i]n this case the Commission has found, based on competent evidence, that Royce Byrd [respondent in this matter] refused to cooperate in a Departmental investigation. The Commission did not make any finding of

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justification for this and we can find no evidence of justification in the record." The majority then concludes that this conduct was wrongful and was just cause for demotion as a matter of law. With this conclusion I cannot agree.

The Commission has not, in any part of the record before me, made any finding that respondent failed to cooperate with a departmental investigation. What the Commission *did* find was:

- (1) respondent, having turned over to the investigatory authorities certain copies of telephone and motel records, did not divulge the source of the copies; and
- (2) when asked by Ralph Edwards about the source of the records, respondent told him that he received them anonymously in the mail.

From these two events, the Department made a conclusion that respondent was not cooperating with their investigation, and cited this as one of the two grounds for respondent's demotion. The record, however, is devoid of any evidence which shows how, if at all, the information sought from respondent was at all pertinent to the Department's investigation. The copies of telephone and motel records submitted by respondent were easily verifiable by petitioner without regard to their source and we fail to see how that information was relevant to the proper scope of the Department of Correction's inquiry. In view of respondent's apparently justifiable concern that he, rather than his wrongdoing superior, was being made the target of an investigation, I find no fault in his refusal to answer the two specific questions which concern us in this case. The burden should be upon the agency seeking to demote an employee to establish that an employee's conduct was such as would actually constitute "just cause" for demotion. The State Personnel Commission, in declining to find that respondent's actions were a "failure to cooperate in a Departmental investigation" and in not seeking to justify the actions of respondent in its conclusions, obviously was of the opinion that the Department of Corrections simply had not carried its burden with respect to its allegations (since no evidence was adduced that the investigation was in any way hampered by respondent's failure to divulge the name of his sources of records) and therefore properly declined to make the findings and conclusions the Department of Corrections was contending for. The Depart-

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ment did not except to any of the Commission's factual findings; the conclusions reached by the Commission are supported by those findings and the evidence from which they are derived, and, in the absence of manifest abuse of discretion on the part of the Personnel Commission, we should accord the deference to those findings and conclusions that has historically been accorded to such findings and has been considered appropriate in appellate review. *See, e.g., Arnold v. Ray Charles Enterprises, Inc.*, 264 N.C. 92, 141 S.E. 2d 14 (1965); *Re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). No such abuse of discretion has been made to appear on the record before me, and I cannot find that any exists. The majority seeks to chart a dangerous course and to set questionable precedent when, upon the cold record in a closely contested matter, they reverse both the factual and legal conclusions reached by an administrative tribunal, basing that reversal upon evidence which the administrative tribunal clearly interpreted in a manner precisely contrary to that of the majority's opinion.

Second, even if I were disposed to seek error in the area of respondent's purported failure to cooperate with a departmental investigation, this Court has acquired no jurisdiction to do so upon the face of the record. The Department of Corrections, when it sought judicial review in Superior Court of the findings and conclusions of the Personnel Commission, took exception to the Commission's failure to find that respondent failed to cooperate. The Superior Court, after reviewing the evidence and receiving argument from counsel, also declined to make any finding or conclusion on that point. No exception was taken by the Department of Corrections to the Superior Court's action in this respect. Therefore, that purported error upon which the majority reverses the Personnel Commission and the Superior Court is not even before us for review, as it must be deemed to have been waived by the petitioner in the absence of properly preserved exceptions, assignments of error and briefs on the point, none of which have come to my attention in this matter. *See Jarman v. Jarman*, 14 N.C. App. 531, 188 S.E. 2d 647, *cert. denied* 281 N.C. 622, 190 S.E. 2d 465 (1972); *see also Manning v. Commerce Ins. Co.*, 227 N.C. 251, 41 S.E. 2d 767 (1947). The majority does not feel it necessary to reach the questions actually presented by this appeal pursuant to properly preserved exceptions and assignments of error. Ac-

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cordingly, on these facts, the judgment of the Superior Court should be affirmed if no error appears requiring this Court's attention. I find none, the majority does not indicate that it has found any, and I would, on this basis, vote to affirm the ruling of the Superior Court affirming the action of the State Personnel Commission.

Third, even if the error complained of had been properly preserved and brought forward for our review, the limit of our authority in these circumstances would be to remand for further findings. See *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E. 2d 334, *mod. on other grounds* 285 N.C. 418, 206 S.E. 2d 162 (1974). N.C. Gen. Stats. § 126-35 provides: "No permanent employee . . . shall be . . . reduced in . . . position, except for just cause. . . ." N.C. Gen. Stats. § 126-37 provides: "The State Personnel Commission is . . . authorized to reinstate any employee to the position from which he has been removed. . . ." Petitioner has been an employee of the Department of Corrections for over thirteen years and was, therefore, a permanent employee within the meaning of the Act. N.C. Gen. Stats. § 126-35 creates a reasonable expectation of continued employment and a property interest within the meaning of the due process clause. See *Faulkner v. North Carolina Department of Corrections*, 428 F. Supp. 100 (W.D.N.C. 1977).

I find no words in the statutes that take away or diminish the criteria that no permanent employee shall be reduced in position except for "just cause." The Superior Court, after reviewing the record of the Commission proceeding and hearing arguments, concluded as follows:

1. Petitioner, although a State agency, is a person as that term is used in General Statute 150A-43, and is entitled to judicial review of a final decision of the State Personnel Commission, another State agency.
2. The authority given the Personnel Commission by Article 8 Chapter 126, North Carolina General Statutes, is to determine whether acts or omissions upon which disciplinary action was predicated constitute just cause for that action. Neither the statutes nor regulations promulgated by the Commission provide that any particular acts or omissions shall constitute such cause. The Commission has authority to reinstate an employee to the position

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from which he was removed, and to order transfer or salary adjustment resulting from improperly discriminatory action of the appointing agency.

3. The numerous findings of fact by the Commission are supported by evidence, and some of the facts found are similar to those listed in Commission regulations as representative of acts for which disciplinary action may be taken.
4. The conclusions reached by the Commission are not logically impelled by its findings of fact, they do not state that the findings are not sufficient to constitute just cause for the disciplinary action taken by petitioner, nor do they state that such action was improperly discriminatory against respondent. Instead, the conclusions reflect the Commission's feeling that the acts of the respondent are excusable.
5. The Commission's authority to determine whether there is just cause for disciplinary action includes authority to determine whether particular acts, even acts representative under Commission regulations of those constituting just cause for discipline, are excusable.
6. The Commission's determination that respondent's acts are excusable is neither arbitrary nor capricious, unsupported by substantial evidence, violative of constitutional or statutory law or procedure, nor in excess of statutory jurisdiction or authority.

Both the State Personnel Commission and the Superior Court interpreted the expression "just cause" as meaning a cause which when viewed in the light of all pertinent evidence, would be sufficient to warrant disciplinary action against a State employee. Logically, there may exist actions which, in the absence of any justifying circumstances, would constitute grounds for disciplinary action but yet, when viewed in the light of all evidence brought forward, might be seen as justifiable under the circumstances and therefore not deserving of any sanction or reprimand. The law has long recognized this principle in many areas. The State Personnel Commission, which heard all of the evidence and had the fullest opportunity to weigh the credibility

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and demeanor of all of the witnesses, concluded that the respondent had exercised questionable judgment, but that his actions were not "just cause" for demotion and transfer because they were, under the circumstances, excusable. The Superior Court, upon review of the record of the administrative proceeding and hearing arguments, concluded that the State Personnel Commission had properly applied the law and exercised its discretion in dealing with this matter. If this Court wishes to disagree with these conclusions (and I do not), the proper remedy is to remand the cause to the Superior Court for remand to the State Personnel Commission for the making of further findings and conclusions. The Commission found that respondent had refused to answer questions on one occasion, but did not determine that such action constituted "just cause" for the demotion of respondent as contended by petitioner and, I think, refuted by respondent. If the majority is concerned that the State Personnel Commission did not make a finding that was required, remand for further findings is the appropriate means by which to alleviate the problem. For these reasons, I would, therefore, vote to remand to the Superior Court with instructions to remand to the State Personnel Commission with instructions to make further findings as to whether respondent's failure to answer questions concerning the source of his telephone and motel records constituted "just cause" for his demotion, and whether there was any justification for his actions which would excuse them should they be found to constitute just cause for demotion.

In summary, I am of the opinion that this Court has no jurisdiction over the aspect of the case which the majority purports to deal with, that the majority exceeds this Court's authority in making evidentiary findings and conclusions precisely contrary to those of the fact-finding tribunal of original jurisdiction, and that the remedy ordered is not the proper or appropriate one. Accordingly, I dissent from their opinion.

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**Brown v. Boney**

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PAUL D. BROWN v. THOMAS E. (TOM) BONEY

No. 7815SC641

(Filed 19 June 1979)

**Libel and Slander § 16— revocation of license for drunk driving—newspaper editorials—no false statements—insufficient evidence of libel**

In an action to recover damages from defendant newspaper editor and publisher for libel and invasion of privacy, the trial court did not err in directing verdict for defendant where plaintiff's evidence failed to show that any false statements were made by defendant in his editorials concerning plaintiff's attempts to keep his name and news of his driver's license revocation for drunk driving out of the newspaper.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 9 February 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals on 23 April 1979.

This is a civil action wherein plaintiff seeks damages from the defendant, a newspaper editor and publisher, for libel and invasion of privacy. Plaintiff's evidence tended to show the following:

Plaintiff's general character and reputation in the community where he lives and works is "very good." The plaintiff has lived at 2828 Forestdale Drive in Burlington for approximately 26 years. The plaintiff has "never held any kind of public office" and has "never been rich." On 24 December 1974, plaintiff was driving home when he was involved in an automobile accident in Greensboro, North Carolina. As a result of the accident, plaintiff "was charged with driving under the influence." On 28 January 1975, plaintiff pleaded guilty to the offense and paid a fine of \$100.00. Plaintiff's driver's license was revoked for one year, but he was granted "limited driving privileges." Plaintiff subsequently saw a copy of the defendant's newspaper, *The Alamance News*, and noticed that it contained a listing of the revocation of driver's licenses in it. After ascertaining that the list was made available to the defendant by the local highway patrol office, plaintiff telephoned Mr. Thomas Bunn in Raleigh and "talked with him about the legality of the list." Plaintiff explained to Mr. Bunn that he did not want his name published on the list "because of the humiliation, the embarrassment, and the fear of losing [his]



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livelihood." Mr. Bunn did not stop the list of license revocations with plaintiff's name from getting to the defendant, and the list was published in defendant's newspaper. On the evening of 4 March 1975, the day before the list was published, plaintiff telephoned the defendant and "begged . . . and pleaded with him" not to publish the list. Defendant responded that he was going to publish the list. Plaintiff then asked him "not to blow me . . . all out of proportion," but the defendant responded that "he was going to make a story out of it." Each edition of defendant's newspaper for the next eight successive weeks, beginning on 3 March 1975, as well as an edition published on 12 June 1975, contained an editorial article relating to the revocation of plaintiff's driver's license and plaintiff's attempts to prevent the publication of his name in the newspaper on the revocation list. The relevant excerpts from the articles are as follows:

"CORRUPTION IN HIGH PLACES" [6 March 1975]

Paul D. Brown of 2828 Forestdale Drive, Burlington is a man who did not want his name in the newspaper this week.

The 55-year-old white male is listed on the driver's license suspension revocation listing for the week ending February 21 for Troop D, District 5 with a one year suspension from January 28, 1975 through January 28, 1976.

The thing that distinguishes Mr. Brown's case is that one man could possess so much power as to get the democratic processes of our republic form of government changed so rapidly from such high places.

After seeing lists of driver's license suspensions in several other major newspapers, The Alamance News in June, 1969 contacted the Department of Motor Vehicles in Raleigh about carrying the same for Alamance County.

We were informed about getting the list from Raleigh but it was suggested that we get it locally from the State Highway Patrol office. Since we call on them each week in connection with a regular "news beat," this was okay with us. In fact, it has been the practice from the first to loan us their copy which we bring into Graham, have thermofaxed copies made in the courthouse annex, and mail back the original.

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The inkling anything was wrong occurred Tuesday morning when The Alamance News reporter was asked by Sergeant V. E. Norwood of the Highway Patrol to return to him both his original and our thermofaxed copies.

The editor immediately telephoned Sgt. Norwood who informed us Mr. Brown had called the patrol office about getting his name omitted from the list published by The Alamance News. Brown was told it was a public record and he would have to contact the newspaper office direct.

Norwood said Brown had been caught "driving drunk" and told him the newspaper had permission to use the list. He checked with his Captain who also "understood it was a public record."

The trooper quoted Brown as saying he was "going to call somebody in Raleigh."

The swiftness of action coming from the top down was amazing. Norwood said the Commissioner of Motor Vehicles, Jacob F. Alexander, told Major Lee Lantz to tell Captain O. R. McKinney of Greensboro to inform Sergeant Norwood "we do not have the right to give out the list."

Norwood further quoted Chapter 20-26 of the General Statutes of North Carolina pertaining to the vehicle law which says we can get the list from Raleigh each week by sending them a dollar each week.

The patrolman added, "I am concerned about it and will be glad to pay you the dollar to write them this week."

Norwood said we also could not get the list in the future except through Raleigh. We could not help but ask the supposed law enforcement officer, "whose side are you on? . . . You get out here and try to get some of these drunken drivers off the road and then come around like this and are trying to shield them?"

The line sergeant for the Alamance County district was sympathetic, indicating it was his personal preference to see Mr. Brown's name appear along with the rest of the list but that effective this week we would have to get the list from Raleigh and again asked for the return of our copy.

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The editor asked him to inform his superiors that we had been carrying the list for over six years and refused to return it.

"I am not supposed to have given it out," he maintained.

He also indicated only one list was supplied to him for the Alamance district "and I am not to post it on the bulletin board out here in the future because then it would become a public record."

"I am only asking you not to print it unless you get it from Raleigh," he repeated, "to just hold off for one week . . . It was my error and I should not have permitted you to have it . . . I'd rather pay you the dollar rather than write forty-five letters explaining the error."

Sergeant Norwood's only error is in working for an outfit so chicken it elects to conspire with the law breakers it is supposed to be arresting instead of the decent honest people of North Carolina who are paying for the patrol's services.

We checked the 1974 City Directory and found Mr. Brown was listed as the purchasing agent for Engineered Plastics, a Gibsonville firm.

✓ Tuesday morning at 11 we put in a call to the Motor Vehicles Commissioner and were told by a secretary, "Mr. Alexander just went into a conference and cannot be disturbed." We thanked her, gave her our name, position, and telephone number and asked that he call collect at his convenience.

Having heard nothing by 3:10 p.m. we again called Mr. Alexander and were told he had been given our message "but is gone for the day," (We always try to give everybody two chances to return a call, but we do not allow unreturned calls to "kill a story." Alexander has not called back yet.)

A reporter had, in the meantime, checked the courthouse records and found none listed against Brown. However, the reporter ascertained from Judge J. B. Allen that a one-year revocation was undoubtedly for drunken driving. It could have occurred in some other county.

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Our efforts had not gone unnoticed. Tuesday night Brown called the editor at home and began begging and pleading, adding, "I did not mean to hurt you and will help you undo what I've done but only if it is confidential."

We told him The Alamance News never accepts any comments of any kind at any time off the record—that we exist to have informed readers and not to have informed reporters.

We expressed admiration for his being able to erect so many obstacles in the path of our getting a story.

We told Mr. Brown, as we had earlier told Sergeant Norwood, newspapers have always had to fight all kinds of petty tyrants who wanted to suppress information about themselves while wanting to know everything about others. (Actually, even the drunk drivers want to know who the OTHER drunk drivers are—they just don't want their own misdeeds known.)

Brown said he had called an attorney in Graham about getting his name left off the list and been informed not to approach The Alamance News with such a request "that you can't be approached."

We appreciate such flattery. We are concerned, however, at the "backing down" of so many of our supposed public servants who don't mind feeding at the public trough but who would surrender the public's First Amendment's right to know so quickly. Given a few more days we believe a man like Mr. Brown might have gotten the U.S. Constitution itself either changed or reinterpreted.

He professed to seeing no parallel between President Nixon's efforts to cover up Watergate and his own efforts to have his name withheld from public scrutiny. (When Dick Cooper was solicitor and asked about pressure from drunks not to prosecute he had a famous expression we like to quote "I've never poured one drink into anybody. They've all done that for themselves.")

Mr. Brown said he had a "friend in Raleigh" whom he declined to identify who had done his work for him.

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While we are aghast, we marvel that liberties fought for so hard and for long are in such danger. Can you imagine having a story routinely covered for over six years suddenly revoked after we had already gotten it for the current week?

Can you imagine the Highway Patrol, charged with getting drunks off the public streets and highways, in collusion with [sic] trying to suppress information from the top down to the local line sergeant?—And even to the point of not posting the notice? (The Courts have held years ago that any public record that is kept, whether required to be kept or not, is a public record.)

We regret the world has self-centered self-serving people like Paul Brown. We regret that they can reach all the way up to the Commissioner of Motor Vehicles in Raleigh and all the way down to the local highway patrol sergeant.

Maybe we are just a small voice crying out in the wilderness but we hope that those who would corrupt our democratic ideals and institutions someday get their just deserts [sic].

Each year brings forth new ones—so the battle is a never-ending one.

“WRITER’S CRAMP” [13 March 1975]

Jacob Alexander, N. C. Commissioner of Motor Vehicles, is a man with even less regard for the General Statutes of North Carolina than he has for ordinary common courtesy.

Last week, Alexander developed “dialer’s disease” when it came to returning our telephone calls. This week, he developed “writer’s cramp” when it came to replying to a letter.

As we noted in an editorial last week, Paul D. Brown of 2828 Forestdale Drive, Burlington, is a man who did not want his name in the newspaper for a license revocation. After objecting to the local Highway Patrol office about releasing the list to us (which we had been carrying regularly for the past six years), he called a “friend in Raleigh” who, somehow or other, decided this could not be done.

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The Commissioner notified the Major, who notified the Captain, who notified the Sergeant, who then kicked the dog (that's us). They even had the brass to ask for the return of a copy of the list we had already made, saying it had been turned over to us illegally and they did not mind us using the list if we could get it from Raleigh.

Anticipating they would carry through with their threat of not posting the list on the bulletin board or allow us to see it this week, we wrote Alexander on Friday. We quoted the State law and tendered the \$1.00 fee.

To date, we have not heard from either our telephone call, or our letter. When our reporter called at the highway patrol office in Graham this week, our anticipations turned out to be correct about the list vanishing from public view there.

There is an old expression, "a friend in need is a friend indeed."

Apparently, Mr. Alexander is a friend of a friend of Paul Brown's in deed [sic].

What North Carolina motorists need, however, is a friend who will comply with the State's statutes and get some of these drunken drivers off the road instead of coddling them.

"A 'FRIEND' "

[20 March 1975]

...

Paul D. Brown of 2828 Forestdale Drive, Burlington, did not want his name in The Alamance News for a one-year suspension. He called "a friend in Raleigh" who immediately threw wrenches into all the democratic processes known. We called Motor Vehicles Commissioner Jacob Alexander twice about getting the list, and have written him twice, both times officially tendering the \$1.00 fee for a list. Mr. Alexander still has the same "phone fright" and writer's cramp he was suffering from last week.

The local State Highway Patrol this week is still not making the list available and refusing to post it on the

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bulletin board in an acknowledged attempt to "keep it from becoming a public record." (We pointed out two weeks ago what a shallow meaningless maneuver this was, but the fact remains, we have not been able to get the list.)

The State Highway Patrol may be right in its efforts to suppress the publication of the names of drunk drivers.

All we can see is if the Patrol will do this much for a "friend," how much more are they doing beside the road at the potential arrest scene?

What does it take to become a "friend"?

"MORE ON BROWN COVER-UP" [27 March 1975]

Our efforts to get public information from the Department of Motor Vehicles has finally gotten some action. Not much, really, but something.

Actually, we were just as well off without a reply. Before, we just thought there were some officials in Raleigh without the common decency to return telephone calls or reply to letters. This week, however, Commissioner Jacob Alexander turned our letters over to a J. T. Baker, Jr., director of the Driver License Section.

Mr. Baker wrote:

"Thank you for your letter requesting that you be placed on the mailing list of those receiving the periodic suspension and revocation listings. I regret to inform you I cannot comply with your request as these listings are distributed to law enforcement personnel only . . . Your check in the amount of one dollar, made out to the Division, is attached . . . If you have additional questions regarding this or other matters, please contact me."

...

It is all an outgrowth of the efforts of Paul Dennis Brown of 2828 Forestdale Drive, Burlington. He did not want his name published in the Alamance News routine weekly listing or [sic] revocations and suspensions.

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It may very well be the public is not entitled to know who is above the law and getting special treatment. It may be that the public would be better off not knowing what is being cloaked in official secrecy (Watergate notwithstanding).

We were never promised life would be easy if we went into the newspaper business. Like Peter Zenger, we knew keeping public business open to the public would be a never-ending fight because there are too many Paul Browns with "friends" in high places.

It may take us a long time, but until we are ruled wrong, we intend to fight for the right of our subscribers to know what is going on in their government.

We seem to have only a small hold on the tail of a big rat in a deep hole. We would expect the State Highway Patrol to be on our side in trying to get the list publicized, instead of trying to kill it.

When something does not add up, it makes us think that rat may be a lot bigger than even we suspect.

"LESS ABOUT BROWN COVER-UP" [3 April 1975]

No records yet.

"EVEN LESS ABOUT BROWN COVER-UP" [10 April 1975]

No records.

"WORD ABOUT PATROL COVER-UP" [17 April 1975]

Nope.

"OUR OWN WATERGATE!" [24 April 1975]

Some people apparently figure because they are rich and influential they are better than everybody else. For them, extra special treatment is their due.

When Paul D. Brown of 2828 Forestdale Drive, Burlington, decided he did not want his drunken driving revocation of license for a year in The Alamance News, he called a "friend" in Raleigh.

His friend must really be something because, despite three letters and two phone calls, we still have not been



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avored with the list of names we had been getting from the Highway Patrol office regularly for six years. . . .

. . .

We regret people feeding at the public trough feel they have the same rights to privacy about their salaries as those working for private employers, but they do not.

The problems of governmental secrecy—with both the Alamance County manager and the State Highway Patrol—are not new.

Watergate is supposed to be behind us—but maybe it has just come down from Washington to North Carolina!

“ALAMANCE NEWS WINS FIGHT TO GET  
HIGHWAY PATROL LIST” [12 June 1975]

It has been a hard fight and it has taken us over three months to get it, but elsewhere in this edition The Alamance News is pleased to announce we are again publishing the list of driver's license revocations which the State Highway Patrol in Raleigh has sought so hard to suppress.

The list was finally made available to The Alamance News this week after lengthy negotiations with State officials and, finally, threats of court action.

Tom Boney, publisher of The Alamance News, commented, “it is still hard for the public to understand the issue because you would think the State Highway Patrol would be around asking all of the newspapers in North Carolina to publish the list of license suspensions and revocations. That would be the logical thing to do. Instead, our newspaper has had to fight tooth and nail for over fourteen weeks to get Patrol officials to release it so we could publish it.”

Our problems arose when Paul D. Brown of 2828 Forestdale Drive, Burlington, decided he did not want his name in the newspaper for drunk driving.

. . .

We discovered the list was available to us Tuesday and required 11 hours of copying time, plus a corresponding

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amount of type-setting time and extra proof reading. Despite this sudden overload we have included all of the lists (with the exception of the week of April 11) this week because we felt our subscribers had already waited long enough for the information. . . .

We started off with a half-page editorial and followed this with three other editorials in March. In April we had successively three-word, two-word, and one-word editorials. When Assistant Attorney General William Melvin ruled partly for us in early May we thought any day we would be getting the list. The red tape in Raleigh is apparently endless.

We regret the public's right to know requires such a battle to substantiate so often (see another editorial also in this issue about public salaries.)

We shall carry the list on a weekly basis (as we did before March) as we continue to strive to get it in more error-proof form. However, that is an internal consideration of the newspaper.

We feel, however, the public's right to know transcends all other considerations. It is a genuine pleasure to finally be able to present the lists on Pages Six and Seven of this issue.

When plaintiff offered the above editorials into evidence, defendant's objection to the introduction of the first eight editorials on plaintiff's libel claim was sustained. All nine editorials were introduced on plaintiff's invasion of privacy claim.

The effect of these publications was to cause plaintiff to go under a doctor's care in May of 1975 for hypertension. The editorials had some adverse effect on plaintiff's home life. The editorials have hurt plaintiff's self-confidence. Plaintiff lost his job and has been unable to get other employment in Alamance County.

At the close of plaintiff's evidence, defendant, pursuant to G.S. § 1A-1, Rule 50(a), moved for a directed verdict, and this motion was granted. Plaintiff appealed.

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*Cahoon & Swisher, by Robert S. Cahoon, for plaintiff appellant.*

*Lassiter and Walker, by William C. Lassiter, for defendant appellee.*

HEDRICK, Judge.

The one question presented by this appeal is whether the court erred in directing a verdict for the defendant at the close of plaintiff's evidence. It is an elementary principle of appellate review that the appellant has the burden not only to show error, but also to show that the alleged error was prejudicial and amounted to the denial of some substantial right. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *Matthews v. Lineberry*, 35 N.C. App. 527, 241 S.E. 2d 735 (1978); 1 Strong's N. C. Index 3d, *Appeal and Error*, § 46.1 (1976). Plaintiff has presented for our review a brief containing thirty-nine pages, the overwhelming majority of which contain a restatement of the allegations of his complaint and a recapitulation of the evidence offered at trial. The function of the brief "is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." Rule 28(a), Rules of Appellate Procedure. Plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof. While the appellant's brief is clearly not in accordance with Rule 28 of the Rules of Appellate Procedure, we nevertheless believe that the question raised by the plaintiff's assignment of error merits some discussion, and thus on our own initiative suspend Rule 28 in order to properly consider it. Rule 2, Rules of Appellate Procedure.

In a libel action, the defamatory statements must be false in order to be actionable, and an admission of the truth of the statement is a complete defense. *Parker v. Edwards*, 222 N.C. 75, 21 S.E. 2d 876 (1942). Likewise, with regard to invasion of privacy of the false light variety, it is essential that the matter published concerning the plaintiff is not true, and it is sufficient if the matter published attributes to him characteristics, conduct, or beliefs

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that are false so that he is portrayed before the public in a false position. Restatement 2d, Torts, § 652E (1977).

If the plaintiff's case is to succeed, he must show that the factual statements made concerning him and his actions were false. This he has failed to do. Indeed, the plaintiff's evidence tends to show the truth rather than the falsity of the statements upon which he bases his claim for libel and his claim for invasion of privacy of the false light category. The statements on which plaintiff primarily relies in this case are within the realm of fair editorial comment which has been accorded a significant measure of protection under the First Amendment. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed. 2d 789, 805 (1974), the United States Supreme Court stated:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. [Citation omitted.]

This does not mean, however, that newspapers or other media defendants can escape liability where the evidence discloses the publication of false factual statements under the guise of editorializing. We hold only that the plaintiff's evidence in the present case failed to show any false statements that would entitle him to recover for either libel or invasion of privacy. The trial judge properly directed a verdict for the defendant.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

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**Wall v. City of Durham**

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J. E. WALL, AS TRUSTEE IN BANKRUPTCY FOR ROBERTS CONSTRUCTION COMPANY, INC., R-A PROPERTIES, AND PALM PARK, INC. (SUCCESSOR TO HAZARD CANNON D/B/A CANNON CONSTRUCTION COMPANY); ROBINSON O. EVERETT AND KATHRINE R. EVERETT D/B/A HOLLY HILLS APARTMENTS; AND HOLLY HILLS APARTMENTS, INC., AND POPLAR APARTMENTS, INC. v. CITY OF DURHAM, A MUNICIPAL CORPORATION

No. 7814SC810

(Filed 19 June 1979)

**1. Municipal Corporations § 4.4— water and sewer rates—“decapping” procedure—unnecessary discrimination**

The “decapping” procedure employed by a city to compute the charges for water and sewer service for apartment complexes in which more than one apartment is served by a single meter, under which the water usage shown by the meter is divided by the number of apartments served through the meter, the water and sewer charge for the quantity resulting from this division is calculated, and this amount is multiplied by the number of apartments served through the meter, unreasonably discriminates against the owners of such apartment complexes, since this procedure subjects those owners to a greater rate under the city’s graduated rate schedule than is applied to other customers who consume an identical quantity of the same service, and there is no justification for such discrimination between customers.

**2. Municipal Corporations § 4.4; Estoppel § 4.6— no estoppel to assert water and sewer rates are discriminatory**

The trial court erred in concluding that plaintiff apartment owners are estopped to assert that a city’s “decapping” procedure for determining water and sewer rates is unreasonably discriminatory because they elected to install only one water connection and one meter to serve several buildings in an apartment complex when they could have installed separate meters for each unit where there was no evidence that defendant city in any way relied on any statements or acts of plaintiffs to its detriment.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment entered 10 April 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals on 23 May 1979.

This is a civil action wherein plaintiffs seek to recover alleged overpayments made for water service furnished to them by the defendant. Plaintiffs alleged that the defendant’s method of calculating water charges unfairly discriminates against them. Plaintiffs also seek to enjoin the further use by the defendant of the method it currently uses to calculate water charges.

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**Wall v. City of Durham**

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The plaintiffs are owners of apartment complexes that receive water service from the defendant. Plaintiff J. E. Wall, as trustee in bankruptcy, is successor in interest to several of the original plaintiffs, and he holds title to several of the apartment projects involved in this action. Poplar Apartments is a 250-unit apartment project in Durham that was constructed in the 1949-1951 period. All of the other apartments involved in this action were constructed in the 1960's and 1970's. Defendant, City of Durham, is a municipal corporation, and it owns and operates the public water system that furnishes water and sewer service to the plaintiffs.

The case was tried before the judge without a jury, and, as noted by Judge McKinnon in the judgment entered on 10 April 1978, "the relevant facts are almost undisputed." The trial judge made extensive findings of fact in an attempt to resolve the controversy between the parties. The relevant facts necessary to an understanding of our opinion are contained in the court's findings, the pertinent portions of which are quoted below. The order in which the findings are quoted is not necessarily the same as they appear in the judge's original findings. For purposes of clarity, we have taken the liberty of rearranging them so that they appear in a narrative form.

Before the 1950s the City of Durham had a flat water rate structure whereby the same charge was made for the first cubic foot and for each cubic foot of water thereafter regardless of the total volume consumed.

While the flat water rate schedule was being used, a number of concerns, including Liggett and Myers, The American Tobacco Company and Duke University, continued to expand their operations, and as they expanded they frequently installed new water services and new meters so there were several structures and several meters at single sites operating as a unified concern.

Sometime in the 1940s . . . the City changed its water rate structure from a flat rate for each cubic foot of water consumed to a declining rate structure, whereby the volume of water consumption was divided into certain brackets for billing purposes and within those brackets a rate per 100 cu.

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ft. unit was applied, and the rate per unit declined as the volume of water consumed increased.

The graduated rate schedule is the same for all users, except to the extent that the City of Durham utilizes procedures sometimes referred to as "decapping" and "recapping" and described in later findings.

Upon the change of the water rate concept from a flat rate to a declining rate structure, and in an effort not to impose additional plumbing requirements on [Liggett and Myers, The American Tobacco Company, and Duke University] to obtain the benefit of their consumption which was occurring at the same integrated site, the City permitted them to use what is known as recapping, that is, the addition of all the consumption of water at a single operating site or location for billing purposes. Thus, as an example, there is an account for Liggett and Myers downtown manufacturing facility, which consists of several buildings located on both sides of Main and Morgan Streets in one single integrated location. The total water consumption at this single location is combined and a bill rendered based on such total consumption. The recapping procedure is utilized when a single water user is obtaining his water service through several meters. Because of the graduated water and sewage rates in the City of Durham, his water and sewage charges would tend to be greater if the charges were computed for water usage through each meter and the resultant charges were added together, than if the water use were initially aggregated and then the water and sewage charge were computed on the aggregate amount of water received through the several meters.

According to a list supplied by the City, the users of City water and sewer services who now receive recapping include: Liggett and Myers, the Durham City Schools, Central Carolina Bank, Duke University, Watts Hospital, White Star Laundry, Burlington Mills, Coca-Cola Bottling Company, Veterans Administration, North Carolina Cerebral Palsy Hospital, American Tobacco Company, Durham Union Bus Station, Golden Belt Manufacturing Company, North Carolina Central University, Budget Realty Company, Valley Terrace

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Apartments, R-A Properties, University Apartments, the Gospel Center, Pifer Industries, Environmental Protection Agency, Air Pollution Building, National Institute of Environmental Health Services, Monsanto, Burroughs-Wellcome, IBM, Becton-Dickerson, Hercules Chemical, Raleigh-Durham Airport, General Electric, Sperry-Rand, Gold Kist Poultry, Johnson-Forrester Laundry, New Method Laundry.

As revealed by this list, recapping is now made available to various types of users—including industries, office buildings, commercial establishments, businesses, hospitals, and institutions, such as Duke University.

“Decapping” is a procedure which is utilized by the city in connection with apartment projects or complexes where more than one apartment dwelling is served by a single meter. Under this procedure the water usage shown by the meter is divided by the number of apartments served through the meter; then the water and sewer charge for the quantity resulting from this division is calculated; and, finally, this amount is multiplied by the number of apartments served through the meter.

In the decapping procedure, no adjustment is made for apartment units that are vacant and the water usage through a meter is divided by the total number of apartments served by that meter without regard to whether any of the apartments are vacant.

In 1953 the defendant adopted Ordinance No. 1205, as amended by Ordinance No. 1258, which contains the following provisions:

“For multiple unit houses there shall be a minimum charge of \$1.50 per month for each family unit as hereinafter defined for each 500 cu. ft. of water used in such unit. Where more than 500 cu. ft. of water is used per month per family unit the additional water shall be pro rated equally between and among the family units served through the same water meter and charged at the rate prescribed for the next bracket of charges in the above schedule.

The term ‘family unit’ above mentioned means one or more individuals occupying premises, including kitch-



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en or bath or both, and living as a single housekeeping unit.”

The concept and practice of treating such family unit or dwelling unit in multiple housing as a separate consumer in the structure of water and sewer rates and charges, and billing therefor on an averaging basis, was actually in effect in the City of Durham for several years prior to the adoption of the 1953 ordinance [No. 1205] and at and prior to the time the apartment buildings and complexes involved in this action were constructed.

In August, 1969, the defendant adopted Ordinance No. 2913, amending the amounts of its previous water and sewer rates and charges, but continuing in ordinance from the preexisting averaging practice and policy with regard to apartment and apartment complex buildings, the pertinent portions of which ordinance are as follows:

Monthly Rates for Water and Sewer Service, and for Sewer Service, Only, Inside the City.

“The schedule of monthly rates for City water and sewer service, inside the city, shall be as follows:

Consumption Per month (Cubic feet)	Rate per 100 Cubic feet	Cost each Division
First 300	\$1.20	\$ 3.60
Next 3,000	.86	25.80
Next 6,700	.72	48.24
Next 10,000	.59	59.00
Next 20,000	.48	96.00
Next 460,000	.38	1,748.00
Over 500,000	.27	
Minimum Charge		3.60

Two or more dwelling units having a common water or sewer meter shall be billed in the following manner:

(a) Each dwelling unit served by a common meter shall be charged on the basis of the mean consumption or discharge of all dwelling units served by that meter; provided that;

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(b) The minimum charge shall be made for each dwelling unit if the mean consumption or discharge is not as great as the minimum provided for in this section.”

Until the revision of Durham’s water rates in 1976, the decapping procedure involved the use of a minimum charge per unit; since that revision only a single service charge of \$2.23 per meter has been imposed without regard to the number of units served through a single meter.

However, the City has continued to divide usage by total number of apartment units served through the meter without allowance for vacancy.

At its meeting of April 5, 1976, the City Council adopted a policy, effective July 1, 1976, as follows:

“In addition, the Special Committee recommends the adoption of the following policies and also recommends that the City Administration develop the necessary criteria and means for their implementation.

(1) That a limited practice of recapping be continued after July 1, 1976, based on:

(a) the application of the service charge to all meters including those recapped,

(b) the limitations of recapping to single corporate entities or persons (specifically excluding neighborhood organizations or similar organizations developed solely to take advantage of the policy), and

(d) the limitation of recapping to buildings or facilities on a single city block or contiguous city block or contiguous city blocks.

(2) That on July 1, 1976, the policy of decapping be modified so that:

(a) the service charge only applies to number of meters in the apartment complex, and

(b) that the remaining portion of the bill be calculated as at present from the consumption schedule.”

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Prior to 1965 the City of Durham had authorized a single meter to serve a number of apartments in the same building. Thus Poplar Apartments, which was constructed in the 1949-1951 period, had a single meter for each of the separate buildings in the complex, although each of these buildings contained more than one apartment unit. "Decapping" in some form was applied by the City at least as early as 1953 with respect to a structure that contained several apartments but was served by a single water meter.

Prior to 1965 the Durham City Code did not allow more than one building to be served by a single meter. At a City Council meeting of July 6, 1965, Ordinances 2394 and 2395 were adopted which authorized common water and sewer connections for the following types of multiple building developments—group apartment housing, motels, hospitals, industrial buildings, schools, and trailer courts. This ordinance was for the mutual convenience of the City and prospective developers. Subsequently, common water and sewer connections were allowed in shopping centers and condominium projects. The ordinance authorizing the common water and sewer connections makes no reference to decapping. However, decapping was applied to those apartment units located in different buildings and served through a common meter just as it had previously been applied to those apartment units located in the same building and served by a common meter.

On the other hand, no decapping procedure has been authorized by the City of Durham or applied to shopping centers or other types of projects where, after 1965, more than one building could be served through one meter.

Whatever the quantity of water involved, the delivery of water to a meter serving a number of apartment units costs the city of Durham no more than delivery of this same quantity of water to a meter serving a different user of water—whether an industry, a store, a motel, an office building, a university, or any other type of user.

The owners and developers of apartments and apartment complexes now have and have had in the City of Durham for many years the privilege and option to provide separate

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water connections and separate water meters for each apartment building and for each separate family or dwelling unit in such apartment building, and in fact there are a number of cases in the City of Durham where that has been done; and if separate water connections and separate meters were installed for each family unit or dwelling unit located in multiple housing, the water consumption of such family unit would be measured by the meter just as electric power or gas consumption is measured, and there would be a separate monthly billing for each of the individual family units, which bills could either be sent to each family unit or to the apartment operator, as desired.

The plaintiff apartment owners and developers in this action elected not to install separate connections and separate meters to serve each separate family unit or dwelling unit because it is more economical to them, in terms of fewer water lines and meters to buy and maintain, and saving in other ways, to install only one connection and meter to a building or group of buildings housing many family dwelling units, and by electing not to install separate connections and separate meters, and thereby making an accurate measurement of separate family unit consumption impossible, they are able to effect substantial savings in cost.

The practice of averaging water consumption among family units in apartment buildings for billing purposes results in the monthly water and sewer bills for an average family unit being approximately equal to the monthly water and sewer bill for an average family of four residing in a single family detached residence.

If the practice of treating each family unit in an apartment building as a separate consumer and averaging among them the total volume of water passing through the master meter, in the absence of separate meters for each family unit, were discontinued, the result would be that at the same rate structure now in effect the single family unit located in a single family detached residence would pay substantially more than would the family unit located in an apartment building next door who used the same amount of water.

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Up to about three years ago the defendant used a practice which allowed apartment owners and operators to notify it each month as to the number of vacancies which had occurred during the month, and the defendant would delete those from its averaging process; but about three years ago this practice was discontinued. If fewer apartment units are rented at any particular time, that would generally have the effect of lowering the average consumption which would lower the billing in a corresponding fashion even though the defendant was not informed of vacancies.

The defendant maintains the meter, the lateral water and sewer connections to private property, the distribution and collection pipe lines, and all water and sewer plants. The owner of the apartment building or other structure on private property which is served by water and sewer services, is responsible for the cost of installing and maintaining all lines and installations outside of the street right-of-way.

Based on its findings of fact, the court made the following pertinent conclusions of law:

[The plaintiffs] have failed to show that the water and sewer rates and charges, or the method of billing therefor, as contained in the ordinance or practice which they challenge, are so unreasonable, arbitrary, or legally discriminative as to exceed the lawful and reasonable discretion of the defendant, and to constitute invalid and unenforceable acts and practices.

Even if there should exist a degree of discrimination, in that the amount of monetary payments by all users of water and sewer service may not be exactly the same, such resulting discrimination is not because of arbitrary action of the defendant or action taken without a reasonable fact basis or justification.

The rate structure and billing methods and practices challenged by the plaintiffs in this action are supported and justified by a factual basis for classification and by evidence which justifies the charges and method and practice of billing.

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By their conduct in electing to install only one connection and one meter to each separate building, and later to install only one connection and one meter to serve several buildings in an apartment complex, under the rate structure in effect for a substantial period of time which billed for water and sewer consumption on a basis of treating each family unit or dwelling unit as a consumer and computing such charges on a mean or average consumption basis for each of such family unit consumers, when at the same time they had the right, if they so desired, to install separate meters for each family unit located in such apartment buildings, the original and present plaintiffs waived their right to now contend that such water and sewer rate structure is invalid, and are estopped from doing so.

From the judgment dismissing their claim, plaintiffs appealed.

*Everett, Everett, Creech & Craven, by Robinson O. Everett and Robert D. Holleman, for plaintiff appellants.*

*William I. Thornton, Jr., and Claude V. Jones for defendant appellee.*

HEDRICK, Judge.

By assignments of error thirteen, sixteen, and seventeen, plaintiffs contend that the court erred in concluding that the defendant's ordinance and billing practice was not unreasonably discriminatory and was justified by a factual basis. We agree.

The authority of a municipal corporation to own, operate, and finance a public utility is granted by G.S. § 160A-312. The authority to fix and enforce rates is contained in G.S. § 160A-314(a), which provides:

A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties *may vary according to classes of service*, and different schedules may be adopted for services provided outside the corporate limits of the city. [Emphasis added.]

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A public utility, whether publicly or privately owned, may not unreasonably discriminate in the distribution of its services or the establishment of rates. *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E. 2d 136 (1967); *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 237 S.E. 2d 484 (1977). Numerous cases have recognized the rule that the statutory authority of a city to fix and enforce rates for public services furnished by it and to classify its customers is not a license to discriminate among customers of essentially the same character and services. In *State ex rel. Utilities Commission v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E. 2d 290, 298 (1953), our Supreme Court stated: "There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service." In 12 McQuillan, *Municipal Corporations* § 35.37b, at 485-86 (3d ed. 1970), the general rule is stated as follows:

A municipality has the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction.

[1] In the present case, it is undisputed that the "decapping" procedure employed by the defendant in computing the charges for water and sewer service furnished to the plaintiffs results in a higher charge than is applied to a similarly situated user who is not subjected to the "decapping" procedure. Thus, the effect of "decapping" is to subject the plaintiffs to a different, and greater, rate schedule than is applied to other customers of the defendant who consume an identical quantity of the same service. There are no findings of fact in this record to justify the different treatment accorded the plaintiffs by the defendant. Indeed, the only finding made by the trial judge pertaining to the cost and conditions of service was that "the delivery of water to a meter serving a number of apartment units costs the city of Durham no more than delivery of this same quantity of water to a meter serving a different user." Thus, application of the above-stated principles of law to the ordinance requiring "decapping," the "policy" adopted by the City Council on 5 April 1976, and the resultant billing pro-

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cedures, compels the conclusion that the defendant unreasonably discriminates against the plaintiffs, and that the defendant's efforts to classify the plaintiffs by use of the "decapping" procedure is clearly not justified by any "factual basis." Furthermore, the unchallenged findings of fact disclose that the plaintiffs are entitled to have their charges for water and sewer service calculated on the same basis as all other customers served through a single or "master" meter.

We note that the procedure referred to in the findings of fact as "recapping" also appears, on this record, to be discriminatory since according to the findings of fact, some apartment complexes receive the benefits of "recapping," and there are no findings showing any factual basis for distinction between apartments allowed to "recap" and the plaintiffs.

[2] By assignment of error number eighteen, plaintiffs contend the trial court erred in its conclusion that by their conduct in electing to install only one water connection and one meter to serve several buildings in an apartment complex when they could have installed separate meters for each unit, the plaintiffs are now estopped from contending that the water and sewer rate structure is unreasonably discriminatory. We think the doctrine of equitable estoppel has no application in the present case.

It is essential to an estoppel that the person asserting the estoppel must have changed his position to his detriment in reliance upon the statements or acts of the parties sought to be estopped. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *Webber v. Webber*, 32 N.C. App. 572, 232 S.E. 2d 865 (1977). The only change of position of the defendant occurred when it amended its ordinances 2394 and 2395 on 6 July 1965 and authorized common sewer and water connections for various types of multiple building developments, including apartment complexes, motels, hospitals, schools, and industrial buildings. There is no evidence whatsoever that the defendant in any way relied on any statements or acts of the plaintiffs to its detriment in changing its ordinances. Thus, the trial court's conclusion that the plaintiffs have been estopped from challenging the validity of the water and sewer charges of the defendant is erroneous.



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Because of our disposition of this case, we find it unnecessary to discuss plaintiffs' remaining assignments of error.

The result is: That portion of the judgment declaring that the defendant does not unreasonably discriminate against the plaintiffs is vacated; the cause is remanded to the Superior Court for the entry of a conclusion that the defendant unreasonably discriminates against these plaintiffs in its charges for water and sewer service; for further proceedings to determine what amount, if any, each plaintiff is entitled to recover from the defendant for the alleged overpayments; and for entry of an appropriate judgment.

Vacated in part; and remanded.

Chief Judge MORRIS and Judge WEBB concur.

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DAVIDSON AND JONES, INC., PLAINTIFF AND THIRD-PARTY PLAINTIFF v. COUNTY OF NEW HANOVER DEFENDANT AND FRANK I. BALLARD, HERBERT P. MCKIM AND ROBERT W. SAWYER, T/D/B/A BALLARD, MCKIM & SAWYER; WAFF BROTHERS, INC.; RAYMOND INTERNATIONAL; AND SOIL & MATERIAL ENGINEERS, INC., THIRD-PARTY DEFENDANTS AND ROBERT E. LASATER AND ROBERT P. HOPKINS, T/D/B/A LASATER-HOPKINS, ADDITIONAL THIRD-PARTY DEFENDANTS

No. 785SC685

(Filed 19 June 1979)

**1. Architects § 3; Negligence § 2— liability of architects for negligence to general contractor and subcontractor**

An architect may be sued by a general contractor and the subcontractors working on a construction project for economic loss foreseeably resulting from breach of the architect's common law duty of due care in the performance of his contract with the owner even though there is no privity of contract.

**2. Professions and Occupations § 1; Negligence § 2— negligence in soil condition report—liability of engineers to contractors**

A general contractor and subcontractors who submitted bids and conducted work on a construction project in reliance on a soil investigative report could sue the engineers who prepared the soil report for damages caused by negligence in the preparation of the report; furthermore, the engineers were not immune from liability for negligence in preparing the report because of an agreement between the owner and plaintiff general contractor that plaintiff

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would rely on its own judgment in submitting its bid and was to conduct a site inspection in order to have a complete understanding of all existing conditions relating to the work.

APPEAL by plaintiff Davidson and Jones, Inc. and third-party defendants Waff Brothers, Inc., Raymond International, and Soil and Material Engineers, Inc. from *Brown, Judge*. Judgment entered 20 March 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 5 April 1979.

Plaintiff general contractor entered into a contract with New Hanover County to construct Phase I of a Law Enforcement Center in Wilmington. Ballard, McKim and Sawyer contracted with New Hanover County to serve as architects for the project.

Plaintiff submitted its bid on the construction project based partially on a soil and subsurface investigative report furnished it by the architects in the bidder's instruction package. The report had been prepared by Soil and Material Engineers for New Hanover County. New Hanover County's instructions to bidders specifically provided:

"Examination of Site and Documents: Before submitting a proposal, the bidder shall.

- (a) Carefully examine the drawings and specifications.
- (b) Visit the site of the work and fully inform himself of existing conditions and limitations.
- (c) Rely entirely upon his own judgment in preparing his proposal, and include in his bid a sum sufficient to cover all items required by the contract."

Plaintiff engaged Waff Brothers, Inc. to demolish all site structures, to haul away debris, to excavate the site, and to unload, drive, extract, clean, trim, and repair tieback holes, and reload sheet piling. Plaintiff engaged Raymond International to install 207 foundation pilings and engaged Soil and Material Engineers to monitor vibrations created by demolition and installation of sheet pilings, as well as to design and install a tieback system of the sheet piling.

The architects engaged Lasater-Hopkins to serve as structural engineers for the construction, to design the structural

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foundation, to review, approve, or disapprove all structural specifications for the foundation, to review the excavation work on the foundation, and to approve or disapprove the design of all shoring and bracing systems surrounding the excavation of the Law Enforcement Center.

During the construction phase of the project, damage occurred to the Public Library Building of Wilmington, which was located on an adjacent site. Plaintiff denied liability for the damage. New Hanover County declared plaintiff to be in default on its contract and requested plaintiff's surety to make the necessary repairs.

Plaintiff filed action against New Hanover County for \$140,029.94 allegedly due under the construction contract, \$129,058.84 for additional expenses incurred at New Hanover County's request for work performed on the Wilmington Public Library, and \$495.00 for additional pilings installed at the construction site.

Defendant New Hanover County filed answer, denied that it was indebted to plaintiff, and alleged plaintiff's breach of contract by failing to remedy and repair damages to the Wilmington Public Library, by improperly constructing an elevator shaft called for in construction plans and specifications and by failing to use proper means, methods, techniques, sequences, and procedures in construction despite proper demand to do so. Defendant filed counterclaim incorporating the terms of its contract with plaintiff and alleged plaintiff negligently failed: to familiarize itself with local site conditions; to supervise and direct the means, methods, techniques, sequences, and procedures of the work; to properly coordinate the work; to properly design or cause to be properly designed the excavation bracing system; and to tension or cause to be tensioned the sheet piling tieback system. Defendant also alleged plaintiff improperly installed or caused to be improperly installed the well point system, employed improper methods and techniques for driving the sheet piling, and improperly installed or caused to be installed the sheet piling by use of trench system—causing the surface level of the soil to move laterally. The county sought recovery of \$117,397.51 for repairs made to the library, \$2,880.00 for repairs to the Law Enforcement Center elevator shaft and two main pilings, and \$3,000.00 for

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removal expenses of certain library facilities and personnel to a temporary location.

Plaintiff, in its reply to the counterclaim, denied negligence and filed third-party complaint against the architects and plaintiff's subcontractors. Plaintiff alleged that the architects were negligent in that: they failed to make or have made reasonable and proper examinations and inspections of the soil conditions in and surrounding the building site; they failed to make or have made reasonable and proper examinations and inspections of the foundations of adjoining structures; they failed to provide reasonable and proper information, drawings, and specifications with respect to soil conditions, foundations of the construction area and surrounding adjacent structures; they represented that there were no unusual or peculiar conditions with respect to soil or surrounding structures; they provided incomplete and misleading information as to soil conditions; and they approved the design and method for driving of pilings. Plaintiff alleged that the subcontractors, Waff Brothers, Inc., Raymond International, and Soil and Material Engineers, were negligent in the performance of their respective subcontracts; that if it were found negligent, it was entitled to indemnity from them; and that Soil and Material Engineers was negligent in its initial investigation of soil conditions.

Waff Brothers, Inc., Raymond International, and Soil and Material Engineers, Inc. answered the third-party complaint, denied negligence, and cross claimed against the other third-party defendants. Each incorporated plaintiff's allegations as to the architects' negligence as part of their cross complaint against the architects.

The architects filed a motion to dismiss on the grounds that they had no duty or obligation, contractual or otherwise, to plaintiff in regard to plaintiff's allegations and that under the terms of plaintiff's contract with New Hanover County, plaintiff was responsible: for examinations or inspections of the foundations of adjoining structures, information, drawings, or specifications with respect to soil conditions; for designing or specifying the method of driving of pilings; for familiarizing itself with surrounding conditions; for all construction means, methods, techniques, sequences, and procedures; and for coordinating all portions of the

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work. The architects also contended that their approval of the drawings of the plaintiff's subcontractor did not relieve plaintiff of its responsibility to properly design and install the shoring and bracing system for the excavation. The architects filed third-party complaint against Lasater-Hopkins seeking indemnity for negligent breach of its subcontract. Subsequently, they cross claimed against the other third-party defendants.

Waff Brothers, Inc. submitted the affidavit of John Waff at the hearing on the architects' motion to dismiss. The affidavit alleged:

"4. Defendant Waff Brothers, Inc. had a vibratory hammer delivered on the job site on July 29, 1975 and began driving sheet piling with it on July 30, 1975.

5. Defendant Waff Brothers, Inc. procured and used said vibratory hammer at the request of and under instructions from Third-Party defendant Ballard, McKim & Sawyer, acting through Herbert P. McKim, who informed affiant that it was necessary for Waff Brothers, Inc. to change from a diesel to a vibratory hammer in order to speed up the work."

After considering the affidavits submitted and the answers to interrogatories, the trial court entered summary judgment for the architects and dismissed the third-party complaints against them for failure to state a claim upon which relief can be granted.

Plaintiff and third-party defendants Waff Brothers, Inc., Soil and Material Engineers, Inc., and Raymond International appealed.

*Manning, Fulton & Skinner, by Charles L. Fulton; Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for plaintiff.*

*Granville A. Ryals and Maupin, Taylor & Ellis, by W. W. Taylor, Jr., for Waff Brothers, Inc., third-party defendant appellant.*

*Crossley & Johnson, by John F. Crossley, for Raymond International, third-party defendant appellant.*

*Reynolds & Howard, by E. Cader Howard, for Soil & Material Engineers, Inc., third-party defendant appellant.*

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*Hogue, Hill, Jones, Nash & Lynch, by David A. Nash, for Ballard, McKim & Sawyer, third-party defendant appellee.*

*Young, Moore, Henderson & Alvis, by J. C. Moore, for Lasater-Hopkins, additional third-party defendant appellee.*

*Trotter, Bondurant, Griffin, Miller & Hishon, by Luther P. Cochrane and John F. Elger; Miller, Johnston, Taylor & Allison, by John B. Taylor, for Associated General Contractors of America, Carolinas Branch, amicus curiae.*

*Wade M. Smith and Steven L. Evans, for North Carolina Chapter of the American Institute of Architects, amicus curiae.*

ERWIN, Judge.

Architects' Liability

[1] The question before us is whether in the absence of privity of contract an architect may be held liable to a general contractor and his subcontractors for economic loss resulting from breach of a common law duty of care. We answer, "Yes."

The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951); *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E. 2d 297 (1939). The duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966); *Honeycutt v. Bryan*, 240 N.C. 238, 81 S.E. 2d 653 (1954). The duty to exercise due care may arise out of contractual relations. However, a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions in connection with an economic relationship, nor is it a prerequisite to suit by a contractor against an architect. See *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416 (E.D. Wash. 1976); see also 57 Am. Jur. 2d, Negligence, § 49, p. 398.

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An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. 5 Am. Jur. 2d, Architects, § 8, pp. 669-70. Where breach of such contract results in foreseeable injury, economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of due care, we know of no reason why an architect cannot be held liable for such injury. Liability arises from the negligent breach of a common law duty of care flowing from the parties' working relationship. Accordingly, we hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner. It is true that neither the general contractor nor the subcontractors could maintain a cause of action against the architects grounded on negligent performance of the architects' contract with New Hanover County. See *Durham v. Engineering Co.*, 255 N.C. 98, 120 S.E. 2d 564 (1961), and *Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E. 2d 444 (1978).

We note that plaintiff and third-party defendants seek to impose contractual duties upon the architects not expressly assumed by them in their contract. This, we refuse to do.

Our decision today does not conflict with our Supreme Court's holding in *Durham v. Engineering Co.*, *supra*. In *Durham*, *supra*, our Supreme Court quoted *Williamson v. Miller*, 231 N.C. 722, 726, 58 S.E. 2d 743, 746 (1950), as follows:

“ [S]ince the contract is made a part of the complaint, and is alleged as the sole basis of recovery, the Court will look to its particular provisions rather than the more broadly stated allegations in the complaint, or the conclusions of the pleader as to its character and meaning. Upon proper construction of these writings depends the propriety of the judgment overruling the demurrer.’ ” (Citation omitted.)

*Id.* at 101, 120 S.E. 2d at 566. Thus, in reaching its decision, the Court did not consider the question before us, nor do we believe that this Court's decision in *Drilling Co. v. Nello L. Teer Co.*, *supra*, precludes us from reaching our decision.

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In *Drilling Co.*, *supra*, we were reluctant to impose liability on a consulting engineer who required work exceeding plan specifications. We indicated that an architect's negligent failure to perform his contractual duty with the owner could result in a defective foundation and possible extensive liability. Such countervailing considerations are of less magnitude where an architect's negligence in performing his contract contributes to a defective building and damage to adjacent property by means of a concurrent breach of a common law duty of care arising out of the circumstances surrounding the parties. Whether or not the architects breached their duty of due care causing pecuniary loss to plaintiff and third-party defendants presents a genuine issue of a material fact. Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). Since a genuine issue of a material fact exists as to whether the architects breached their common law duty of due care in the performance of their contract, summary judgment in their favor is reversed.

Soil and Materials Engineers', Inc. Liability

[2] Plaintiff and third-party defendants allege that Soil and Material Engineers, Inc. negligently misrepresented the subsurface soil conditions and that their reliance on the soil investigative report prepared by Soil and Material Engineers, Inc. was the proximate cause of their injury.

A surveyor or civil engineer is required to exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury. *R. H. Bowman Associates, Inc. v. Danskin*, 72 Misc. 2d 244, 338 N.Y.S. 2d 224 (1972), *aff'd mem.*, 43 A.D. 2d 621, 349 N.Y.S. 2d 655 (1973). Such liability is based on negligence, and lack of privity of contract does not render Soil and Material Engineers, Inc. immune from liability to the general contractor or the subcontractors for damages proximately resulting from submitting a bid or conducting work in reliance on negligently prepared soil test reports. *M. Miller Co. v. Central Contra Costa*



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*Sanitary Dist.*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961); *see also* Restatement of Torts, § 552 (1938).

Restatement of Torts, § 552 provides:

“§ 552. INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS.

One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

- (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
- (b) the harm is suffered
  - (i) by the person or one of the class of persons for whose guidance the information was supplied, and
  - (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.”

We believe that the Restatement of Torts, § 552 is in accord with the law of North Carolina. We know of no cases disavowing the recognition of a cause of action in *negligence* based on a negligent misrepresentation. In performing its contractual duties, Soil and Material Engineering, Inc. was under a common law duty to use due care. To the extent that plaintiff and third-party defendants have alleged a breach of that duty of due care and that the breach was a proximate cause of their injury, they have stated a cause of action. *See generally* Prosser, *Misrepresentation and Third Persons*, 19 *Vanderbilt L. Rev.* 231, 246-48 (1966). The agreement between New Hanover County and plaintiff, that it was to rely entirely on its own judgment in submitting its bid and was to conduct a site inspection to have a complete understanding of all existing conditions relating to the work, did not render Soil and Material Engineers immune from liability for any negligence in preparing the soil condition report. *See M. Miller Co. v. Central Contra Costa Sanitary Dist.*, *supra*, and *Craig v. Everett M. Brooks Co.*, 351 Mass. 497, 222 N.E. 2d 752 (1967).

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We only hold, at this point in the proceedings, that a cause of action has been sufficiently alleged. *See McCloskey & Company, Inc. v. Wright*, 363 F. Supp. 223 (E.D. Va. 1973).

The judgment entered below is

Reversed.

Judges VAUGHN and MARTIN (Harry C.) concur.

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JERRY W. WHITEHURST v. DR. DONALD P. BOEHM

No. 783SC775

(Filed 19 June 1979)

**1. Physicians, Surgeons and Allied Professions § 11.1— podiatrist—standard of care—showing by orthopedic surgeon improper**

In malpractice cases the applicable standard of care for podiatrists and other "allied occupations" to medicine must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify with respect to that limited field of practice; therefore, the standard of care required of a podiatrist could not be established through testimony of an orthopedic surgeon who was not familiar with the practice of podiatry.

**2. Physicians, Surgeons and Allied Professions § 15.1— malpractice of podiatrist alleged—expert testimony by orthopedic surgeon—exclusion proper**

The trial court in an action for malpractice did not err in excluding an orthopedic surgeon's response to a hypothetical question concerning a podiatrist's failure to use a tourniquet since the standard of care required of the podiatrist could only be established by other podiatrists and since all the evidence tended to show that defendant podiatrist did use a tourniquet.

**3. Physicians, Surgeons and Allied Professions § 20.2— malpractice of podiatrist—conflicting instructions—error favorable to plaintiff**

In a malpractice action brought against defendant podiatrist, the trial court erred in giving conflicting instructions that the standard of care of a podiatrist must be established by other podiatrists and that it must be established by an orthopedic surgeon, but such error was favorable to plaintiff.

APPEAL by plaintiff from *Bruce, Judge*. Judgment entered 5 April 1978 in Superior Court, PITT County. Heard in the Court of Appeals 3 May 1979.

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Plaintiff instituted this action against defendant, Dr. Donald P. Boehm, alleging that the defendant was negligent, in that he failed to properly diagnose the plaintiff's foot condition, that he recommended surgery when in fact surgery was not needed, that the surgery on plaintiff's foot was done in a negligent manner, and that the defendant failed to take proper postoperative care of the wound. Defendant admitted performing the operation, but denied all allegations of negligence. Defendant is a podiatrist.

At trial, plaintiff presented evidence which tended to show that he developed a pain in his left foot and had several appointments with the defendant in the summer of 1975. Defendant diagnosed plaintiff's problem as a Morton's neuroma (scar tissue on a nerve) and indicated that the neuroma tissue could be removed by minor surgery in defendant's office.

On 19 September 1975, the surgery was performed, and defendant again assured the plaintiff that the surgical procedure was "quite simple." Local anesthesia was administered to the plaintiff and a "rubber-band type" tourniquet was used on plaintiff's calf during the operation. An incision was made between the third and fourth toes on the top of the plaintiff's foot. The surgery became more complicated than anticipated. The plaintiff's foot bled profusely and the pain grew more severe. Plaintiff overheard the defendant tell his nurse that "[i]t was turning out to be a bigger problem than it looked like."

After the operation, plaintiff left defendant's office with his foot in a bandage and wearing a special canvas shoe. At this time, plaintiff was not given any instructions, either verbal or written. One half hour after the surgery, blood had saturated the bandage and the pain was intensifying. Plaintiff was unable to return to work as a result. Plaintiff made several return visits to the defendant on 22 September 1975 and 24 September 1975, but the defendant refused to change the original bandage. It was at these visits that the defendant provided the plaintiff with written instructions.

Plaintiff finally removed the bandage himself on or about 26 September 1975. His foot was swollen and infected. Plaintiff visited the defendant on two more subsequent occasions but defendant did not provide any medication and reassured the plaintiff that everything was alright with his foot. On the advice of a

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nurse at plaintiff's place of employment, plaintiff visited his regular physician, Dr. Woodworth, on 16 October 1975. Dr. Woodworth referred the plaintiff to Dr. Crisp, an orthopedic surgeon. After waiting a year for the infection to clear, plaintiff underwent corrective surgery at Duke University Medical Center, with orthopedic surgeon Dr. McCollum operating on the underside of the plaintiff's left foot. This operation relieved the most severe areas of pain, however, the plaintiff still could not move his toes on the left foot.

Dr. Woodworth testified that his examination of plaintiff's foot revealed that the foot needed further attention and that the foot was not healing properly. He subsequently referred the plaintiff to Dr. McCollum.

Dr. McCollum testified that his diagnosis of plaintiff's problem was a neuroma and that he operated in November 1976 under a general anesthetic with a tourniquet and removed a neuroma. The defendant's inadequate dissection in the first operation led to a new neuroma which necessitated Dr. McCollum's corrective surgery. Dr. McCollum testified that the plaintiff still suffered a permanent partial disability of 10% of his foot. Based upon the numbness and stiffness of the third toe, plaintiff's inability to stand longer than two hours without severe pain and his inability to engage in activities such as tennis, Dr. McCollum surmised that plaintiff's disability prior to the second operation was 25% of the foot.

Defendant testified that he diagnosed the plaintiff's problem as two neuromas, but elected to remove only one of them as a result of the risk involved. He operated on the plaintiff on 19 September 1975. After the surgery, he gave the plaintiff oral and written instructions. On 27 September 1975, the defendant changed the bandage and was "satisfied with the progress that had been made since the operation." The defendant further testified that his incision (between the second and third toes) was made in a different area than that of Dr. McCollum's (between the third and fourth toes) and that Dr. McCollum's surgery was therefore not corrective.

Defendant's nurse testified that she gave the plaintiff's wife written and oral instructions immediately after the surgery and

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that the defendant changed plaintiff's bandages on several postoperative visits.

The jury reached a verdict in favor of defendant, finding no negligence. Plaintiff appeals.

*James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff appellant.*

*Farris, Thomas & Farris, by Robert A. Farris and Thomas J. Farris, for defendant appellee.*

CARLTON, Judge.

[1] The plaintiff first contends that the trial court erred in excluding the testimony of Dr. McCollum, an orthopedic surgeon, "concerning the standard of care that should have been present in the treatment of the plaintiff." The assigned error raises the primary question for determination on this appeal: In an action for malpractice, what is the proper applicable standard of care for one engaged in the practice of podiatry?

On direct examination of Dr. McCollum, objections by the defendant to the following questions and others similarly worded were sustained by the court:

Q. Now, would the use of the tourniquet, as you have described, be within the standards of professional competence and care customarily similar in the communities here in North Carolina, and Durham? Is this general standard practice?

Q. Now, would that be the normal procedure that would be exercised here at Duke University Medical Center?

Q. If you had a patient that was coming to you for this particular type of condition, which was described as one that Mr. Whitehurst had, what generally would you do in the way of informing that particular patient about the risk incident to surgery and the alternatives for treatment and this type of thing?

The burden of proof is on the plaintiff in a medical malpractice case to establish the applicable standard of care required of practitioners in defendant's field of practice. See *Price v. Neyland*, 115 U.S. App. D.C. 355, 320 F. 2d 674 (1963). A physician

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in North Carolina, is held to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice. See *Thompson v. Lockert*, 34 N.C. App. 1, 237 S.E. 2d 259 (1977); *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). The same rules that govern the duty and liability of physicians and surgeons in the performance of professional services are applicable to practitioners of the "kindred branches of the healing profession" and to practitioners in allied health fields. 70 C.J.S., Physicians and Surgeons, § 41, p. 946. In introducing the deposition of Dr. McCollum, plaintiff was attempting to meet his burden of proof. Moreover, he was attempting to establish for the practice of podiatry, the same standard of care required of orthopedic surgeons. Based on a review of the record, we agree with plaintiff that podiatrists consider themselves even more qualified than orthopedic surgeons to perform surgery of the foot. However, we do not agree with plaintiff's interpretation of prevailing law. The standard of care required of a podiatrist cannot be established through testimony of an orthopedic surgeon who is not familiar with the practice of podiatry; it can only be established by the testimony of another podiatrist or one equally familiar with that field of practice.

The practice of podiatry is defined in G.S. § 90-202.2 as "the surgical or medical or mechanical treatment of all ailments of the human foot, except the amputation of the foot or toes or the administration of an anesthetic other than local and except the correction of clubfoot deformity and triple arthrodesis." The term podiatry is often used interchangeably with the term chiropody. The definition of podiatry, by its own national organization, is as follows: Chiropody-podiatry is that specialty of medical practice which includes the diagnosis and/or the medical, surgical, mechanical, physical and adjunctive treatment of the diseases, injuries and defects of the human foot. *Lawyers' Medical Cyclopedia*, Vol. 1, § 1.18, p. 33. There is an American Podiatry Association and there are schools of podiatric medicine across the country. Podiatrists are not members of the American Medical Association and the practice of podiatry is closely regulated by state statutes. See G.S., Chap. 90, Art. 12A.

The record discloses that the defendant had graduated from the Illinois College of Podiatric Medicine and was licensed to practice podiatry in North Carolina.

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While there are no North Carolina cases on the applicable standard of care required of podiatrists, the majority view is that a podiatrist must exercise that degree of ordinary skill and care which is commonly exercised by other podiatrists in the same locality under similar circumstances. He is not bound to possess and exercise the degree of care and skill required of an ordinary physician or surgeon. *Anno*: 80 A.L.R. 2d 1278; *Whyte v. American Motorists*, 122 So. 2d 297 (La. Ct. App. 1960).

Accordingly, proof of negligence, by establishing the requisite standard of care, is reserved for competent practitioners of the defendant's own school of medicine, who alone can testify as to the teachings of that school and the defendant's conformity thereto in the treatment of the patient. *Anno*: 85 A.L.R. 2d 1022; *Am. Jur. 2d, Physicians and Surgeons*, § 205, p. 340; *Ferguson v. Gonyaw*, 64 Mich. App. 685, 236 N.W. 2d 543 (1975); *Binns v. Schoenbrun*, 81 N.M. 489, 468 P. 2d 890 (1970); *Harris v. Campbell*, 2 Ariz. App. 351, 409 P. 2d 67 (1966).

A school of medicine relates to the system of diagnosis and treatment. While the law recognizes that there are different schools of medicine, it does not favor, or give exclusive recognition to, any particular school or system of medicine, as against the others. *When a patient selects a practitioner of a recognized school of treatment he adopts the kind of treatment common to that school, or, as otherwise stated, he is presumed to elect that the treatment shall be according to the system or school of medicine to which such practitioner belongs.* The question whether or not a practitioner in his treatment of the case exercised the requisite degree of care, skill, and diligence is to be tested by the general rules and principles of the particular school of medicine which he follows, and not by those of other schools, since he is only under the duty of exercising the degree of skill and care ordinarily exercised by practitioners of his school. (Emphasis added.) 70 C.J.S., *Physicians and Surgeons*, § 44, p. 953.

North Carolina adheres to the majority view concerning the qualification of experts attempting to establish the standard of care in malpractice cases. In *Hardy v. Dahl*, 210 N.C. 530, 187 S.E. 788 (1936), the plaintiff sought damages for the wrongful death of his son, alleging negligence on the part of the treating defendant,

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a naturopath. Our Supreme Court discussed the applicable standard of care for a naturopath, saying:

In determining liability in a civil action for damages on the ground of negligence, the defendant was not required to possess the highest technical skill nor the wide scientific knowledge and learning of the well recognized schools of medicine and surgery, nor to exercise the utmost degree of care, *but only to exercise that degree of care, knowledge, and skill ordinarily possessed by members of his school of practice*, and to use reasonable care and diligence in the exercise of that skill and knowledge and in the exercise of his judgment in the treatment he holds himself out to practice. (Emphasis added.) *Id.* at 533, 534, 187 S.E. 788 at 790.

Likewise, the standard of care for dentists in malpractice actions is established by other dentists, *Hazelwood v. Adams*, 245 N.C. 398, 95 S.E. 2d 917 (1957); *Grier v. Phillips*, 230 N.C. 672, 55 S.E. 2d 485 (1949) and the standard for medical doctors is established by other medical doctors similarly situated. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955); *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57 (1951).

Our review of the applicable statutes and the record indicates that the practice of podiatry is a narrowly restricted one. This allied health profession is not at all comparable with the practice of medicine and surgery. The educational requirements for a podiatrist are less demanding than those for physicians and surgeons. See G.S. 90-202.5. The practice is limited to correcting conditions of the foot. It would be highly unlikely that a practitioner in one of these fields would be familiar with the training and standards of the other. Indeed, Dr. McCollum testified that he was not familiar with the standards of licensing with respect to podiatrists, nor with their standards for professional care and that all his opinions were based on standards for physicians and surgeons.

Arguably, the layman can urge that one engaged in the healing arts should be held accountable to the highest degree of medical care. It is obviously difficult for a layman to distinguish between those who proudly call themselves "doctor." Indeed, the defendant and his witness, another podiatrist, testified that they were more qualified than an orthopedic surgeon to perform



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surgery of the foot. There is no evidence, however, that defendant, prior to the surgery, ever held himself out to be more than he was—a podiatrist. Even a general medical practitioner is not held to the higher standards of the specialist. 70 C.J.S., Physicians and Surgeons, § 41, p. 946.

Chapter 90 of our General Statutes is entitled "Medicine and Allied Occupations." It sets forth licensing and other standards for the practice of medicine, dentistry, pharmacy, optometry, chiropractic, nursing, podiatry, embalming, dental hygiene, dispensing optician, psychology and speech and language pathology and audiology. Podiatry is obviously an "allied occupation" (to medicine) in the contemplation of our state law. Plaintiff elected to undergo foot surgery by one other than a pure medical or surgical practitioner. Under prevailing law, he cannot now complain that the mode of treatment employed by one he voluntarily selected was less than the most competent available in the world of medicine. It is obviously a function of the legislature, not the courts, to determine if those who carry the title "doctor" should be limited to those engaged in the pure practice of medicine and surgery, or to take other steps to insure that the innocent layman knows the limitations of those engaged in the medically "allied occupations."

We hold that, in malpractice cases, the applicable standard of care for podiatrists and other "allied occupations" to medicine must be established by other practitioners in the particular field of practice or by other expert witnesses *equally* familiar and competent to testify with respect to that limited field of practice.

We therefore dismiss plaintiff's contention that an orthopedic surgeon is competent to establish the standard of care for a doctor of podiatry. Objections made by defendant to this line of questioning were properly sustained by the trial court.

[2] Plaintiff next assigns as error the exclusion of Dr. McCollum's response to a hypothetical question formulated by plaintiff's counsel on direct examination. The questioning was as follows:

Q. Well, assuming for the moment that the jury should find from the evidence and by its greater weight that when Dr. Donald P. Boehm performed the original surgical pro-

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cedure on Mr. Whitehurst *that he did not use a tourniquet*, do you have an opinion satisfactory to yourself, based upon competent medical authority, as to whether or not this would have obscured his vision at the site of the operation or the exact location that the operation was performed? (Emphasis added.)

The trial court was proper in sustaining objections to this question for two reasons. As noted above, the standard of care can only be established by "members of his [podiatry] school of practice." To allow Dr. McCollum's response to this question calling for the opinion of an orthopedic surgeon concerning a podiatrist's method of treatment would be contrary to prevailing law.

Even assuming the question were not objectionable for the aforementioned reason, it would still be improper for another reason. The use of hypothetical questions is an accepted method of examining an expert witness. However, an important *caveat* in framing a hypothetical question is that "only such facts as are in evidence or such as the jury will be justified in inferring from the evidence" are to be incorporated in the question. 1 Stansbury, N.C. Evidence, § 137, p. 452 (Brandis rev. ed. 1973); *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966). In the case *sub judice*, there was no evidence that the defendant did not use a tourniquet during the plaintiff's operation. On the contrary, all the evidence, including the plaintiff's own testimony, tended to show that the defendant did in fact use a tourniquet. This assignment of error is overruled.

The plaintiff next contends that the trial court committed error in its instructions to the jury. Plaintiff argues that the standard of care, defined and explained in terms of "others similarly situated" in the instructions, should have encompassed "specialists dealing with orthopedic surgery of the foot." We do not agree with this contention in light of our holding as to the applicable standard of care.

[3] The plaintiff further contends that the court's instructions were conflicting as to the appropriate standard of care to be applied by the jury. The pertinent part of the charge is as follows:

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Now, with respect to the expert testimony, the standard of care that is established by members of the same profession in the same or similar communities under like circumstances. Now, an orthopedic surgeon, I instruct you, as far as the foot is concerned, is the same as a podiatrist. It follows, therefore, that the only way you may properly find that the standard in the first allegation has not been met is through evidence presented by Dr. McCollum who was an orthopedic surgeon, or through the defendant himself, or his witness, the other podiatrist from Goldsboro.

Plaintiff argues that the holding of *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 582 (1964) necessitates a finding of prejudice by this Court as a result of these conflicting instructions.

We agree with plaintiff that the instructions were conflicting but we do not agree that prejudice to plaintiff resulted. Unquestionably, the trial court was instructing the jury on one hand that the standard of care of a podiatrist must be established by other podiatrists and, on the other hand, by an orthopedic surgeon. In light of our earlier holding, equating the standard of care between the two professions was error. However, the error was in plaintiff's favor, not to his prejudice. The instruction that defendant was subject to the high standards of an orthopedic surgeon could only serve to lighten plaintiff's burden for Dr. McCollum testified that defendant's surgical procedure was inadequate. Still, the jury found that defendant had met the higher, though unrequired, standards of orthopedic surgery and returned a verdict against the plaintiff. Not only was the error in the instructions not prejudicial to plaintiff, it was beneficial to him. This assignment of error is overruled.

We have reviewed plaintiff's remaining assignments of error and find them devoid of merit.

In the trial below, we find

No error.

Judges VAUGHN and CLARK concur.

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 In re Farrow
 

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IN THE MATTER OF: SUSAN LYNN FARROW, RESPONDENT

No. 789DC1142

(Filed 19 June 1979)

**1. Evidence § 14; Insane Persons § 1.2— physician-patient privilege—inapplicability to involuntary commitment proceedings**

The physician-patient privilege created by G.S. 8-53 is not applicable in involuntary commitment proceedings conducted pursuant to Article 5A of G.S. Ch. 122; therefore, that statute did not prohibit the magistrate, in entering a temporary custody order, from considering information contained in a doctor's affidavit relating to matters which had been orally communicated to the doctor by respondent while she was his patient and relating to knowledge obtained by him as a result of his examinations of the respondent while he attended her in a professional capacity.

**2. Insane Persons § 1.2— involuntary commitment of person admitted voluntarily**

A patient voluntarily admitted to a mental health care facility under G.S. 122-56.1 *et seq.* may not be ordered held involuntarily under G.S. 122-58.1 *et seq.* absent evidence sufficient to support a conclusion that it is reasonably necessary for the effective treatment and safety of the patient or for the safety of others to do so.

APPEAL by respondent from *Wilkinson, Judge*. Judgment entered 24 August 1978 in District Court, GRANVILLE County. Heard in the Court of Appeals 27 March 1979.

This is an appeal from an involuntary commitment order entered pursuant to G.S. 122-58.8. Facts pertinent to the questions raised are stated in the opinion.

*Attorney General Edmisten by Associate Attorney Christopher S. Crosby for petitioner appellee.*

*Susan Freya Olive for respondent appellant.*

PARKER, Judge.

This proceeding was commenced 14 August 1978 when Daniel T. Peak, M.D., a physician at John Umstead Hospital, filed his sworn petition before a magistrate pursuant to G.S. 122-58.3(a) for the involuntary commitment of the respondent. In this petition Dr. Peak alleged that respondent was mentally ill and imminently dangerous to herself or others. As the facts upon which this opinion was based, the petitioner alleged that respondent "[h]ears

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voices which tell her she is no good and should kill herself" and that she "[h]as made 3 suicide attempts in the last 2 weeks." At the time the petition was filed, respondent was already a patient at John Umstead Hospital, having voluntarily admitted herself in May, 1978. Petitioner was her attending physician.

[1] Upon receipt of the petition, the magistrate ordered that respondent be retained at John Umstead Hospital "for temporary custody, examination and treatment pending a district court hearing." When the matter came on for hearing before the district court, the respondent, who was present and represented by all counsel, moved to dismiss the proceedings on the grounds that all allegations in the affidavit and petition of Dr. Peak were based on confidential physician-patient communications barred by the provisions of G.S. 8-53 from being disclosed by the physician or from being considered by the magistrate as a basis for issuing the temporary custody order. Respondent contended that the magistrate thus had no evidence properly before him on which to base his custody order and for this reason the proceedings should be dismissed. The district court denied the motion, which ruling is the basis of respondent's first assignment of error.

When Dr. Peak's affidavit was offered in evidence at the hearing, respondent objected to its admission on the grounds that in material part it contained solely privileged information protected from disclosure by G.S. 8-53. [No objection was made, either in the district court or before this court on this appeal, on the grounds that the doctor was not present and subject to cross-examination; see G.S. 122-58.7(e) and *In re Benton*, 26 N.C. App. 294, 215 S.E. 2d 792 (1975)]. Respondent's objection was overruled and the doctor's affidavit was received in evidence, which ruling is the basis of respondent's second assignment of error. Since respondent's first two assignments of error each present the question of the extent of the applicability of G.S. 8-53 in involuntary commitment proceedings, we will discuss them together.

"At common law no privilege was recognized for communications between physician and patient, but North Carolina, in common with a number of other states, has created such a privilege by statute." 1 Stansbury's, N.C. Evidence, Brandis Revision, § 64, p. 200. "It is the purpose of such statutes to induce the patient to make full disclosure that proper treatment may be given, to pre-

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vent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination." *Sims v. Insurance Co.*, 257 N.C. 32, 36, 125 S.E. 2d 326, 329 (1962). The North Carolina statute creating the privilege is G.S. 8-53, which in its present form, is as follows:

§ 8-53. Communications between physician and patient.— No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician; or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or in the case of unadministered estates, the next of kin; provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Interpreting G.S. 8-53, our Supreme Court has held that the privilege created by that statute is for the benefit of the patient alone, *Capps v. Lynch*, 253 N.C. 18, 116 S.E. 2d 137 (1960); and "extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908). The privilege may be waived by the patient, *Capps v. Lynch, supra*, and in any event is a qualified, rather than an absolute, privilege in that the judge has discretion, either at the trial or prior thereto, to "compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." G.S. 8-53.

In the present case the information contained in the doctor's affidavit related to matters which had been orally communicated to him by the respondent while she was his patient and to knowledge obtained by him as a result of his examinations of the respondent while he attended her in a professional capacity. It was information necessary to enable him to prescribe and to per-

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form professional services for her as his patient. Respondent did not waive the privilege. The doctor's affidavit, therefore, contained information within the scope of the statutory privilege, if G.S. 8-53 is applicable in an involuntary commitment proceeding. We hold that it is not.

Our conclusion that G.S. 8-53 is not applicable in involuntary commitment proceedings conducted pursuant to Article 5A of G.S. Ch. 122 is based upon an analysis both of the purpose of such proceedings and upon the express statutory provisions which govern how that purpose shall be accomplished. The policy of this State concerning involuntary commitments is set forth in the first section of Article 5A of G.S. Ch. 122 as follows:

G.S. 122-58.1 *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, or unless he is mentally retarded and, because of an accompanying behavior disorder, is imminently dangerous to others, that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate.

It is manifest from this declaration of policy and from a reading of the entire Article 5A of G.S. Ch. 122 that one of the purposes, indeed the primary purpose, of an involuntary commitment proceeding is to protect the person who, after due process, has been found to be both mentally ill and imminently dangerous by placing such a person in a more protected environment where the danger may be minimized and his treatment facilitated. In a real sense the proceeding is an important step in his medical and psychiatric treatment. That the Legislature intended for his physician to play a key role almost from the inception of the proceedings and that it did not intend this role to be inhibited by G.S. 8-53 is made manifest by a number of express statutory provisions. For example, while G.S. 122-58.3(a) authorizes *any* person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others to appear before a clerk of court or magistrate to execute an affidavit to this effect and "petition the clerk or magistrate for issuance of an order to

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take the respondent into custody for examination by a qualified physician," subsection (d) of the same section provides that if the affiant is himself a qualified physician, he may execute the oath to the affidavit before any official authorized to administer oaths and in such case the physician is not required to appear before the clerk or magistrate for this purpose. Clearly, the Legislature contemplated that a physician who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others should initiate the proceedings for such person's commitment by executing the oath setting forth his knowledge of these facts. In the usual case that knowledge would be obtained by the physician in the course of treating his patient, and it would be anomalous indeed to believe that the Legislature intended that a physician who happened on the knowledge in some other manner should be permitted to execute the affidavit but that the physician who had the surer knowledge derived from observation and treatment of his own patient should be prevented by G.S. 8-53 from doing so. Other sections of Article 5A of G.S. Ch. 122 make even more clear that the Legislature did not contemplate that G.S. 8-53 should apply in involuntary commitment proceedings. G.S. 122-58.6(c) provides that "[p]ending the district court hearing, the qualified physician attending the respondent is authorized to administer to the respondent reasonable and appropriate medication and treatment that is consistent with accepted medical standards." That the Legislature contemplated that such attending physician should be free to testify is shown by G.S. 122-58(7)(e) which expressly provides that "[c]ertified copies of reports and findings of qualified physicians and medical records of the mental health facility are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied." It should be noted that the Legislature did not say that there should be admissible in evidence the reports and findings of qualified physicians *other than those who attend and treat the patient or other than as prohibited by G.S. 8-53*; instead it made *all* of the reports and findings of qualified physicians and medical records of the mental health facility admissible in evidence at the involuntary commitment hearing provided for in G.S. 122-58.7. Again, G.S. 122-58.11, which deals with rehearings for persons who have been committed, provides in subsection (a) that "if the chief of medical services of the in-patient facility determines that treatment of a respondent beyond the initial period will be



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necessary, he shall so notify the clerk of superior court of the county in which the facility is located." In such case the district court judge is to calendar a rehearing at least ten days before the end of the initial period of commitment. Subsection (c) provides that such "[r]ehearings are governed by the same procedures as initial hearings, and the respondent has the same rights he had at the initial hearing. . ." Surely, the Legislature did not intend that at such a rehearing the staff physicians who had been attending and treating the respondent and who of all persons were most knowledgeable and best qualified to testify concerning his need for continued treatment should be barred from testifying. These statutes all clearly imply that the attending physicians are not to be prevented by G.S. 8-53 from testifying at any of the hearings provided for under Article 5A of G.S. Ch. 122. We hold, therefore, that G.S. 8-53 does not apply in involuntary commitment proceedings conducted pursuant to that Article. Respondent's first two assignments of error are overruled.

For decisions from other jurisdictions holding the physician-patient privilege inapplicable to incompetency or involuntary commitment proceedings, see: *In Re Allen*, 204 N.Y.S. 2d 876 (1960) [disapproving holding in *Matter of Gates*, 170 App Div 921, 154 N.Y.S. 782 (1915) and adopting view earlier expressed in *Matter of Benson*, 16 N.Y.S. 111 (1891)]; *Metropolitan Life Ins. Co. v. Ryan*, 237 Mo. App. 464, 172 S.W. 2d 269 (1943); for cases *contra*, see cases cited in Annot., 44 A.L.R. 3d 24, § 34, pp. 155-57. For express statutory solutions to the problem, see Conn. Stat. Ann., § 52, 146f(b) and Mass. Gen. Laws, Ch. 233, Sec. 20B(a); for a general discussion of the problems posed by the inherent conflict between the psychiatrist's duty to maintain confidentiality and his duty to disclose when necessary to protect his patient or the public from imminent danger, see Note, U. Ill. L. Forum (1976) p. 1103; see also *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P2d 334, 83 ALR 3d 1166 (1976).

[2] At the conclusion of the hearing in the present case, the court entered an order finding respondent to be mentally ill in that she suffered from psychotic depression, imminently dangerous to herself in that she had made three attempts to kill herself in the preceding two weeks, and in need of further hospitalization and treatment. On these findings the court ordered respondent committed to John Umstead Hospital for a

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period of 60 days or until discharged according to law. Respondent's third and final assignment of error challenges the entry of this order on the grounds that, since respondent was already a voluntarily admitted in-patient receiving treatment at John Umstead Hospital, and since there was no showing that she would not voluntarily remain at the hospital for as long as proper treatment of her condition might require, there was no sufficient reason for imposing upon her the restraint of an involuntary commitment order. On the facts disclosed by this record, we agree.

Respondent testified at the hearing before the district judge that she had been a voluntary patient at John Umstead Hospital since May 1978, that she had never left the hospital against medical advice, and that she did not intend to do so. On one occasion, in July 1978, she had been discharged by Dr. Peak, but she voluntarily returned to the hospital after one week and had applied for readmission because she felt unable to live safely outside. The reason she admitted herself to John Umstead Hospital was to obtain treatment for her suicidal tendencies. Her behavior and mental state were no worse at the time of the petition than they had been at the time of her May admission or at the time of her July discharge and readmission. She wanted to remain a patient at John Umstead Hospital, but wanted to retain her voluntary status, not be committed. No evidence was presented to contradict respondent's testimony, the only evidence presented in support of the petition being the sworn petition itself.

The policy of this State as declared by our Legislature is to encourage voluntary admissions to treatment facilities, G.S. 122-56.1, and to favor a less restrictive mode of treatment than involuntary commitment whenever appropriate. G.S. 122-58.1. Here, the respondent, although mentally ill and imminently dangerous to herself, had recognized her need for treatment by voluntarily admitting herself to the hospital. There was no showing that she had ever attempted to leave the hospital without permission of her doctor nor was there any showing that reasonable cause existed to believe that she might attempt to do so. G.S. 122-56.3 provides that "[t]he application (for involuntary admission) shall acknowledge that the applicant may be held by the treatment facility for a period of 72 hours subsequent to any written request for release that he may make." Presumably the application signed by respondent conformed with this requirement. If so, the

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hospital authorities had ample opportunity to seek an involuntary commitment order should respondent attempt to leave the hospital before they felt it safe for her to do so. We hold that absent evidence to show and a finding by the district court of facts which would support a conclusion that it is reasonably necessary for the effective treatment and safety of the patient or for the safety of others to do so, a patient voluntarily admitted under G.S. 122-56.1 *et seq.* may not be ordered held involuntarily under G.S. 122-58.1 *et seq.* No such evidence or finding appears in the present record. For this reason the order appealed from is

Reversed.

Judges HEDRICK and CARLTON concur.

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STATE OF NORTH CAROLINA v. GEORGE WILLIAM SPORTS

No. 7918SC221

(Filed 19 June 1979)

**1. Criminal Law §§ 33, 87; Rape § 18.1— preliminary questions to witness—introduction of witness—explanation of other evidence**

In this prosecution for assault with intent to commit rape and crime against nature, the victim's testimony about her orphan status, epileptic history, scholarship assistance and summer employment was competent to establish an introduction for her as a witness and to explain why the witness was working at a fast-food restaurant and walking home alone on the night in question.

**2. Criminal Law § 102.7— district attorney's jury argument—characterizations of prosecutrix—supporting evidence—unsupported argument as harmless error**

In a prosecution for assault with intent to commit rape and crime against nature, the district attorney's reference to the victim as "a twenty-one year old epileptic, half-blind college student," and "epileptic, virgin orphan," were consistent with facts in evidence and not improper. Furthermore, the district attorney's reference to the victim's noncompensated summer employment which was not supported by admitted evidence did not constitute prejudicial error.

**3. Criminal Law § 85.2— cross-examination of character witness—specific acts of misconduct by defendant—harmless error**

The trial court erred in permitting the prosecutor to ask defendant's character witness whether he knew defendant had been convicted of armed

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robbery, but such error was harmless where defendant had previously testified about his conviction for armed robbery.

**4. Criminal Law § 102.10— jury argument—characterizations of defendant**

In this prosecution for assault with intent to commit rape and crime against nature, the district attorney's characterization of defendant in his jury argument as an "admitted armed robber" and a "confessed armed robber" was supported by the record and was not improper.

**5. Rape § 18.2— assault with intent to rape—evidence of attempted penetration not necessary**

The State's evidence was sufficient for the jury in a prosecution for assault with intent to commit rape although there was no evidence of an attempted penetration.

APPEAL by defendant from *Albright, Judge*. Judgment entered 8 November 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 May 1979.

The defendant was indicted for assault with intent to commit rape and crime against nature. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to consecutive prison terms of 7 to 10 years and 8 to 10 years, the defendant appealed. The State's evidence tended to show that Ms. Virginia Poot, the prosecuting witness, worked at McDonald's restaurant in Greensboro on 30 October 1977. She was a senior at East Carolina University and was living with her aunt and working at McDonald's to help finance her education. Ms. Poot, an orphan, was the recipient of a scholarship grant under the Vocational Rehabilitation program. She qualified by reason of her epileptic condition. This scholarship helped to finance her education. To supplement the scholarship aid, she worked during the summer months. She had worked during the summer of 1977 and was working at the time of this incident because she could not afford to return to East Carolina in the fall of 1977.

Ms. Poot worked until about 1:00 a.m. on 30 October 1977. The person with whom she was to ride home failed to come to work due to sickness and the prosecutrix was unable to find another ride to her aunt's house. She began walking home and the defendant offered her a ride. She first declined but later accepted and, after a short drive, the defendant pulled into a service station lot. He told Ms. Poot to "take off them drawers or I will slit

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your throat." She refused and defendant proceeded to remove her clothes. He unzipped his pants and used words indicating he intended to have intercourse with her. Defendant put his mouth and hand on Ms. Poot's breast and then forced her to perform fellatio. The prosecutrix attempted to crush the defendant's testicles, but failed and received a slap across her face from the defendant. Defendant then put his tongue in Ms. Poot's mouth and she bit the tongue causing it to bleed. Defendant then told the prosecutrix to get out of the car.

An identification specialist for the county sheriff's office took photographs of blood and a dental plate at the service station where the assault occurred. He also took photographs of blood in the defendant's automobile.

The defendant's evidence tended to show that on 30 October 1977 after playing cards with friends from his job, the defendant picked up the prosecutrix on the highway. They pulled over at a service station. The defendant kissed the prosecutrix and she kissed him back. She apparently became scared when he touched her breast and she then bit his tongue, causing it to bleed and causing the defendant to spit out his partial dental plate. He told the prosecutrix to get out of the car and he drove to Wesley Long Hospital for treatment. Defendant testified that he never forced the prosecutrix to perform fellatio and never had any intentions of committing forcible rape on her.

*Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.*

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

CARLTON, Judge.

[1] Defendant first assigns as error the trial court's overruling of his objections and denial of his motion to strike certain testimony of Virginia Poot. On preliminary and direct examination of Ms. Poot by the assistant district attorney, evidence of Ms. Poot's orphan status, epileptic history, scholarship assistance and summer employment was admitted over defendant's objections. Defendant contends that the evidence presented was irrele-

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vant and served only to excite prejudice and sympathy for the prosecuting witness. We disagree.

It is elementary that when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, etc. The purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying. 1 Stansbury, N.C. Evidence, § 24, p. 56 (Brandis rev. ed. 1973); *Pittman v. Camp*, 94 N.C. 283 (1886). Evidence offered for this purpose is relevant at trial, if it does in fact establish an introduction for the witness. See McCormick, Evidence, Relevancy, § 185, p. 435.

Moreover, relevant evidence should not be excluded "simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." 1 Stansbury, N.C. Evidence, § 80, p. 242 (Brandis rev. ed. 1973); see *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed. 2d 1091 (1977); *State v. Williams*, 17 N.C. App. 39, 193 S.E. 2d 452 (1972), *cert. denied*, 282 N.C. 675 (1973).

In the case *sub judice*, evidence of Ms. Poot's background and epilepsy was presented pursuant to preliminary questioning by the assistant district attorney. The evidence was relevant not only for introductory and general purposes, but also to serve as an explanation as to why the witness was working at McDonald's, living with her aunt in Greensboro, and walking home alone on the night in question. We do not believe the challenged testimony played upon the passions and prejudices of the jury to the extent that it must be considered prejudicial. This assignment of error is overruled.

[2] The defendant next argues that the assistant district attorney's jury argument, which incorporated evidence from the testimony complained of above, was prejudicial and designed solely to arouse the sympathy and emotions of the jury. In his argument, the assistant district attorney referred to the prosecuting witness as "a young twenty-one year old epileptic, half-blind college student," an "epileptic, virgin orphan," and an "innocent young orphan and virgin." He also briefly recounted Ms. Poot's testimony concerning her prior summer employment and the fact that after tutoring two children she was never paid. That particular portion of Ms. Poot's testimony was not in the evidence,

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as the court had sustained defense counsel's objection and granted his motion to strike.

The argument of counsel is left largely to the control and discretion of the presiding judge and counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). "[Counsel], may not, however, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not 'travel outside of the record' or inject into his argument facts of his own knowledge of other facts not included in the evidence." *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E. 2d 572, 584 (1971). "The fact that the sympathy or prejudice of the jury may be aroused by the argument of counsel does not render the argument improper when it is legitimate and based on competent evidence." *State v. Stegmann*, 286 N.C. 638, 656, 213 S.E. 2d 262, 275 (1975).

Applying these principles to the present case, we find that the State's argument was in substantial compliance with case authority. References to Ms. Poot's virginity, epileptic condition and visionary problems were all permissible, such references being consistent with the facts in evidence. Granted, the assistant district attorney at one point did travel outside the record by referring to Ms. Poot's noncompensated summer employment. However, we believe that this error was of relatively little importance, particularly in light of the facts that *were* in evidence. We do not believe it was prejudicial. Moreover, during the assistant district attorney's argument, defense counsel made no objections to the portions of the argument that he now complains of. An impropriety in the argument should be brought to the attention of the trial court in time for the impropriety to be corrected in the charge unless the impropriety is gross, in which case the error can be corrected *ex mero motu*. 4 Strong, N.C. Index 3d, Criminal Law, § 102.3, p. 520; *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). This assignment of error is overruled.

The defendant next contends that the trial court erred in overruling his objection and denying his motion to strike the testimony of defendant's character witness, regarding a specific act of misconduct on the part of the defendant. We disagree.

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[3] During cross-examination of defendant's character witness, the assistant district attorney asked the witness whether he knew the defendant had been convicted of armed robbery.

The defendant relies on the case of *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978) in support of his argument. In *Chapman*, our Supreme Court stated the well established rule in our jurisdiction that it is error for the State to cross-examine the defendant's character witness as to particular acts of misconduct on the part of the defendant. A character witness may be cross-examined as to the general reputation of the defendant as to particular vices or virtues, but not as to specific acts of misconduct. See also *State v. Green*, 238 N.C. 257, 77 S.E. 2d 614 (1953).

Any error here was harmless in that the defendant had previously testified himself that he had been convicted of armed robbery. In *Chapman*, the situation presented was strikingly similar to the case at bar in that the prosecutor asked the defendant's character witnesses whether they were aware that defendant "got his gun and went after some black people in Charlotte." The error was acknowledged, but declared to be harmless. The test for harmless error was stated in *Chapman* as being the absence of a "reasonable possibility that a different verdict would be reached at a new and error free trial." *Chapman, supra*, at 417, 241 S.E. 2d at 674. This assignment of error is overruled.

[4] Defendant next assigns as error the denial of his motion for mistrial and for a new trial on the ground that the State improperly and prejudicially argued the defendant's prior armed robbery conviction for purposes other than to attack defendant's credibility. He argues that these remarks by the assistant district attorney might have been considered by the jury as substantive evidence of defendant's guilt rather than mere impeachment evidence.

During his argument, the assistant district attorney characterized the defendant as an "admitted armed robber." At another point in the argument, he juxtaposed the credibility of Ms. Poot against the defendant. He also referred to defendant as one who has "committed armed robbery," and one who is a "confessed armed robber."

When the assistant district attorney used the defendant's armed robbery conviction as part of his effort to undermine the



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defendant's credibility, he was acting within the bounds of proper jury arguments. See *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977); *State v. Westbrook*, *supra*. Furthermore, when the assistant district attorney used the defendant's conviction for the purpose of characterization of the defendant, his actions were not improper. In *Westbrook*, our Supreme Court held that as long as the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in noncomplimentary terms in the argument. By defendant's own testimony, he was convicted of armed robbery. Clearly, the assistant district attorney did not go outside the record in this case and his use of the description "armed robber" as part of the characterization of defendant was supported by the evidence.

Moreover, a curative instruction was given to the jury on defendant's request before the conclusion of the assistant district attorney's argument. The jury was told to completely disregard any line of argument purporting to characterize the defendant as an armed robber. While we find that such an instruction was unnecessary here, correction by the court would have cured any impropriety had one existed. *State v. Bryant*, 236 N.C. 745, 73 S.E. 2d 791 (1953).

[5] Defendant finally contends that the trial court erred in failing to grant his motion to dismiss. Particularly with respect to the charge of assault with intent to commit rape, he argues that there was no evidence of penetration. The argument is meritless.

Chief Justice Sharp stated the North Carolina rule in *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed. 2d 112 (1974):

The requisites of the crime with which defendant is charged have been stated many times: To convict a defendant on the charge of an assault with an intent to commit rape the State must prove not only an assault but that the defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part. It is not necessary that defendant retain that intent throughout the assault; if he, at any time during the assault, had an intent to gratify his passion upon the woman, notwithstand-

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ing any resistance on her part, the defendant would be guilty of the offense. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, *i.e.*, by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E. 2d 649, 651. To convict a defendant of an assault with intent to commit rape "an actual physical attempt forcibly to have carnal knowledge need not be shown." 75 C.J.S. Rape § 77, p. 557 (1952).

Clearly, in the case at bar, sufficient evidence of all elements of the offense were presented to withstand defendant's motion to dismiss. Ms. Poot's testimony tended to show that the defendant assaulted her and that the assault was sexually motivated. Moreover, she described circumstances from which the jury could reasonably infer that defendant intended to rape her notwithstanding any resistance on her part.

We have reviewed defendant's remaining assignments of error and find them to be without merit. In the trial below, we find

No error.

Judges VAUGHN and CLARK concur.

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SOUTHERN RAILWAY COMPANY v. JEFFCO FIBRES, INC.

No. 7819SC704

(Filed 19 June 1979)

**1. Fires § 3; Landlord and Tenant § 10— fire arising out of use of leased building—sufficiency of evidence**

In an action to recover damages caused when a fire destroyed a freight depot which plaintiff had leased to defendant where defendant contended that, pursuant to the lease agreement, it was not liable for damages to the freight depot caused by fire, unless the loss occurred by reason of, or arises out of or is incidental to the use or occupancy of the property, plaintiff's evidence was sufficient to establish that the fire originated inside the building in an area controlled by defendant and that the loss occurred by reason of or was incidental to defendant's occupancy of the depot where such evidence tended to show that highly inflammable goods were stored in the building; employees of defendant had smoked inside the depot, contrary to provisions of the lease; the

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fire originated in the center of the building, smouldered there for some time on the floor and then flared up; and the fire was discovered only a few hours after the defendant's employees had left work.

**2. Trial § 32.1— definition of words in lease—jury instructions not required**

In an action to recover damages caused by a fire in a depot leased by plaintiff to defendant where the lease provided that defendant would be liable for fire loss which occurred "by reason of, or arises out of, or is incidental to, the use or occupancy . . . of the property," there was no merit to defendant's contention that the trial court was required to define "by reason of," "arising out of," and "incidental to" in order for the jury to be apprised of the requirement in the lease as to causation.

**3. Trial § 33.4— jury instructions—review of evidence**

In an action to recover for damages sustained when a fire destroyed a freight depot which plaintiff had leased to defendant, there was no merit in plaintiff's contention that the court's statement of defendant's contentions was not based on evidence in the record, since the import of defendant's testimony that plaintiff intended to tear down the depot was essentially the same as the court's statement that defendant offered evidence that plaintiff intended to abandon the depot.

**4. Rules of Civil Procedure § 59; Trial § 52— adequacy of damages—denial of new trial—no abuse of discretion**

In an action to recover for damages sustained when a fire destroyed a freight depot which plaintiff had leased to defendant, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial made on the ground that the jury's award of \$1250 for damages was grossly inadequate since there was evidence that the depot was in extremely poor condition and that plaintiff had planned to tear it down.

*APPEAL* by both defendant and plaintiff from *Seay, Judge*. Judgment entered 7 February 1978 and order denying defendant's and plaintiff's motions to set aside the verdict entered 14 March 1978 in Superior Court, CABARRUS County. Heard in the Court of Appeals 24 April 1979.

On 24 May 1974, plaintiff brought this action to recover damages caused when a fire destroyed a freight depot which plaintiff had subleased to defendant. Plaintiff alleged that, pursuant to the terms of the lease agreement, defendant was liable for fire damage to the freight depot. The lease agreement provided in pertinent part:

"7. Licensee will not permit smoking within any building of the Company occupied hereunder by Licensee, and will post and maintain in a conspicuous place, or places, within

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said premises a sign or signs, reading 'NO SMOKING ALLOWED,' or words of similar import.

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9. The liability of the parties to this agreement, as between themselves, for death, personal injury and property loss and damage, which occurs by reason of, or arises out of, or is incidental to, the use or occupancy by Licensee of the property covered by this agreement, shall be determined in accordance with the following provisions.

- (a) Licensee shall be solely responsible for, and shall bear all cost, expense and liability resulting from loss of or damage to property by fire, whether or not negligence on the part of Company may have caused or contributed to such loss or damage; . . ."

Defendant answered alleging that it had not caused the fire and was therefore not liable under the terms of the lease agreement for the damage to the depot.

By order of the court, entered 13 November 1974, the following facts were taken as established. On 22 March 1972, the plaintiff leased a freight depot to the defendant for \$1,800 per year. On 14 November 1973 the building was totally destroyed by fire.

At trial, plaintiff's evidence tended to show that the defendant used the freight depot to store, sort and sell textile fibers. The depot was built around the turn of the century and was constructed of heavy mill timber. The building was in good condition in 1972 when it was inspected by plaintiff's safety inspector. The wiring was safe and an upgraded circuit breaker had been installed and "No Smoking" signs were posted in the depot. The fire occurred at approximately 7:00 p.m. on 14 November 1973 after all employees had left work. The cause of the fire had not been determined, but two witnesses, who were experts in fire investigation, testified that the fire originated on the floor of the office in the center of the depot. The floor in that area had been burned completely through indicating that the fire began and possibly smouldered there. Cigarette butts were found in the portion of the depot which had not been totally destroyed by fire, and William G. Cash testified that he had seen some of Jeffco's

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employees smoking on the premises. The plaintiff presented evidence that the value of the depot prior to the fire was \$25,000 to \$30,000 and that it would cost over \$65,000 to replace it. Plaintiff spent \$1,000 to remove the debris from the fire and \$8,423.47 to repair a boxcar which was damaged by fire.

At the close of plaintiff's evidence, defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50. The court denied defendant's motion.

Defendant presented evidence tending to show that the depot was in very poor condition prior to the fire, that the floorboards were rotten and the wiring gave off sparks, and that plaintiff was considering tearing down the building. Defendant kept the depot clean and enforced the no smoking rules in the depot. Derelicts and vagrants congregated at the depot after closing hours and may have smoked cigarettes there. Two fires near the depot had been caused by sparks from passing trains.

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

"1. Did the plaintiff, Southern Railway Company, sustain any loss of or damage to property by fire, by reason of, or arising out of, or incident to, the use or occupancy by the defendant, Jeffco Fibres, Inc., of the property covered by the lease agreement between the parties dated March 15, 1972?

ANSWER: Yes.

2. If so:

(a) What amount, if any, is the plaintiff entitled to recover for loss or damage to the building?

ANSWER: 1,250.00

(b) What amount, if any, is the plaintiff entitled to for the removal of debris?

ANSWER: 1,000.00

(c) What amount, if any, is the plaintiff entitled to recover for damage to the boxcar?

ANSWER: 8,423.47"

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Defendant moved for a judgment notwithstanding the verdict, pursuant to G.S. 1A-1, Rule 50(b), and plaintiff moved to vacate the verdict and for a new trial, pursuant to G.S. 1A-1, Rule 59, on the issue of damages. Both motions were denied.

*Hartsell, Hartsell and Mills by William L. Mills, Jr., for plaintiff appellee.*

*Hedrick, Parham, Helms, Kellam & Feerick by Richard T. Feerick and Edward L. Eatman, Jr. for defendant appellant.*

CLARK, Judge.

[1] Defendant contends that, pursuant to the lease agreement, defendant is not liable for damages to the freight depot caused by fire, unless the loss occurred "by reason of, or arises out of or is incidental to the use or occupancy of the property." Defendant contends that the court erred in denying defendant's motion for a directed verdict since plaintiff's evidence failed to establish that the loss was so caused.

A motion for directed verdict in a jury trial presents the question whether the evidence is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Upon a motion for directed verdict made by defendant, all the evidence which supports its claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn from plaintiff's evidence. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977); *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

Ordinarily, there is no direct evidence of a cause of a fire and, therefore, causation must be established by circumstantial evidence. See *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920). "The cause of the fire is not required to be shown by direct and positive proof . . . . It may . . . be inferred from circumstances . . . . It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown . . . from the admitted or known facts . . . ." *Simmons v. Lumber Co.*, 174 N.C. 220, 225, 93 S.E. 736, 738 (1917). The plaintiff's evidence tends to show that highly inflammable goods were stored in the building; that the employees of defendant had

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smoked inside the depot and that the fire originated in the center of the building, smouldered there for some time on the floor, and then flared up. The fire was discovered at approximately 7:00 p.m. only a few hours after the defendant's employees had left work. The fire was starting to burn the roof when it was discovered. Taken in the light most favorable to the plaintiff, there is sufficient circumstantial evidence to establish that the fire originated inside the building in an area controlled by defendant, and that the loss occurred by reason of or was incidental to defendant's occupancy of the depot.

[2] Defendant also assigns error to the trial judge's failure to define and explain the legal import of the phrases "by reason of," "arising out of," and "incidental to" which appeared in the lease agreement, and that the jury, therefore, did not know that they were required to find a causal connection between the defendant's use or occupancy of the depot and the plaintiff's loss.

The trial judge charged the jury, in pertinent part, as follows:

"Now, in this case and as to this first issue, the plaintiff, Southern Railway, has the burden insofar as these two things are concerned: First, that if the plaintiff has suffered damages and loss and second, that these damages or losses were incurred by reason of or arose out of or were incident to the occupancy or use by the defendant, Jeffco Fibres, of the premises, herein specifically the old freight depot here in the City of Concord.

Now, Members of the Jury, proof of burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of an accident or some providential cause, but, in this particular case, this lawsuit, the matter of this fire is not a matter of negligence, where proof of negligence and proof of proximate cause are involved.

Here there was a lease existing between the parties. That is, plaintiff's Exhibit Number One and Defendant's Exhibit Number Two, which had a provision contained therein as to a fire loss. The lease provides, in part, section nine, the liability of the parties to this agreement as between themselves, for

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at the time, personal injury, property loss, and damage, which occurs by reason of or arising out of or is incidental to the use or occupancy by licensee herein, means Jeffco, the defendant, of the property covered by this agreement shall be determined in accordance with the following provisions: (a) Licensee, that is, Jeffco, the defendant, shall be solely responsible for and shall bear all cost and expenses and liability resulting from loss of or damage to property by fire, whether or not negligence on the part of the company, that is, the Southern Railway Company, may have caused to contributed to such loss or damage. . . .”

So, I charge, Members of the Jury, as to this the first issue, that if you find from the evidence and by its greater weight that on or about November 14, 1973, that there existed a lease dated March 15, 1972, between the parties, and that on November 14, 1973, the freight depot building of the Southern Railway was being occupied and used by the defendant, Jeffco, pursuant to this lease and that by reason of the use or the occupancy of the building by Jeffco, or arising out of the use or occupancy of the premises by Jeffco, or incident to the use or occupancy of the building by Jeffco Fibres, that the plaintiff, Southern Railway, suffered loss or damages by reason of the destruction of the freight depot, that is, the burning of the building and the boxcar and that the defendant, Jeffco Fibres, has not borne the cost and expense therefor, it would be your duty to answer the first issue in favor of the plaintiff, having the burden of proof, that is, answer the issue yes. . . .”

Defendant contends that these instructions were insufficient since the Court was required to define the phrases in order for the jury to be apprised of the requirement in the lease as to causation.

It is not error for the court to fail to define and explain words of common usage and meaning to the general public. See *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Geer*, 23 N.C. App. 694, 209 S.E. 2d 501 (1974); *State v. Patton*, 18 N.C. App. 266, 196 S.E. 2d 560 (1973); *C.C.T. Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962); 12 Strong's N.C. Index 3d *Trial* § 33.7 (1978).



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We find that the terms "by reason of," "arising out of," and "incidental to" are phrases of common usage. While there may be some circumstances that would require a specific definition and explanation of these terms by the trial court in his instructions to the jury, it appears that under the circumstances of this case, the meaning of the terms as were used in the jury instructions was clear and should have been understood by the jury. We find no merit in defendant's second contention.

[3] Plaintiff assigns as error the trial court's statement of the defendant's contentions in the jury charge. Plaintiff contends that the court was incorrect when it stated that defendant "offered evidence tending to show that immediately before its occupancy, the railroad had considered abandoning the [freight depot]," since there was no evidence in the record that the plaintiff had ever planned to abandon the building. There was, however, evidence presented by Alfred Lonstein, president of Jeffco Fibres, that the plaintiff had planned to tear down the freight depot. Plaintiff contends that the statement in the jury charge that the depot was to be abandoned implied an admission by the plaintiff that the building was worthless, whereas a building that is to be torn down may contain valuable construction material which could be sold or reused. Plaintiff contends that an instruction by the court that there was evidence tending to establish a particular fact which was a material bearing on the issue, when there is no evidence in the record supporting the statement, must be held prejudicial. *In re Will of Atkinson*, 225 N.C. 526, 35 S.E. 2d 638 (1945); *Curlee v. Scales*, 223 N.C. 788, 28 S.E. 2d 576 (1944); 12 Strong's N.C. Index 3d *Trial* § 33 (1978). We find no merit in plaintiff's contention that the court's statement of defendant's contentions was not based on evidence in the record, since the import of the testimony that plaintiff intended to tear down the depot is essentially the same as the court's statement that plaintiff intended to abandon the depot.

[4] Plaintiff assigns as error the trial court's denial of plaintiff's motion for a new trial, pursuant to G.S. 1A-1, Rule 59, on the issue of damages to plaintiff's building. Plaintiff contends that the jury award of \$1,250 for damages to the depot was grossly inadequate since the evidence tended to show that it would cost between \$60,000 and \$70,000 to replace the depot, and the reasonable value of the depot immediately preceding the fire was over

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\$25,000 and after the fire it was worthless. A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial judge, *Gwaltney v. Keaton*, 29 N.C. App. 91, 223 S.E. 2d 506 (1976), and a ruling by the trial judge will not be set aside except upon a showing of abuse of discretion. *Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E. 2d 209 (1970), *cert. denied*, 277 N.C. 458, 178 S.E. 2d 225 (1971). In light of the evidence that the depot was in extremely poor condition, and that plaintiff had planned to tear it down, we cannot say that the court's denial of the plaintiff's motion for a new trial was in manifest abuse of its discretion. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). Plaintiff's second assignment of error is overruled. The judgment and the order appealed from are

Affirmed.

Judges VAUGHN and CARLTON concur.

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HECHT REALTY, INC. v. KENNETH WAYNE WHISNANT AND JOHNNIE F. WHISNANT

No. 7827SC746

(Filed 19 June 1979)

**Brokers and Factors § 6.1— real estate broker—action for value of services—procuring cause of sale—insufficiency of evidence**

In an action in *quantum meruit* to recover the reasonable value of plaintiff real estate broker's services in procuring a buyer for defendants' property, plaintiff's evidence was insufficient to show that it was the procuring cause of the sale of defendants' property where it tended to show that plaintiff's contract for exclusive listing of the property had expired; plaintiff had knowledge of a listing contract between defendants and another broker; the other broker sold the property pursuant to this listing; an offer by the purchasers negotiated by plaintiff was met by a counter offer which was not accepted by the purchasers; defendant owners did not prevent plaintiff from making the sale under the terms as specified in their counter offer; and the final sale price was lower than the price negotiated by plaintiff and the closing date was changed from 2 April to 15 March.

APPEAL by defendants from *Friday, Judge*. Judgment entered 23 March 1978 in Superior Court, LINCOLN County. Heard in the Court of Appeals 2 May 1979.

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Plaintiff filed its complaint against defendants, Kenneth Wayne Whisnant, Johnnie F. Whisnant, Henry Neil Castles and wife, Jean Castles, and Melba Howard d/b/a Howard Realty Company, alleging: that on 22 April 1975, the Castles contacted plaintiff to discuss the purchase of property on Lake Norman and the sale of their house; that plaintiff showed the Whisnants' house to the Castles with the owners' permission and with the understanding that if plaintiff procured a purchaser, the Whisnants would pay plaintiff a six percent commission; that plaintiff and the Whisnants entered into an exclusive listing contract for the period from 13 August 1975 through 13 November 1975; that on 12 January 1976, the Castles informed plaintiff they were ready to purchase the Whisnants' property; that on 13 January 1976, defendant Wayne Whisnant agreed to pay plaintiff a five percent commission of a gross sale price of \$124,000; that on 2 March 1976, a contract for the purchase of the Whisnant property was prepared with plaintiff's assistance and signed by the Castles; that said contract was taken by plaintiff to defendants, who signed it after making certain changes; that plaintiff informed the Castles of the changes made in the contract; that on 4 March 1976, Mr. Castles came to plaintiff's office and requested that his binder be returned and stated that he was no longer interested in defendants' property; the binder was returned, and on the same day, defendant Johnnie Whisnant informed plaintiff that defendants had sold the property to the Castles under a purchase agreement negotiated by Howard Realty.

Plaintiff alleged that it was entitled to recover the reasonable worth of its services in bringing defendants and the Castles together, through which defendants entered into a real estate purchase agreement for defendants' property, based on action for *quantum meruit*; that defendants, the Castles and Howard Realty, had conspired to deprive plaintiff of its commission; and that judgment should be entered against them jointly and severally for \$7,440 compensatory damages, and \$20,000 punitive damages.

The Whisnants answered and alleged the affirmative defense of the Statute of Frauds since the complaint failed to allege that an agreement between plaintiff and these defendants was written. Defendants also denied that plaintiff was entitled to any relief.

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Howard Realty filed a motion for summary judgment which was allowed, and no appeal was taken. On 16 May 1977, defendants (Whisnants) filed a motion for summary judgment which was denied. On 27 May 1977, plaintiff took a voluntary dismissal as to the Castles. Hereinafter the word "defendants" relates to Kenneth Wayne Whisnant and Johnnie F. Whisnant.

At trial, Ms. Leatherwood, a licensed real estate broker employed by plaintiff, testified that on 22 April 1975, she showed defendants' property to the Castles. At the time, she had no listing agreement with defendants. Since she was a friend of defendants, they had given her permission to show the property. Defendants indicated to her that they would pay a standard six percent commission if she "could bring an acceptable offer to them." As alleged in the complaint, plaintiff obtained an exclusive listing of the property for the period from August 1975 through November 1975. After Ms. Leatherwood showed the property to the Castles again on 13 January 1976, after the exclusive listing had expired, she proceeded to write up an offer contingent upon the sale of defendants' property. Ms. Leatherwood discussed a five percent commission with defendant Wayne Whisnant since Howard Realty now had a listing on the property. Wayne Whisnant agreed to the commission. On 2 March 1976, plaintiff's agent prepared an offer to purchase defendants' property at a price of \$124,000 which was signed by defendants.

Mr. Castles signed the offer and gave Ms. Leatherwood a \$7,000 binder. Later the same day, Ms. Leatherwood met with Wayne Whisnant and told him she had the offer. Wayne Whisnant wrote on the offer that he agreed to pay a six percent commission to plaintiff if the property sold for \$124,000 and then signed the offer. Everything was agreed to except the closing date and the draperies. On the same day, Ms. Leatherwood also informed Johnnie Whisnant about the offer. Both defendants met with Ms. Leatherwood and wrote into the offer that the farm bell would not remain; that the draperies and hardware would remain; that Johnnie Whisnant would receive \$52,500 payable only to her at closing; that the closing date would be moved up to April 1976; and that the possession date would be negotiated with 30 days notice. Each of these operations and additions to the offer was initialed by both defendants. Ms. Leatherwood then contacted the Castles and told them that defendants wanted an earlier closing

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date and longer possession period. On 4 March 1976, Mr. Castles met with Ms. Leatherwood at her office and nervously asked that his binder of \$7,000 be returned. Plaintiff's president returned the binder. Later the same day, Johnnie Whisnant called Ms. Leatherwood and informed her that she had just signed an offer to sell the house to the Castles. Ms. Leatherwood informed her that if she went through with the sale, there would be a double commission.

On cross-examination, Ms. Leatherwood testified that she did not deliver the names of any prospects to defendants after the expiration of the exclusive listing contract held by plaintiff. She discussed a five percent commission with defendants on 13 January 1976, because she believed the property was exclusively listed with Howard Realty. When the offer to purchase was presented to defendants, they made changes in the offer. This counter offer was not accepted by Mr. Castles.

Johnnie Whisnant testified that: the property was sold to Mr. Castles on 15 March 1976 for \$118,000; Howard Realty was paid a commission of \$1,000; Mr. Castles was to pay Johnnie Whisnant an additional \$500 for draperies; Wayne Whisnant would pay Johnnie Whisnant \$500 for draperies; she would recover an additional \$200 for the mirror; and the closing date was 15 March 1976.

John Hecht, president of his company, testified that he returned the \$7,000 binder to Mr. Castles and that there was never a signed contract between the parties.

Defendants did not offer any evidence.

The jury entered a verdict finding that Ms. Leatherwood, agent of plaintiff, was the procuring cause of the sale of the property between the defendants and the Castles and that plaintiff was entitled to recover \$6,080 as reasonable value of its services. Defendants thereafter filed a written motion for judgment notwithstanding the verdict supported by case law. The trial court denied the motion and entered judgment for plaintiff according to the verdict. Defendants appealed.

*Bradley, Guthery, Turner & Curry, by Clayton S. Curry, Jr., for plaintiff appellee.*

*Don M. Pendleton and Thomas M. Shuford, Jr., for defendant appellants.*

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ERWIN, Judge.

Defendants' first assignment of error presents the following question: "Did the trial court err in denying the appellants' motion for a directed verdict at the close of the plaintiff's evidence and at the conclusion of all of the evidence, and in denying appellants' motion for judgment notwithstanding the verdict and for a new trial?" Defendants rely on several North Carolina cases in contending that in order for the plaintiff to recover, it must establish (1) a binding contract and (2) performance on its part, and this was not established in the case *sub judice*. Plaintiff contends that this is an action on *quantum meruit* for the reasonable worth of the plaintiff's services in procuring the Castles to purchase defendants' property. We concede that this is a close case, but we are compelled to find error and reverse the judgment entered by the trial court.

Our Supreme Court stated the rules governing this case in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E. 2d 486, 491 (1968), as follow:

"Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228; *Martin v. Holly*, 104 N.C. 36, 10 S.E. 83. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commission [sic] provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode*, 164 N.C. 19, 80 S.E. 62. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to 'a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.' 12 C.J.S. *Brokers* § 91, p. 209 (1938). *Accord*, 12 Am. Jur. 2d *Brokers* § 190 (1964)."

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In *Sparks v. Purser*, 258 N.C. 55, 57, 127 S.E. 2d 765, 766-67 (1962), our Supreme Court stated:

“The plaintiff admitted he did not have an exclusive listing. He did not introduce evidence that he obtained an unqualified offer from a purchaser, ready, able and willing to pay \$36,500.00. ‘It is the established law in this jurisdiction that a real estate broker is not entitled to commissions or compensation unless he has found a prospect, ready, able and willing to purchase in accordance with the conditions imposed in the broker’s contract . . .’ *Ins. Co. v. Disher*, 225 N.C. 345, 34 S.E. 2d 200. ‘. . . commissions are based upon the contract of sale.’ *Trust Co. v. Adams*, 145 N.C. 161, 58 S.E. 1008; *White v. Pleasants*, 225 N.C. 760, 36 S.E. 2d 227; *Banks v. Nowell*, 238 N.C. 737, 78 S.E. 2d 761; *McCoy v. Trust Co.*, 204 N.C. 721, 169 S.E. 644.

This is not a case in which the owner went behind the broker’s back to take advantage of his efforts, then closed the sale himself in order to escape a broker’s commission justly earned, as in *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228.”

Plaintiff relies on *Lindsey v. Speight*, 224 N.C. 453, 31 S.E. 2d 371 (1944), wherein our Supreme Court held in an action by plaintiff for the reasonable value of his services in securing a purchaser for the property of defendant, who had listed such property with the plaintiff for sale, where there is evidence that plaintiff was the procuring cause of sale, a motion for judgment of nonsuit was properly overruled. In *Lindsey*, there was no intervention nor another broker as here. The plaintiff’s own evidence showed that the property had been listed with Howard Realty.

We hold that *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228 (1959), is not applicable to the facts in the case before us. In *Cromartie*, evidence that tended to show that property was listed by the owners with plaintiff broker, that the broker procured a client’s interest in the property and advised the owners of the name of the client, and that the owners sold the property to the client at the agreed price before the broker had an opportunity to complete the negotiations and show the property to the client, was sufficient to preclude involuntary nonsuit in the broker’s action for commission.

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It is well settled that on a motion by defendant for a directed verdict under G.S. 1A-1, Rule 50(a), of the Rules of Civil Procedure, the court must consider the evidence in the light most favorable to the plaintiff and may grant such motion only if, as a matter of law, the evidence is insufficient to justify a verdict for plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971), and *Adams v. Curtis*, 11 N.C. App. 696, 182 S.E. 2d 223 (1971). Plaintiff's own evidence showed: that it had knowledge of the contract of listing between defendants and Howard Realty; that Howard Realty, in fact, sold the property pursuant to this listing; that plaintiff's offer was met by a counter offer which was not accepted; that the final sale price was lower; that the closing date was changed from 2 April to 15 March 1976; and that defendants did not prevent plaintiff from making the sale under the terms as specified in defendants' counter offer.

On the record before us and with the direct intervention of Howard Realty, we hold that the chain of events set in motion by the plaintiff was broken to the extent that plaintiff cannot establish that it was the procuring cause of the ultimate sale of defendants' property when the evidence is taken in the light most favorable to plaintiff. Defendants' motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a), of the Rules of Civil Procedure should have been allowed by the trial court. In this day of multiple listings with two or more persons from different brokers' offices involved in one sale, the integrity of contracts of sale is very important in the marketplace.

Judgment reversed.

Judges MARTIN (Robert M.) and ARNOLD concur.



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**Knowles v. Coach Co.**

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WALTER E. KNOWLES v. CAROLINA COACH COMPANY

No. 782SC781

(Filed 19 June 1979)

**Landlord and Tenant § 18— rental of bus station—strike by bus company employees—refusal of tenant to pay rent during strike—lease properly terminated—landlord's recovery of rent proper**

Where plaintiff leased a bus station from defendant but refused to pay rent during the four months that defendant suspended operations because of a labor dispute with its employees, the trial court properly granted summary judgment for defendant on plaintiff's claim for damages due to defendant's alleged breach of the lease agreement and properly granted summary judgment for defendant on its counterclaim for rental payments allegedly due and owing, since the lease made no provision for rights and obligations in the event of a strike; the fluctuation of traffic levels through the station would be a normal business risk which plaintiff would assume in undertaking to run his enterprise; and in the absence of any wrongful act on defendant's part in bringing on the strike and causing the reduction of traffic through the bus station, plaintiff's failure to pay the required rentals was not excusable under the lease agreement, particularly since plaintiff continued to operate the station to accommodate the traffic other than from defendant which normally passed through the station as well.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 25 July 1978 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 4 May 1979.

Plaintiff filed this civil action 23 December 1974, seeking damages for an alleged breach by defendant of a lease agreement. Defendant counterclaimed, seeking rental payments allegedly due and owing. The lease was effective 1 February 1968 through 31 December 1977. It provided for the lease of a bus station and certain concessions, rental payments being payable to defendant in the amount of \$650.00 per month with commissions payable to plaintiff for ticket sales, express shipments and charters. Under the lease agreement, plaintiff was also entitled to operate his ticket agency for inter-city carriers other than the defendant.

Beginning 9 December 1973 and continuing until 1 April 1974, the defendant's bus drivers went on strike as a result of a labor dispute which suspended the operation of defendant at the Washington Bus Station. Plaintiff paid no rent to the defendant for the months of January through April of 1974. Defendant ter-

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minated the lease agreement effective 20 November 1974 and requested plaintiff to vacate the premises.

Plaintiff is seeking \$3,700.00 for "out-of-pocket expenses" during the period of the strike, \$66,000.00 for the "loss of probable profits," and \$100,000.00 as punitive damages. Defendant counterclaimed for the \$1,382.80 rental it contends plaintiff owes for the months of January through April 1974.

Defendant deposed plaintiff and obtained certain information and exhibits through discovery. Defendant then moved for summary judgment on plaintiff's claim, asserting on the basis of plaintiff's deposition and the several pleadings filed that no material issue of fact existed as to the actions of defendant which were complained of, and that it was therefore entitled to judgment as a matter of law. Summary judgment was entered by the trial court in favor of defendant denying plaintiff's claim for all damages and "lost" prospective profits, and summary judgment was further entered in favor of defendant against plaintiff on the issue of liability for unpaid and owing rental payments with respect to defendant's counterclaim. (The issue of amount of damages on the counterclaim was reserved for the jury, the trial court determining that there was a factual dispute as to the actual amount owed.) From the trial court's entries of judgment on the summary judgment motions, plaintiff appeals, assigning error.

*Wilkinson and Vosburgh, by John A. Wilkinson and Steven P. Rader, for the plaintiff.*

*Allen, Steed and Allen, by Arch T. Allen III, D. James Jones, Jr., and Charles D. Case, for the defendant.*

MARTIN (Robert M.), Judge.

The only question for our consideration is whether the trial court erred in granting summary judgment on the two counts in favor of defendant. Plaintiff contends that the lease agreement was wrongfully terminated and that he is entitled to recover damages arising from that wrongful termination. He argues that his failure to pay rental installments, the default upon which defendant cites as the breach of the lease resulting in termination, was brought about by a work stoppage resulting from defendant's refusal to bargain with its bus drivers. Plaintiff and defendant

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agree that a binding contract between the parties was duly executed. The language of the contract is not in dispute.

In his complaint plaintiff alleges:

During the year 1973, . . . the defendant company became involved in a dispute with its own employees over wages and working conditions. The defendant refused to meet the demands of its employees although it knew that such failure would precipitate a strike, and on or about December 9, 1973, the employees of the defendant struck. As a result, the company's business through the Washington bus station . . . was abruptly terminated.

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On Thanksgiving Day, November 28, the defendant demanded possession of the premises of the bus station from the plaintiff and ordered him to vacate the same. They closed out his account and willfully and in violation of his contract evicted him from the premises. . . .

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The breach of the contract with the plaintiff by the defendant was done with the intent to divest plaintiff of his right under the contract. It was not done with the mere purpose of undertaking to make him pay rent for a period when the defendant itself was unable to perform, but was done with the malicious and wrongful purpose of attempting to maneuver him into a position that would allow the defendant to claim a breach by the plaintiff.

To support its motion for summary judgment and to establish the nonexistence of a breach of the contract on the part of the defendant, movant offered the deposition of plaintiff Walter Knowles.

Knowles stated in his deposition: "Of course, I do not contend that Carolina Coach Company had a strike for the purpose of reducing my commission on ticket sales. The strike was not really within the contemplation of either of us when the contract was entered into. No strike is mentioned in the contract." In that context we hold that the supporting evidence offered by the defend-

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ant establishes that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law as to plaintiff's cause of action.

At the completion of discovery, defendant properly moved for summary judgment as it was apparent from the pleadings and plaintiff's deposition that proof of an essential element of plaintiff's claim was absent. Plaintiff had admitted his default on the covenant of the lease requiring him to pay rent; he contended, however, that the actions of defendant in dealing with the labor dispute with its drivers caused the strike to begin and continue for a protracted period of time, placing him in a position where diminished traffic through the bus station resulted in diminished revenues to him to an extent that he was unable to pay the rental as provided by the lease agreement. Because of this, plaintiff contends, defendant's termination of his lease was wrongful. We do not agree. Initially, we note that the lease provisions are silent as to exculpatory measures in the event of a labor dispute. We note further that labor disputes are not so extraordinary or phenomenal occurrences as to be wholly beyond the imaginations of the contracting parties and, had they so wished, they could have included language in the lease agreement that would have delineated rights and obligations upon the happening of such a contingency. Ordinarily, the fluctuation of traffic levels through the station would be a normal business risk which plaintiff would assume in undertaking to run his enterprise. The only element of wrongfulness which would justify requiring defendant to absorb plaintiff's loss in this respect would be if defendant deliberately precipitated the labor dispute for the purpose of forcing plaintiff either out of business or into default under the lease agreement. Plaintiff made no such allegation, and in the portion of his deposition quoted above, indicated his belief that the strike was *not* brought on to produce detriment to him. In the absence of any wrongful act on defendant's part in bringing on the strike and causing the reduction of traffic through the bus station, plaintiff's failure to pay the required rentals was not excusable under the lease agreement, particularly since plaintiff continued to operate the station to accommodate the traffic other than from Carolina Coach Company which normally passed through the station as well. Under these circumstances, defendant's termination of the lease and eviction of plaintiff for failure to pay rent could not have been wrongful.

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Defendant, on its motion for summary judgment, relied upon the pleadings and the deposition of plaintiff to demonstrate the absence of any material issue of fact on this element of plaintiff's claim. Since the evidence from plaintiff himself, even when viewed in the light most favorable to him, tended to show strongly the absence of any wrongful act on defendant's part, the burden was upon plaintiff to show, either by affidavit or other evidence, some forecast of the evidence he intended to rely upon in proving the existence of this essential element of his claim. He failed to do this, and, accordingly, summary judgment was properly entered against him. See *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979) and cases cited therein. This assignment of error is overruled.

Plaintiff argues that he is not liable to defendant on its counterclaim for rent for the four months and he is excused from his breach of the lease agreement. He contends that he is excused from performance by the broadened concepts of commercial impracticability of performance and frustration of purpose.

The only question presented is whether, as a matter of law, the breach by plaintiff may be excused because of the strike. Under paragraph 6 of the lease agreement, it is stated:

Lessee shall pay to Carolina Coach Company . . . by the 5th day of each month during the term hereof as rental for the leased premises the sum of six hundred and fifty dollars (\$650.00) per month, payable in advance.

Plaintiff admits that he has not paid any rent for January, February, March and April, 1974. In *Arnold v. Ray Charles Enterprises, Inc.*, 264 N.C. 92, 141 S.E. 2d 14 (1965), the Supreme Court said:

The general rule is that, where a person by his contract charges himself with an obligation possible and lawful to be performed, he must perform it . . . [I]f a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefore in his contract, at least where he could reasonably have anticipated the event. 17A C.J.S., Contracts § 459 (1963).

*Id.* at 97, 141 S.E. 2d 17-18.

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In *Taylor v. Gibbs*, 268 N.C. 363, 150 S.E. 2d 506 (1966), an action to recover rent for tobacco allotments, the Court rejected the tenant-defendant's contention that he was excused by subsequent governmental controls and stated:

In substance he asks that the plaintiff be affected by an event that was totally unanticipated by him and by the defendant. If the parties had anticipated a development or governmental action similar to the acreage-poundage control, it should have been inserted as part of the agreement. Since they did not, the law cannot bind the plaintiff to an unforeseen and unexpected eventuality not within the contemplation of either party.

*Id.* at 364, 150 S.E. 2d 507.

In *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E. 2d 292 (1965), the Court considered the question of whether the "frustration of purpose" doctrine would constitute the defense of excuse. The court held that for such frustration or impracticability to be established, the subject of the contract must be destroyed. See *Blount-Midyette v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E. 2d 225 (1961).

In a leading case on commercial frustration, *Lloyd v. Murphy*, 25 Ca. 2d 48, 153 P. 2d 47 (1944), the California court declined to excuse a lessee under a lease for "the sole purpose of . . . the business of displaying and selling new automobiles. . . ." The lessee sought relief because of subsequent wartime restrictions on the sale of new automobiles. Justice Traynor of the California Supreme Court wrote the opinion rejecting excuse and concluded by stating:

No case has been cited by defendant [lessee] or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally destroyed or its accomplishment rendered extremely impracticable or where it has been shown that the lease remains valuable to the lessee.

*Id.* at 58, 153 P. 2d 52-53.

We hold that summary judgment in favor of defendant as to plaintiff's liability for damages on defendant's counterclaim was proper.

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**Emerson v. Tea Co.**

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Affirmed.

Judges ARNOLD and ERWIN concur.

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CATHERINE A. EMERSON v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

No. 7815SC815

(Filed 19 June 1979)

**1. Negligence § 56— fall of store customer—subsequent repairs—no consideration on summary judgment motion**

In an action to recover for injuries sustained by plaintiff when she tripped and fell over a metal strip that formed the edging for electrically operated doors of defendant's store, the admission by defendant in answer to an interrogatory that repairs had been made after the incident would not have been admissible at trial and therefore could not properly be considered on a hearing on a motion for summary judgment.

**2. Negligence § 56— fall of store customer—statement by bag boy—no consideration on summary judgment motion**

In an action to recover for injuries sustained by plaintiff when she tripped over a metal strip and fell at the entrance of defendant's grocery store, a statement by defendant's bag boy that the bolt binding the metal strip to the cement had been stripped, had been sitting loose in the hole and was not tight and that plaintiff herself had not pulled up the bolt would not have been admissible at trial since it did not relate to an act then being done by the bag boy within the scope of his employment, and therefore could not properly be considered at a hearing on a motion for summary judgment.

**3. Negligence § 57.10— metal strip at store entrance—fall by customer—summary judgment for defendant improper**

In an action to recover for injuries sustained by plaintiff when she tripped over a metal strip at the entrance to defendant's store, a genuine issue of material fact was raised by virtue of plaintiff's statement in her deposition filed in response to defendant's summary judgment motion that plaintiff was tripped by a loose metal strip near the door and that she would not have fallen but for the loose strip, and defendant failed to produce evidence that the unsafe condition was not caused by its failure to exercise reasonable care.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 17 April 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 24 May 1979.

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Plaintiff filed a complaint alleging that she "was tripped by a loose metal strip that formed the edging for the electrically operated doors" while attempting to leave the defendant's place of business in Chapel Hill and that the defendant knew or should have known of the dangerous and unsafe condition caused by the loose metal strip. She further alleged

[t]hat as a result of the defendant's failure to correct said dangerous and unsafe condition, warn the plaintiff of said dangerous and unsafe condition, or take other action necessary to insure the safety of the plaintiff while on the premises, said dangerous and unsafe condition caused the plaintiff to trip and fall while on the premises of the defendant.

Defendant filed answer, denying negligence and pleading plaintiff's contributory negligence. Interrogatories were served on and answered by the defendant. Defendant thereafter filed motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 17 April 1978, summary judgment was entered in favor of the defendant and plaintiff appeals.

Other facts pertinent to this decision are hereinafter noted.

*Levine & Stewart, by John T. Stewart, for plaintiff appellant.*

*Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.*

CARLTON, Judge.

The sole question for determination is whether the trial court erred in allowing the motion 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 mov-



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ant (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. While the motion will receive stricter application in negligence cases, summary judgment is available in all types of litigation to both plaintiff and defendant. See *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

The rules for determining whether summary judgment is appropriate in negligence actions are the same as those in non-negligence actions. The nature of a negligence action is simply such that only the exceptional case will lend itself to a Rule 56 motion. *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). For reasons discussed *infra*, we do not believe this to be one of those exceptional actions.

The established principles in actions of this nature were succinctly stated by our Supreme Court in *Long v. National Food Stores, Inc.*, 262 N.C. 57, 59-61, 136 S.E. 2d 275, 277-278 (1964):

1. A customer who enters, during business hours, a store kept open for public patronage to purchase goods therein has invitee status.

2. A store proprietor is not an insurer of the safety of such customers on his premises, and liability for injury to such customers attaches only for injuries resulting from actionable negligence on his part.

3. The law imposes upon a store proprietor the legal duty to exercise ordinary care to keep its aisles and passageways, where customers are expected to go, in a reasonably safe condition, so as not unnecessarily to expose them to danger, and to give warning of hidden dangers or unsafe conditions of which it knows or in the exercise of reasonable supervision and inspection should know.

4. "The standard is always the conduct of the reasonably prudent man. The rule is constant, while the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion. [Citations omitted.] For instance, what would constitute such care in a country non-service

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store would seem not to be adequate in a city self-service store through which passes a steady flow of customers who, because of the nature of the business, are constantly handling the merchandise." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281 (1963).

5. The inviter is charged with knowledge of an unsafe or dangerous condition on his premises during business hours resulting from his own negligence or the negligence of an employee acting within the scope of his employment, or of a dangerous condition of which his employee has notice. In such cases the inviter is liable if injury to an invitee is a proximate result of such negligence, because the inviter is deemed to have knowledge of his own and his employees' acts.

6. But where the unsafe or dangerous condition is the result of a third party's negligence or where there is no evidence of the origin thereof, an invitee proximately injured thereby may not recover, unless he can show that the unsafe or dangerous condition had remained there for such a length of time that the inviter knew, or by the exercise of reasonable care, should have known of its existence.

7. The doctrine of *res ispa loquitur* is inapplicable in suits against business proprietors to recover for injuries sustained by customers or invitees in falls during business hours on floors and passageways located within the business premises and on which there is litter, debris, or other substances.

8. No inference of negligence on the part of a store proprietor arises merely from a showing that a customer in his store during business hours fell and sustained an injury in the store.

Upon a motion for summary judgment, the burden is on the movant to establish that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See 6 Moore's Federal Practice, § 156.15[3]. "Defendant, moving for summary judgment, assumes the burden of producing evidence, of the necessary certitude, which negatives plaintiff's claim." *Tolbert v. Tea Co.*, 22 N.C. App. 491, 494, 206 S.E. 2d 816, 817 (1974).

Assuming the defendant meets his burden, for the plaintiff to survive a motion for summary judgment, it is necessary that the

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reviewable documents establish either that (1) negligence of the defendant or an employee acting within the scope of his employment, resulted in the defect, in which case knowledge of the defect is charged to the defendant, or (2) that the defect was caused by a third party and existed for such a time that defendant knew, or by the exercise of reasonable care should have known, of its existence. Since there is no allegation as to the latter, it is incumbent here for plaintiff to show in the reviewable documents some evidence tending to show (a) defective or negligent construction or maintenance; (b) express or implied notice of such defects. *Sams v. Hotel Raleigh, Inc.*, 205 N.C. 758, 172 S.E. 371 (1934).

Plaintiff contends that the documents before the trial court at the summary judgment hearing establish a triable issue of fact with respect to her allegation of defective or negligent construction or maintenance by defendant in three instances: (1) defendant's admission in the interrogatories that repairs were made to the metal stripping after her fall, (2) the positive statement in her affidavit submitted in response to defendant's motion for summary judgment that she "tripped by a loose metal strip around the mechanism that activated the automatic doors," and (3) the statement to her by an employee of defendant several days after the incident that the bolt binding the metal trim to the cement had been stripped and was sitting loose in the hole, indicating that plaintiff had not pulled up the bolt at the time of the incident.

[1] With respect to the first contention, we note the following established rule: Evidence which may be considered on a motion for summary judgment includes admissions in the pleadings, depositions on file, answers to interrogatories, admissions on file including those not obtained under Rule 36, affidavits, and any other material *which would be admissible in evidence* or of which judicial notice may properly be taken. *Jernigan v. State Farm Mut. Auto. Ins. Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The making of repairs or taking adequate precautions after an accident is not admissible as an admission of previous negligence. 2 Stansbury, N.C. Evidence, § 180, p. 58 (Brandis rev. ed. 1973); *Price v. Railroad Co.*, 274 N.C. 32, 161 S.E. 2d 590 (1968); 65A C.J.S., Negligence, § 225, p. 628.

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The admission by defendant in answer to an interrogatory that repairs had been made after the incident would not have been admissible at trial; hence, such evidence could not be properly considered at the hearing on motion for summary judgment.

[2] Plaintiff's second contention is that defendant knew or should have known of a defect and failed to take corrective action by virtue of a statement in her deposition that subsequent to the accident, a bag boy at defendant's store informed her that the bolt binding the metal strip to the cement had been stripped, had been sitting loose in the hole and was not tight and that plaintiff had herself not pulled up the bolt.

What an agent or employee says relative to an act presently being done by him within the scope of his agency or employment is admissible . . . against the principal or employer, but what [he] says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer. 2 Stansbury, N.C. Evidence, § 169, p. 12 (Brandis rev. ed. 1973).

While there are exceptions to the stated rule, we find none of them applicable to the case at bar. Since the statement by the defendant's employee to plaintiff would not have been admissible at trial, it could not properly be considered at the hearing on the motion for summary judgment. See *Grimes v. Credit Company*, 271 N.C. 608, 157 S.E. 2d 213 (1967); *Brown v. Montgomery Ward and Company*, 217 N.C. 368, 8 S.E. 2d 199 (1940); *Staley v. Park*, 202 N.C. 155, 162 S.E. 202 (1932).

[3] Plaintiff finally contends that a genuine issue of material fact was raised by virtue of her positive statement in the deposition filed in response to the motion for summary judgment that she was tripped by a loose metal strip near the door. Her affidavit also stated that she "would not have fallen but for the loose metal strip." The plaintiff further stated in her deposition:

The canvas on the top part of the shoe was ripped, so *evidently* the piece of metal was high up enough that it caught my shoe on the upper part and it just, you know—I *guess that's what flipped me*. But, *evidently*, the metal must

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have been high up enough that it caught my shoe on the top part. It was not a matter of stubbing my toe or anything like that. (Emphasis added.)

Q. Now that's a conclusion that you reached—

A. Yes, sir.

Q. —and not something you saw?

A. Yes, sir.

This case is similar to *Tolbert v. Tea Co., supra*. There, plaintiff brought action against defendant to recover for injuries sustained when plaintiff fell while shopping in defendant's grocery store. Plaintiff's deposition disclosed that "[plaintiff's] foot slipped on the stuff that was on the floor. My feet flew out from under me and my head hit the floor and I felt very severe pain in my neck and shoulder area." Immediately after the fall, plaintiff observed crushed strawberries on the floor. Defendant argued that plaintiff had failed to present evidence showing how the strawberries got on the floor or whether the unsafe condition had been allowed to exist for such time that defendant should have known of its existence. The trial court granted defendant's motion for summary judgment, but this Court reversed, holding that it was defendant's duty to produce evidence that the fall was not caused by its failure to exercise reasonable care.

We are of the opinion that defendant has failed to produce evidentiary material of the necessary certitude to negate plaintiff's claim. We are cognizant of the fact that plaintiff's deposition was characterized by conjectural phrases and words importing doubt as to the condition of the allegedly "loose metal strip." However, it was defendant's duty to produce evidence that the unsafe condition was not caused by its failure to exercise reasonable care in light of the clear assertions in plaintiff's complaint. *Tolbert v. Tea Co., supra*. Consideration of whether plaintiff offered evidence to support her claim in her deposition is improper when defendant has not produced sufficient evidence to defeat plaintiff's claim in its entirety and to show that defendant is entitled to judgment as a matter of law. See *Keith v. Kresge Co.*, 29 N.C. App. 579, 225 S.E. 2d 135 (1976); *Sanders v. Davis*, 25 N.C. App. 186, 212 S.E. 2d 554 (1975); *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974).

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Furthermore, in passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from such material. 6 Moore's Federal Practice, ¶ 56.15[3], p. 56-469; *Whitley v. Cubberly*, *supra*.

It may be that upon a trial of the issues, the plaintiff, with the burden of establishing her case, may be unable to prove any negligence on the part of the defendant. On the record before us, however, summary judgment was improvidently entered against the plaintiff. The judgment of the trial court is therefore

Reversed.

Judges VAUGHN and CLARK concur.

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STATE OF NORTH CAROLINA v. HARRY HILL

No. 7912SC125

(Filed 19 June 1979)

**1. Electricity § 1— tampering with electric meter—evidence showing lack of authority—relevancy**

In a prosecution of defendant for unlawfully and willfully tampering with an electric meter in violation of G.S. 14-151.1, testimony by two servicemen of the utility company that they did not give defendant permission to tamper with the meter was relevant to show that defendant had no permission from any employee with apparent authority to tamper with the meter; furthermore, testimony by the manager of operations for the utility company that power to a lot in a trailer park had been disconnected and had not been officially reconnected, and that he did not give defendant authority to connect extension cords to that lot was admissible and sufficient to show lack of authority.

**2. Electricity § 1— tampering with electric meter—sufficiency of evidence**

In a prosecution of defendant for unlawfully and willfully tampering with an electric meter in a trailer park, the State's evidence was inconsistent with defendant's evidence that the tenant of a trailer gave him permission to run an extension cord to his lot, and the State's evidence was sufficient to show that defendant was the person who tampered with the meter where it tended to show that service to Lot 226 was disconnected on 10 April 1978; defendant

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moved to Lot 224 on 15 April 1978 and could not obtain electrical service until the prior delinquent amount was paid and until he made a security deposit; on 17 April a serviceman for the electric company found that service to Lot 224 had been reconnected by means of a meter on Lot 223; on 26 April the serviceman discovered defendant's extension cord running to Lot 226; the meter for Lot 226 had been tampered with and reenergized; and the manager for the trailer park testified that no one was living on Lot 226 on 26 April 1978, the owner being in Europe and the tenant having vacated several days before defendant moved to Lot 224.

**3. Criminal Law § 86.5— prior acts of defendant—cross-examination for impeachment purposes**

In a prosecution of defendant for unlawfully and willfully tampering with an electric meter in a trailer park, the trial court did not err in permitting the prosecutor to cross-examine defendant as to whether he had lived with a trailer park resident, whether her account with the electric company was delinquent, and whether she was pregnant with defendant's child, since such questions were properly asked for the purpose of impeaching defendant.

APPEAL by defendant from *Herring, Judge*. Judgment entered 21 September 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 1 May 1979.

Defendant was convicted, as charged, of unlawfully and willfully tampering with a meter which had been installed for the purpose of measuring the use of electricity in violation of G.S. 14-151.1. Defendant appeals from the judgment imposing a twelve-month prison term.

The evidence for the State tended to show that on 29 March 1978, the South River Electric Membership Corporation disconnected service to a trailer on Lot 224 in the Palm Springs Trailer Court, north of Fayetteville, because the bill had not been paid by the tenant, Mrs. Rivera. On 10 April 1978, a serviceman, Lacy Bullard, discovered that the meter to Lot 224 had been reconnected and he disconnected it. On 17 April 1978, Bullard returned to Lot 224 and found that service had again been restored to Lot 224 through the meter from Lot 223. Bullard instructed a lineman to disconnect the lines from the transformer. On 26 April 1978, Bullard found several extension cords running from the trailer on Lot 224 across Lot 225 through the back window to an outlet in the trailer on Lot 226. Bullard had disconnected the service to Lot 226 on 10 April 1978 because the occupants were moving. On 26 April 1978, the meter for Lot 226 had been tampered with and had been reenergized.

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Lawrence Fisher, manager of operations for the South River Electric Membership Corporation, testified that he had spoken to the defendant on 18 April 1978 and defendant stated that he did not know Mrs. Rivera, former tenant of the trailer on Lot 224, and that he had moved into the trailer on 15 April 1978. Fisher informed defendant that he would have to clear up the account on Lot 224 before electric service would be restored. Fisher did not give defendant permission to run an extension cord between Lots 224 and 226.

Katie Davis, manager for the Palm Springs Trailer Park testified that no one was living in the trailer on Lot 226 on 26 April 1978.

Defendant testified that he had moved onto Lot 224 on 15 April 1978 and contacted the electric company to connect service to Lot 224. He was informed that he could not obtain service until he paid the overdue account and made a security deposit. Thereafter, he had asked Richard Thomas, occupant of Lot 226, if he could run a series of extension cords from Lot 226 to Lot 224 until his service was connected. Thomas gave him permission to do so. He had known Iris Rivera for 10 years but had never lived with her, and she was not pregnant with his child.

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

*Assistant Public Defender Rebecca Bosley for defendant appellant.*

CLARK, Judge.

The defendant first assigns as error the trial court's failure to dismiss the case against the defendant on the grounds that the evidence was insufficient to warrant the submission of the case to the jury. The defendant, who appeared *pro se*, did not move for a dismissal pursuant to G.S. 15A-1227 but did question the sufficiency of the State's evidence. Since the defendant was not represented by counsel, the court may consider a challenge to the sufficiency of the State's evidence which is made in layman's language, as a motion for judgment of nonsuit. *See State v. Whitfield*, 256 N.C. 704, 124 S.E. 2d 869 (1962). In any event, the sufficiency of the evidence may be raised for the first time on appeal.



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G.S. 15A-1446(d)(5). Therefore, we shall consider whether the State's evidence was sufficient to reach the jury. There must be substantial evidence of each of the material elements of the offense charged, in order to withstand a challenge to the sufficiency of the evidence. *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972). G.S. 14-151.1 provides:

"(a) It shall be unlawful for any unauthorized person to alter, tamper with or bypass a meter which has been installed for the purpose of measuring the use of electricity, gas or water or knowingly to use electricity, gas or water passing through any such tampered meter or use electricity, gas or water bypassing a meter provided by an electric, gas or water supplier for the purpose of measuring and registering the quantity of electricity, gas or water consumed.

(b) Any meter or service entrance facility found to have been altered, tampered with, or bypassed in a manner that would cause such meter to inaccurately measure and register the electricity, gas or water consumed or which would cause the electricity, gas or water to be diverted from the recording apparatus of the meter shall be prima facie evidence of intent to violate and of the violation of this section by the person in whose name such meter is installed or the person or persons so using or receiving the benefits of such unmeasured, unregistered or diverted electricity, gas or water."

The State was required to prove that the defendant tampered with an electric meter that served the trailer on Lot 226 near Lot 224 where defendant resided, that he was unauthorized to do so, and that he connected that power for his own use on Lot 224 or that he knowingly received electricity from a bypassed meter. Defendant contends that the State's evidence was insufficient in two respects. First, there was insufficient evidence of lack of authority and second, the State failed to present sufficient evidence that the defendant was the person who tampered with the meter on Lot 226.

[1] Defendant contends that Bullard was a serviceman for the electric company and not authorized to give defendant permission to tamper with the meter on Lot 226, and, therefore, his testimony that he did not give defendant permission was irrele-

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vant. According to the defendant, only Fisher was capable of authorizing defendant to tamper with the meter and Fisher did not testify that he did not give defendant authority to tamper with the meter but only testified that he did not permit defendant to run an extension cord from Lot 226 to Lot 224. On a motion for nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). The evidence for the State tends to show that three employees of the electric company had dealings with defendant. The testimony of two servicemen that they did not authorize the defendant to tamper with the meter was relevant to show that he had no permission from any employee with apparent authority to tamper with the meter. Fisher, although he did not specifically state that he did not give defendant permission to tamper with the meter, testified that the power to Lot 226 was disconnected on 10 April 1978, has not been officially reconnected, and that he did not give defendant authority to connect extension cords to Lot 226. We find that this evidence was relevant to the issue of authority, was admissible, and sufficient to show lack of authority. This assignment of error is without merit.

[2] Defendant also challenges the sufficiency of the State's evidence that the defendant was the person who tampered with the electrical meter on Lot 226. The State's evidence on this issue is entirely circumstantial. Where the State's evidence is circumstantial, the courts have applied a strict test of sufficiency of proof. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). "To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. Guilt must be a legitimate inference from facts established by the evidence. When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed." *State v. Blizzard*, 280 N.C. at 16, 184 S.E. 2d at 854.

Defendant contends that the State's evidence raises no more than a suspicion that the defendant committed the crime, since it also raises an inference that either the tenant or the owner of the

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trailer on Lot 226 tampered with the meter. In *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965), the Supreme Court, in ruling on a motion for nonsuit, considered defendant's evidence which tended to show that he did not commit the crime. The defendant's evidence was consistent with the State's circumstantial evidence which appeared to link him to the crime, but defendant's evidence tended to show that the presence of the circumstantial evidence did not lead unerringly to the conclusion that defendant committed the crime. The court held that the motion for nonsuit should have been granted since the circumstantial evidence presented by the State raised no more than a suspicion of guilt. In the case *sub judice*, the defendant contends that the State's circumstantial evidence was not inconsistent with and did not negate his testimony that the tenant, Richard Thomas, gave him permission to run the extension cord to Lot 226. We do not agree. The State's evidence tends to show that service to Lot 226 was disconnected on 10 April 1978. Defendant moved to Lot 224 on 15 April 1978 and could not obtain electrical service until the prior delinquent account was paid and until he made a security deposit. On 17 April, a serviceman for the electric company found that service to Lot 224 had been reconnected by means of a meter on Lot 223. On 26 April, the serviceman discovered the defendant's extension cord running to Lot 226. The manager for the trailer park testified that no one was living on Lot 226 on 26 April 1978. The owner of Lot 226 was in Europe, and the evidence tends to show that the tenant of Lot 226 vacated on 10 April 1978, several days before defendant moved to Lot 224. The evidence clearly raises more than an inference that defendant was the person who tampered with the meter. We find this circumstantial evidence inconsistent with defendant's evidence, and this case distinguishable from *Bruton*. This assignment of error is overruled.

[3] Defendant also contends that the trial judge erred in permitting the prosecutor to ask prejudicial and improper questions of the defendant during cross-examination. The defendant did not object to the questions and therefore waived the right to assert the alleged error upon appeal. G.S. 15A-1446. However, G.S. 15A-1446(b) also provides that "the appellate court may review such errors in the interest of justice if it determines it appropriate to do so." In light of the fact that defendant appeared

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*pro se*, and was the witness to whom the allegedly improper questions were addressed, we elect to consider this assignment of error.

The questions which defendant contends were improper are as follows:

“Q. Mr. Hill, isn't it true that the reason you couldn't get any service in your own name was because you were living with Mrs. Rivera and that account was delinquent?

A. No.

Q. Mr. Hill, and I ask this in good faith, isn't it true that Mrs. Rivera is right now pregnant with your child?

A. No.”

A defendant who elects to take the stand is subject to impeachment as is any other witness. The scope of cross-examination is within the discretion of the trial judge. *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978). In the case *sub judice*, defendant told Mr. Fisher that he did not know Mrs. Rivera and that he had only been in the area since 15 April 1978. On cross-examination, however, he admitted that he had known Mrs. Rivera for 10 years and had visited her at Lot 224. The questions concerning defendant's activities were therefore relevant and were properly asked for the purpose of impeaching the defendant. *State v. Neely*, 26 N.C. App. 707, 217 S.E. 2d 94, *appeal dismissed*, 288 N.C. 512, 219 S.E. 2d 347 (1975). We find no merit in this assignment of error.

Defendant also contends that the court erred in failing to explain the statutory language of G.S. 14-151.1 and apply it to the evidence. *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965). Defendant contends that the issue of who can give authority is a complicated issue requiring special instructions. There is no evidence in this case that any one from the electric company gave or purported to give the defendant or anyone else permission to tamper with the meter. Defendant contends that he did not tamper with it and was given permission to use electricity from Lot 226. We find that the instructions on the issue of lack of authority were sufficiently clear to apprise the jury of the applicable law. Defendant's assignment of error is overruled.

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**State v. Childers**

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We have carefully examined and considered defendant's other assignments of error and find that discussion is not warranted.

No error.

Judges VAUGHN and CARLTON concur.

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**STATE OF NORTH CAROLINA v. HELEN CHILDERS**

No. 7927SC161

(Filed 19 June 1979)

**1. Narcotics § 1.3— manufacture of controlled substance—intent to distribute**

In prosecutions under G.S. 90-87(15) for manufacturing a controlled substance in which the production, propagation, conversion or processing of the controlled substance is involved, the intent of defendant either to distribute the controlled substance or to consume it personally is irrelevant and does not form an element of the offense. However, in those cases in which the activity constituting manufacture is preparation or compounding, the State has the burden of proving that defendant intended to distribute the controlled substance, but in proving such intent the State may rely upon ordinary circumstantial evidence such as the amount of the controlled substance possessed, the nature of its packaging, labeling and storage, and the activities of defendant with reference to the controlled substance. Statements in *State v. Baxter*, 21 N.C. App. 81 and *State v. Whitted*, 21 N.C. App. 649, that G.S. 90-87(15) defines manufacturing in such a way that it can only mean manufacture with intent to distribute are no longer authoritative.

**2. Narcotics § 3— marijuana seeds—presumption of capability to germinate**

The State is entitled to assume that marijuana seeds are capable of germination until it is shown otherwise, and defendant has the burden of showing that marijuana seeds found in his or her possession have been sterilized or rendered incapable of germination by some process so as to come within the exception contained in G.S. 90-87(16).

**3. Narcotics § 4.5— instructions—misstatement of contention—harmless error**

In this prosecution for manufacturing marijuana, the trial judge's statement that the State contended that marijuana seeds were packaged and labeled by defendant when there was no evidence to support such statement was harmless error in light of the overwhelming evidence of defendant's guilt of the crime charged.

Chief Judge MORRIS and Judge HEDRICK concur specially.

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State v. Childers

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APPEAL by defendant from *Friday, Judge*. Judgment entered 25 September 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 4 May 1979.

Defendant was tried, upon an indictment proper in form, for manufacturing marijuana in violation of N.C. Gen. Stats. § 90-95(a)(1), a felony. Evidence for the State tended to show that a search of her room, conducted pursuant to a valid search warrant, revealed seven growing marijuana plants, small in size and contained in two pots. Two glass jars, containing marijuana seeds covered with a resinous substance, were also found. The defendant made a statement to police officers, after being duly informed of her rights to silence and to counsel, admitting that the seven growing plants were hers, stating that she was growing them for her personal use, and did not know how to convert the raw marijuana into a usable form. At trial, an expert chemist employed by the S.B.I. testified that the plants found were marijuana, and that the seeds were marijuana seeds. He further testified, however, that he made no tests to determine if the seeds were sterile. Defendant objected to the introduction of the seeds into evidence, on the grounds that they had been insufficiently tested for the expert to be able to identify them as marijuana, and moved to suppress that portion of the State's evidence. This motion was denied by the trial court. Defendant offered no evidence; no objection was raised to the admission of her statement concerning the seven marijuana plants. From a judgment of conviction for manufacturing marijuana and a sentence of two years' imprisonment, defendant appeals, assigning error.

Defendant was also tried for possession of marijuana, those charges stemming from the discovery, pursuant to a search warrant, of some marijuana at another location purportedly under defendant's control. The jury returned a verdict of not guilty of this offense.

*Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.*

*Roberts and Planer, by Geoffrey A. Planer and Alan R. Krusch, for the defendant.*

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State v. Childers

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MARTIN (Robert M.), Judge.

[1] Defendant first assigns as error the failure of the trial court to instruct the jury that defendant could not be found guilty of manufacturing marijuana if it were found that she was growing the plants for her personal use. She contends that in order for her to be found guilty of the offense of manufacturing marijuana, it must be proved beyond a reasonable doubt by the State that she was manufacturing it with intent to distribute, citing *State v. Baxter*, 21 N.C. App. 81, 203 S.E. 2d 93 (1974) and *State v. Whitted*, 21 N.C. App. 649, 205 S.E. 2d 611, cert. denied 285 N.C. 669, 207 S.E. 2d 761 (1974).

N.C. Gen. Stats. § 90-95(a) provides that "it is unlawful for any person: (1) To manufacture . . . a controlled substance." Marijuana is a controlled substance under Schedule VI of the North Carolina Controlled Substances Act, pursuant to the provisions of N.C. Gen. Stats. § 90-94. N.C. Gen. Stats. § 90-87(15) defines "manufacture" as:

. . . the production, preparation, propagation, compounding, conversion or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . .

N.C. Gen. Stats. § 90-87(24) defines "production" as including "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." "Preparation" is defined by *Webster's Third New International Dictionary* as being "the action or process of making something ready for use or service." The same source provides, in addition, definitions as stated for the following terms: (1) propagation: causing to continue or increase by natural reproduction; (2) compounding: the putting together of elements, ingredients or parts to form a whole; (3) conversion: changing [of a substance] from one form, state or character into another; (4) processing: to subject [something] to a particular method, system or

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**State v. Childers**

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technique of preparation, handling or other treatment designed to effect a particular result.

N.C. Gen. Stats. § 90-87(15), in defining the term "manufacture" used six specific terms to illustrate what activity was being proscribed. It excepts "preparation or compounding of a controlled substance by an individual for his own use." Defendant argues that, because these two activities are excepted, any manufacture of a controlled substance for personal use would not be "manufacturing" within the contemplation of the statute. With this contention we cannot agree. The plain meaning of the exception is to avoid making an individual liable for the felony of manufacturing controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (*i.e.*, rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (*i.e.*, making the so-called "Alice B. Toklas" brownies containing marijuana). The four activities not excepted by this proviso contemplate a significantly higher degree of activity involving the controlled substance (*i.e.*, planting, growing, cultivating or harvesting a controlled substance or creating it by any synthetic process or mixture of processes, or taking a controlled substance and, by any process or conversion, changing the form of the controlled substance or concentrating it) and thus are more appropriately made felonies without regard to the intent of the person charged with the offense as to whether the controlled substance so "manufactured" was for personal use or for distribution. The burden will, of course, be upon the State to prove from the evidence beyond a reasonable doubt that, in cases where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding, that the defendant intended to distribute the controlled substance. In proving such intent, the State would be able to rely upon ordinary circumstantial evidence (*e.g.*, the amount of the controlled substance possessed, the nature of its packaging, labeling and storage, if any, the activities of the defendant with reference to the controlled substance) as evidence pertinent to intent, but no presumptions presently apply to aid the State in making its case on this element. In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense.



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We are not unaware of the prior holding of this Court in *State v. Baxter*, 21 N.C. App. 81, 203 S.E. 2d 93 (1974) and *State v. Whitted*, 21 N.C. App. 649, 205 S.E. 2d 611 (1974), *cert. denied* 285 N.C. 669, 207 S.E. 2d 761 (1974). We would initially note that these cases, holding that the offense of manufacturing a controlled substance can mean only manufacture with intent to distribute, are factually distinguishable from the case *sub judice*. We next note that this Court, in the cases of *State v. Elam*, 19 N.C. App. 451, 199 S.E. 2d 45, *cert. denied* 284 N.C. 256, 200 S.E. 2d 656 (1973), and *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied* 293 N.C. 592, 241 S.E. 2d 513 (1977) (written by Morris, J., now C.J., who was author of the *Whitted* opinion following *Baxter*) has foreshadowed an interpretation of this statute similar to ours; an interpretation, we think, that more nearly comports with the intent of the Legislature and the plain meaning of the words employed. To the extent that *Baxter* and *Whitted* offer any conflict to our holding today, we expressly overrule them. Chief Judge Morris and Judge Hedrick join in this opinion for the express purpose of disavowing the holdings of *Baxter* and *Whitted* in respect to the interpretation of the meaning of the term "manufacture" as contained in N.C. Gen. Stats. § 90-87(15) and reaffirming the holding of *Wiggins* in respect thereto.

We are aware that our interpretation of the statute may lead to some apparently anomalous results, where a person cultivating one marijuana plant weighing less than one ounce would be subject to conviction for a felony, while possessing less than one ounce of the final product of the plant would constitute only a misdemeanor. However, the Legislature has chosen, in its wisdom, to impose a higher penalty for manufacturing even small quantities of controlled substances than for merely possessing them. We may not presume to contravene that legislative intent. Should a revision of the present manufacturing statute be deemed advisable such an action must be done by the Legislature itself.

As the trial court, in its instructions, placed upon the State the burden of proving defendant's intent to distribute with reference to both the growing plants and the seeds found, the State was forced to carry a heavier burden than is required by the statute; accordingly, any error in the instruction is favorable to the defendant and therefore not prejudicial. The defendant did

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not attempt to contradict or attack in any way her statement made to the police (other than by her plea or not guilty) that the plants were hers and she was cultivating them. This was an admission of propagation and producing marijuana, and therefore was an admission of manufacturing marijuana from which the jury could properly find her guilty of that offense without reference to her intent. We conclude, therefore, that the instructions given by the trial court were favorable to defendant and did not result in prejudicial error. This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in failing to suppress evidence of the marijuana seeds contained in State's Exhibit 5B and in allowing the State's expert forensic chemist to testify about them. We do not agree. N.C. Gen. Stats. § 90-87(16) defines marijuana, and excludes from that definition "the sterilized seed of such plant which is incapable of germination." The State argues, and we think persuasively so, that the exception implies an affirmative act by which presumptively vital seeds are rendered sterile, rather than the naturally occurring sterile seeds resulting from a lack of fertilization by pollination. We think it reasonable to presume that seeds are capable of germination until shown to be otherwise. It is unlawful to possess marijuana seeds; if, however, the seeds have been sterilized or rendered incapable of germination by some process, that may be asserted as an affirmative defense to the charge. It is appropriate that the burden should be upon the defendant to make this showing in that the defendant will ordinarily be in the best position to be aware of and prove any affirmative act by which the seeds have, in fact, been sterilized. Where, as was the case here, the defendant does not make any showing as to the seeds, and offers no proof that they were in any different state from that in which they naturally occurred, the State is entitled to assume that the seeds are vital and to proceed upon that assumption until the contrary is shown by defendant's evidence. We conclude, therefore, that the trial court's actions were not erroneous and this assignment of error is overruled.

[3] Defendant also assigns as error the misstatement of certain facts by the trial court in its summary of the State's contentions. The judge erroneously stated that the State contended the mari-

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juana seeds were packaged and labeled by the defendant. There was no evidence to support this statement, although the seeds had been placed into plastic bags and labeled by the State's witnesses after seizure. We conclude, in the face of the overwhelming evidence to support the conviction (considering especially defendant's statement admitting to the elements of manufacturing marijuana by production and propagation) that this inadvertence on the trial court's part was not prejudicial, particularly since the evidence of packaging and labeling is pertinent primarily to the intent of defendant to distribute the controlled substance, which, while included by the trial judge in his instructions as an element of the offense of manufacturing, did not properly belong there and was error favorable to defendant. The assignment of error is overruled.

Of defendant's two remaining assignments of error, one is mooted by our discussion above, and the other is merely formal and is without merit. Accordingly, they are overruled. As we find no prejudicial error in the trial below, the judgment of the trial court is affirmed.

Affirmed.

Judges ARNOLD and ERWIN concur.

Chief Judge MORRIS and Judge HEDRICK concur specially.

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DAVID E. OGLESBY v. EDWARD G. MCCOY, DIRECTOR OF THE MARINE FISHERIES OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES; AND HOWARD LEE, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES

No. 783SC855

(Filed 19 June 1979)

**Constitutional Law § 25.1; State § 2.1— lease of oyster bottoms—amount of rent—increase after second renewal proper**

Since plaintiff and the State, parties to a lease of oyster bottoms, clearly did not intend to create a perpetual lease, a third renewal of the lease was within the discretion of the State, and the requested increase in the rental fee, pursuant to G.S. 113-202(j), after the first renewal term had ended, was constitutionally permissible and did not impair the State's obligation of its lease contract with plaintiff.

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Oglesby v. McCoy

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APPEAL by plaintiff from *Tillery, Judge*. Order dated 25 July 1978 and filed 10 August 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 29 May 1979.

Plaintiff's predecessors entered into a lease with defendants' predecessors on 1 July 1942. The lease was for eight acres of bottoms used for cultivating oysters in the Newport River, Carteret County. The lease provided in pertinent part as follows:

TO HAVE AND TO HOLD the said above described bottoms, and the privileges and appurtenances thereto appertaining, to him, the said party of the second part, and his heirs and assigns, for the period of twenty years from the 1st day of April, 1942, and no longer (with the right of renewal as set forth in the statute regulating the leasing of Oyster and Clam bottoms), upon the following terms and conditions, to-wit: That the said party of the second part shall pay annually, in advance, on or before April 1st of each and every year the sum of Fifty Cents per acre for and during the first ten years, from April 1st, 1942, and One dollar per acre for the next succeeding ten years. That the said party of the second part shall keep the said bottoms properly staked as required by law and shall plant and cultivate the same as the law prescribes, and he shall comply with all the conditions and requirements set forth in Consolidated Statutes, Sections 1903-1912, inclusive, providing for the leasing of Oyster and Clam bottoms.

At the time the lease was executed, Section 1910 of the Consolidated Statutes provided in pertinent part as follows:

The term of each lease granted under the provisions of this Article shall be for a period of 20 years from the first day of April preceding the date of granting of said lease. At the expiration of the first lease, the Lessee, upon making written application on the prescribed form, shall be entitled to successive leases on the same terms as applied to the last 10 years of the first lease for a period not exceeding 10 years each.

Plaintiff's complaint alleged that the lease was renewed pursuant to the statute in 1952 and 1962 and that annual rental pursuant to the lease was paid to defendants through 1975. Further,

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plaintiff alleged that defendants refused to accept the rent tendered for 1976 and that defendants then tendered to plaintiff a renewal lease for the period beginning 1 April 1972 and continuing for a period of 10 years at an increased rental of \$5 per acre. Plaintiff was advised by defendants that the new lease must be executed or action would be taken to terminate the leasehold.

Defendants alleged that the Division of Marine Fisheries of the Department of Natural and Economic Resources mistakenly accepted payments of \$1 per acre per year from the plaintiff for the years 1972 through 1975 and that the action of the Division of Marine Fisheries in refusing to accept the \$1 per acre rental in 1976 was in accordance with G.S. 113-202(j) which provides in pertinent part as follows:

(j) Initial leases begin upon the issuance of the lease by the Secretary and expire at noon on the first day of April following the tenth anniversary of the granting of the lease. Renewal leases are issued for a period of 10 years effective from the time of expiration of the previous lease. The rental for initial leases is one dollar (\$1.00) per acre for all leases entered into before July 1, 1965, and for all other leases until noon on the first day of April following the first anniversary of the lease. Thereafter, for initial leases entered into after July 1, 1965, and from the beginning for renewals of leases entered into after said date, the rental is five dollars (\$5.00) per acre per year. Rental must be paid annually in advance prior to the first day of April each year. Upon initial granting of a lease, the pro rata amount for the portion of the year left until the first day of April must be paid in advance at the rate of one dollar (\$1.00) per acre per year; then, on or before the first day of April next, the lessee must pay the rental for the next full year.

The statute quoted above was enacted in 1967 and plaintiff alleges that it purports to subject renewals of leases on terms that differ from the original terms and which increase the rental from \$1 per acre to \$5 per acre. Plaintiff contends that the act is unconstitutional and that he is entitled to have his rights, status and legal relationships declared by the court. Plaintiff prayed that the court restrain the defendants from entering upon the leased premises pending a determination of the rights of the par-

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ties, that the court declare that the lease of the plaintiff should exist pursuant to its terms and unaffected by G.S. 113-202(j) and that the rental to be paid by plaintiff to defendants continue to be in the sum of \$1 per acre per year. Plaintiff further prayed that the quoted statute be declared unconstitutional insofar as it attempts to affect the lease of the plaintiff.

Pursuant to G.S. 1A-1, Rule 12(c), defendants moved that judgment be entered for them on the pleadings on the ground that undisputed facts entitled them to judgment as a matter of law. The trial court found that the predecessor statutes to G.S. 113-202(j) did not operate to give plaintiffs a right to perpetual renewals for the same rental fee as the original term. The court further found that G.S. 113-202, as it relates to increasing the rental charge to \$5 per acre per year for renewal leases of oyster and clam bottoms entered into after 1 July 1965, is constitutional in its application to the lease in question. The trial court granted defendants' motion for judgment on the pleadings and plaintiff appeals.

*Bennett, McConkey & Thompson, by Thomas S. Bennett, for plaintiff appellant.*

*Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr. and Assistant Attorney General Daniel C. Oakley, for defendants appellee.*

CARLTON, Judge.

The primary question for determination is whether the legislature, in enacting G.S. 113-202(j) in 1967, violated the constitutional prohibition of statutes impairing the obligation of contracts. We hold that it did not.

Contracts to which a state is a party are within the constitutional prohibition against the impairment of the obligation of contracts. An act of a legislature may be an obligation of the state within the constitutional prohibition, and whatever rights are created by such act a subsequent legislature cannot impair. It is a well established principle that a contract to which a state, or a subdivision thereof is a party is as much within the constitutional prohibition of statutes impairing the obligation of contracts as a contract between individuals, par-

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ticularly with respect to contracts previously entered into by the state in its proprietary capacity. 16 C.J.S., Constitutional Law, § 285, p. 1301.

Clearly, under the stated rule, the passage of G.S. 113-202(j) in 1967 would violate the constitutional prohibition of statutes impairing the obligation of contracts, as applied to the lease in question, if the legislature had intended for the statute to apply to leases which had not expired or which had been properly renewed pursuant to the terms of the lease. Such, however, is not the situation in the case at bar.

At the time the tendered new lease was submitted to plaintiff in 1976, the original lease had not been renewed since 1962. Pursuant to the terms of the lease, therefore, the lease had expired in 1972. Plaintiff argues, however, that the terms of the lease effectively gave him a perpetual lease and that the State was bound to renew it every 10 years at his request; therefore, the 1967 statute impaired the obligation of his continuing contract with the State. We do not believe this to be the prevailing law.

We adopt the majority view that the law does not favor perpetual leases and that the intention to create one must appear in clear and unequivocal language, and accordingly, a lease will not be construed to create a right to perpetual renewal unless the language employed indicates clearly and unambiguously that it was the intention and purpose of the parties to do so. *See* 50 Am. Jr. 2d, Landlord and Tenant, § 1171, p. 56. Moreover, leases providing for successive renewals, without other qualifying language, will be construed as providing for but one renewal. 31 A.L.R. 2d 607. The latter rule is based on the principle that courts do not favor perpetuities, and unless the lease, expressly or by clear implication, provides that the second lease shall contain a covenant for future renewals, it will be construed as providing for but a single renewal.

Applying the stated rules to the facts disclosed by the record, we think the parties clearly did not intend a perpetual lease in light of the language of the lease and the circumstances surrounding the transaction. The 1942 lease provided for a period of 20 years "with the right of renewal as set forth in the statute requiring the leasing of Oyster and Clam bottoms." By referring

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to the statute in the renewal clause in the lease, the parties anticipated that statutory changes would be operative on the right to renewal.

Moreover, nowhere in the instrument do we find any language indicating an instrument in perpetuity. In light of the State's vested interest in oyster and clam bottoms, we think our legislative and executive branches of government would have used appropriate and apt words to create a perpetual lease had such been intended. See *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952). Since neither the statute nor the lease employed clear and unambiguous language indicating an intent to create a lease in perpetuity, we hold that such was not the intent of the parties. Renewal of the lease in question in 1972 was therefore in the discretion of the State and must be in compliance with G.S. 113-202(j) requiring a \$5 per acre per year rental fee for "renewals of leases entered into after said date [1 July 1965]." Put another way, the requested increase in the rental fee, pursuant to statutory authorization, after the first renewal term had ended, was constitutionally permissible.

Plaintiff contends that the case at bar is completely controlled by a former decision of our Supreme Court in *Oglesby v. Adams*, 268 N.C. 272, 150 S.E. 2d 383 (1966). There, plaintiff entered into an oyster bottom lease in 1953 with the State for a 20 year period with rights to renewal similar to the lease in question here. The rental fee was \$1 per acre per year and plaintiff's tender of rent at that rate prior to 1 April 1965 was refused by the State under the authority of a statute enacted by the legislature in 1965 increasing the rental fee to \$5 per acre per year. Our Supreme Court held that the statute violated the rights conferred upon the plaintiff by the lease, citing the constitutional prohibition of statutes impairing the obligation of contracts.

Our decision is not in conflict with that decision of our Supreme Court. There, the initial 20-year lease had not expired and the act of the legislature attempted to increase the rental fee during the term of an expiring lease. Here, in light of the rule enunciated above, no lease was existing at the time the State attempted to increase the rental fee in 1976.

We note finally that our legislature amended the 1965 statute following the *Oglesby* decision in 1966. It is obvious from a com-



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**Smith v. Beasley**

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parison of the 1965 and 1967 legislation that our legislature intended for all renewals after 1 July 1965 to be subject to an annual rental of \$5 per acre per year. We hold that our legislature effectively raised the rental rate for oyster and clam bottoms for renewals subsequent to 1 July 1965. The rental increase is effective provided that the renewal in question is not a first renewal under a lease similar to the one in question, in which event the rental could not be raised by the State until the lessee attempted to exercise a renewal for a second term. In the instant case, the lessee had already exercised his first and second renewals and a third renewal was therefore in the discretion of the State. Since no lease was existing at the time, the State had the right to give effect to the statute and request an increase in the rental rate from the plaintiff.

For the reasons stated above, the decision of the trial court is

**Affirmed.**

**Judges VAUGHN and CLARK concur.**

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BETTY ROUSE SMITH v. MYRTLE TEW BEASLEY AND DURAL LEE FISH

No. 7810SC742

(Filed 19 June 1979)

**1. Trial § 32.2— instruction on unanimity of verdict**

The trial court did not err in instructing the jury that a "verdict is not a verdict until all 12 of your minds concur."

**2. Automobiles § 91.5; Trial § 52.1— alleged inadequate damages— refusal to set aside verdict**

In this action to recover for injuries suffered by plaintiff in an automobile accident, the trial judge did not abuse his discretion in refusing to set aside a jury verdict of \$3,350 on the ground that the jury arbitrarily omitted an amount for pain and suffering because plaintiff's evidence showed medical expenses, lost wages and lost benefits of over \$3,800, since the jury could have failed to believe that all of plaintiff's medical expenses and other damages which she sought to prove were caused by the accident, and the jury was not compelled to believe testimony as to the nature, extent and cause of her pain.

Judge CLARK dissenting.

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*Smith v. Beasley*

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APPEAL by plaintiff from *Preston, Judge*. Judgment entered 4 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 1 May 1979.

Plaintiff instituted this action seeking to recover damages for personal injuries sustained in an automobile accident. On 13 October 1975, between 7:30 and 8:00 a.m., plaintiff was proceeding westwardly on Highway 70. As she approached the intersection of Highway 70 and New Rand Road, defendant Beasley drove her son-in-law's car into plaintiff's path. Plaintiff was unable to stop but swerved to her left and hit the side of defendant's car. Plaintiff's car spun around throwing plaintiff against the door and bumping her head. Plaintiff was shaken and had a bump on her head but was not bleeding. When she sat down in the police car, however, she noticed a severe pain in her back. She had never had any previous back problems. Plaintiff went to the emergency room at Rex Hospital where she was examined by Dr. Robert Nelson. Plaintiff then went home and stayed in bed for a couple of weeks. Plaintiff had several sessions with a physical therapist, during which she was placed in traction and hot moist heat was applied to her lower back. She also did exercises. Plaintiff was uncomfortable riding in a car because sitting in one position for any length of time was painful. Plaintiff has continued exercise treatments to help her back.

Plaintiff's evidence shows that she was an active person prior to this accident. She and her husband rode motorcycles and took camping trips. She bowled and coached a church softball team. Since the accident she has been unable to partake of any of these activities. She has trouble lifting things such as a basket of clothes, and she cannot reach up into a cabinet.

As a result of her injury, plaintiff contended that she lost \$3,040.00 in salary, \$277.95 in retirement pay, \$177.84 in social security contributions, and \$66.00 in hospitalization insurance. She also incurred medical bills of \$387.00. Dr. Nelson told plaintiff that she could return to work on 20 February 1976. Her previous position had been terminated, however, and she was unable to find a job until 15 March 1976.

Defendant, called by plaintiff as a hostile witness, testified that she pleaded guilty to a traffic charge arising out of this accident. She did not see plaintiff's car before she pulled into the intersection. Defendant presented no evidence.

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**Smith v. Beasley**

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The jury found that plaintiff was injured by defendant's negligence and awarded damages in the amount of \$3,350.00. The plaintiff's motion to set aside the verdict for inadequate damages and motion for a new trial were denied and judgment was entered in accordance with the jury's verdict. From this judgment, plaintiff appeals.

*Brenton D. Adams, for plaintiff appellant.*

*Young, Moore, Henderson & Alvis, by Robert C. Paschal and George M. Teague, for defendant appellees.*

VAUGHN, Judge.

[1] Plaintiff first contends that the trial court erred in instructing the jury that a "verdict is not a verdict until all 12 of your minds concur." Plaintiff argues that this instruction was insufficient to prevent the jury from reaching a compromise verdict or a verdict by majority vote when the entire charge is considered. We have no reason to believe that the jury was misled or confused by this instruction. See *Boyer v. Boyer*, 20 N.C. App. 637, 202 S.E. 2d 297, cert. den., 285 N.C. 233, 204 S.E. 2d 22 (1974). This assignment of error is overruled.

[2] Plaintiff next contends that the jury verdict was inadequate because they failed to make any award for pain and suffering. Plaintiff asserts that her out-of-pocket expenses were over \$3,800.00 and, therefore, the jury's award of \$3,350.00 could not have included any award for pain and suffering. The general rule is that "[t]he granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge." (Citations omitted.) *Robertson v. Stanley*, 285 N.C. 561, 563, 206 S.E. 2d 190 (1974), reversing the decision of this Court in the same case reported in 21 N.C. App. 55, 203 S.E. 2d 83 (1974). The trial court's ruling should not be reversed unless a clear abuse has been shown. See *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E. 2d 168 (1978). In *Robertson v. Stanley*, supra, the minor plaintiff and his father sued defendant for damages resulting from defendant hitting plaintiff with his car in a drive-in theater. The parties stipulated as to the medical bills incurred and plaintiff produced evidence of pain and suffering. The jury found that

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defendant was negligent and awarded plaintiff's father damages in the amount of the medical expenses. They awarded plaintiff nothing for his personal injury. Plaintiff's motion for a new trial was denied and plaintiff appealed. The Supreme Court reversed, finding that the jury had arbitrarily ignored plaintiff's evidence of pain and suffering. "If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such cases." *Robertson v. Stanley, supra*, at 566.

*Robertson*, however, is distinguishable from the present case. Here the amount of plaintiff's medical expenses, lost wages and lost benefits were disputed while in *Robertson* the medical expenses were stipulated. The dissent in the *Robertson* case when it was decided in the Court of Appeals pointed out

"By its answer to the issues the jury found that this minor was injured by the sole negligence of defendant and then said that he was not entitled to recover anything for these injuries. Obviously the jury made a mistake which the trial judge should have, on his own motion, corrected by setting the verdict aside and ordering a new trial." *Robertson v. Stanley*, 21 N.C. App. 55, 58, 203 S.E. 2d 83 (1974).

The jury is entitled to believe or disbelieve all or part of plaintiff's evidence. The jury could have failed to believe that all of plaintiff's medical expenses, lost wages and other special damages that she sought to prove were caused by the accident. Certainly they were not compelled to so find and neither were they required to believe the testimony as to the nature, extent and cause of her pain. We do not conclude, therefore, that the jury arbitrarily ignored plaintiff's evidence and rendered an inconsistent verdict or one not in accordance with the law. See *Brown v. Moore*, 286 N.C. 664, 213 S.E. 2d 342 (1975). The judge did not abuse his discretion when he declined to set the verdict aside. This assignment of error is overruled.

We have carefully considered plaintiff's remaining assignments of error and conclude that no error has been shown which would require a new trial.

No error.

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**Smith v. Beasley**

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Judge CARLTON concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The majority distinguishes *Robertson* from the present case on the ground that: "Here the amount of plaintiff's medical expenses, lost wages and lost benefits were disputed while in *Robertson* the medical expenses were stipulated." These damage claims were disputed only in the sense that the pertinent allegations in the complaint were denied on information and belief. The plaintiff offered uncontradicted evidence of medical expenses in the sum of \$387.00, of loss of wages and wage benefits in the sum of \$3,495.79. The jury award was \$3,350.00. The fact that the award was less than the amount of actual damages which the uncontradicted evidence tends to show must be considered in light of the charge to the jury. This amount was not referred to in the charge, either in the summary of the evidence or in explaining the law applicable to the damage issue. This indicates to me that the jury did not know the total sum shown by the evidence or did not understand that all the damages shown were recoverable, not that the jury failed to believe some of plaintiff's evidence. Plaintiff's testimony of discomfort and pain were fully supported by other witnesses, including the attending physician, Dr. Nelson, and the physical therapist, Ann Hodges. Though some of plaintiff's symptoms of injury were subjective, Dr. Nelson testified that he had no reason to believe that they did not exist. Obviously some pain and discomfort accompanied the diagnosed acute lumbo-sacral sprain. Under these circumstances the ground relied on by the majority for distinguishing the case is not convincing. In my opinion the verdict is contrary to the instructions of the trial court, is inconsistent, and therefore improper and invalid.

Further, the court failed to charge on plaintiff's loss of use of her back as an element of damages. There was substantial evidence of such loss of use, apart from pain and suffering and loss of earnings, which required the court to charge on this element of damages. The harm in this error was increased by the failure to award damages for pain and suffering.

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I vote to set aside the verdict and order a new trial on all issues.

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STATE OF NORTH CAROLINA v. GREGORY LYNN COX AND ROBERT WILEY NORWOOD

No. 7915SC36

(Filed 19 June 1979)

**Criminal Law §§ 73.1, 99.10— hearsay testimony—improper questions by trial judge**

In a prosecution for armed robbery, the trial judge committed prejudicial error in the admission of a deputy sheriff's rank hearsay testimony concerning criminal activity by defendants in another county and in his prosecutorial interrogation of defendants about matters which were the subject of the hearsay testimony.

APPEAL by defendants from *Smith (David I.), Judge*. Judgments entered 17 August 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 4 April 1979.

Both defendants were charged with armed robbery of Larry Wood at the Village Motel on 9 January 1978. Defendant Norwood was found guilty as charged, and the judgment imposed a prison term of 25 to 40 years. Defendant Cox was found guilty of common law robbery, and the judgment imposed a prison term of 8 to 10 years.

EVIDENCE FOR THE STATE

Larry Wood, in the early morning hours of 9 January 1978, was working as night auditor at the Village Motel in Graham. Defendant Cox and Don Cox (also charged but during trial tendered a plea of guilty), who had checked in as guests a few hours earlier, and defendant Norwood were in the game room. Norwood went to the bathroom. He returned with a hammer, from the rear struck Wood on the head, told him that he was being robbed, and ordered him to lie on the floor in the game room. Defendant Gregory Cox told Wood that Norwood had a gun and wanted to use it, but that if he would be quiet Norwood might not do anything. Wood heard the cash register open. About \$150.00

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was missing. Defendant Cox came to the game room and took \$60.00 from Wood's wallet. Defendant Cox told Wood that he and his brother were getting \$10.00 each to help Norwood in the robbery. They left in a 1975 Granada. Investigation revealed that the car was stolen from the Moore County Airport.

DEFENDANT NORWOOD'S TESTIMONY

He, defendant Cox, and Don Cox went to the Village Motel, and defendant Gregory Cox paid for a room. They went to the game room about 11:30 p.m. and played pool. He left them about midnight, went to the room, and went to sleep. They awakened him about 2:30 a.m., and they rode back to Sanford.

DEFENDANT COX'S TESTIMONY

Defendant Norwood struck Wood on the head with a hammer. Wood's head was bleeding, so he got a towel for him. Norwood took Wood's wallet. Norwood told him and his brother to get in the car. He did not go to the room and awaken Norwood. He did not receive any money from Norwood.

*Attorney General Edmisten by Assistant Attorney General Thomas F. Moffitt for the State.*

*John D. Xanthos for defendant appellant Cox; Donnell S. Kelly for defendant appellant Norwood.*

CLARK, Judge.

The record on appeal reveals that during cross-examination of State's witness, Deputy Sheriff Richard Frye, by counsel for defendant Cox, the following occurred:

"I checked out the 1975 Ford Granada. As to who drove that up to the custodial office, I was not present when the vehicle was drove up to the Lee County Sheriff's Department and parked. I don't recall who drove the vehicle up there.

Q. Well, did your investigation reveal that Mr. Gregory Cox had ever had possession of that vehicle?

A. Later investigation from another County revealed that all three of them had been in this — this vehicle, that the vehicle was —

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MR. KELLY: OBJECTION and move to strike.

COURT: OVERRULED. Motion denied.

A. That the vehicle was stolen from the Moore County Airport—

Q. I didn't ask you that, Mr. Frye. You know that.

COURT: OVERRULED. You asked the question. Now answer the question.

MR. XANTHOS: I asked him, if your Honor please,—

COURT: I said OVERRULED.

MR. XANTHOS: May we have the question read back?

COURT: Answer the question.

A. The vehicle was stolen from the Moore County Airport. Also a breaking and entering and larceny had occurred at the Moore County Airport. All three of these Defendants were indicted for the breaking and entering and, as I recall, was charged with larceny of the motor vehicle from the Moore County Airport. The vehicle was—

MR. KELLY: Your Honor, I OBJECT as to Defendant Norwood and move that all of that be stricken, may it please the Court.

COURT: OVERRULED. Motion denied.

MR. XANTHOS: If your Honor please, Greg Cox moves that it be stricken. It's not responsive.

COURT: OVERRULED.

Q. Well, now will you answer my question, Mr. Frye?

COURT: He answered your question. Move on.

At no time did my investigation reveal that the Defendant, Gregory Cox had possession of vehicle or was driving it.

Q. Now you said something in your Direct Examination about the '75 Ford Granada as being in the possession of Mr. Norwood, is that correct, sir?



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MR. KELLY: OBJECTION as to Norwood, sir.

COURT: OVERRULED.

A. As I recall, I was informed that it was in the possession of Mr. Norwood. I do not—like I say, I wasn't present when the vehicle was brought to the Lee County Sheriff's Department.

MR. KELLY: Motion to strike, your Honor.

COURT: Motion denied."

The answer was not responsive to the question. The witness had no personal knowledge of their activities in Moore County. The State, over valid objections, was permitted by the court to show by this evidence that the 1975 Granada was stolen from the Moore County Airport, that defendant Cox, Don Cox and defendant Norwood were charged with larceny of the car and also with breaking and entering in Moore County. The evidence was rank hearsay and obviously inadmissible.

When examination of defendant Cox as a witness had been completed by counsel, the trial judge then conducted an examination of Cox as follows:

"COURT: 'Did you ever tell Mr. Wood that Mr. Norwood had a gun and for Mr. Wood to do whatever he said?'

Cox answered that he did not say that.

COURT: 'You never—you never said that?'

Again, Cox said that he had not said that.

COURT: 'How long had you been with Mr. Norwood? You said you'd known him about five days?'

Cox said that he had.

COURT: 'Had these other occurrences already happened in Moore County and Lee County before you came to Alamance?'

He answered that they had—about two days prior to coming to Alamance County.

COURT: 'And you were still going around with him?'

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A. 'No, Sir, I'm not.'

COURT: 'I say you were when you came to Alamance after all of these things had happened in Moore and Lee County?'

A. 'I was just riding with him, yes, sir.'

When direct- and cross-examination of defendant Norwood was concluded the trial judge asked him two questions: (1) "Why did you come to Alamance County that night?" (2) "You come through Burlington to go back to Sanford?" The questions did not clarify any testimony elicited by direct- or cross-examination.

These questions by the court cannot qualify as clarifying questions. They emphasized the hearsay testimony of Deputy Sheriff Frye relating to the criminal activity of the defendants in Moore County. The trial judge may not go beyond clarification and, in reality, conduct a cross-examination which is calculated to impeach a defendant and deprecate his testimony before the jury. *State v. McCormick*, 36 N.C. App. 521, 244 S.E. 2d 433 (1978); *State v. Dickerson*, 6 N.C. App. 131, 169 S.E. 2d 510 (1969).

The evidence of defendants' guilt is substantial. The victim's identification of the defendants was not challenged. And we must consider defendants' assignments of error in light of the rule that a new trial will be granted only if the error is prejudicial or harmful, and not mere technical error which could not have affected the result. *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). Nevertheless, the erroneous admission of rank hearsay evidence by the trial judge and his prosecutorial interrogation about matters which were the subject of the hearsay evidence, were so prejudicial to the defendants that we cannot, in good conscience, find that the error could not have affected the result.

The strength of the State's evidence possibly contributed to the prejudicial conduct of the trial judge. Often when presiding over criminal trials the trial judge is impressed by the strength of the State's evidence and concludes that any sane jury would convict, that the defendant is stupidly stubborn in not submitting a guilty plea, that defendant's counsel is a chronic nitpicker, and that both are wasting the time of the court. During such attacks upon his patience if the judge can continue to perform his duties

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fairly and impartially, he exercises that sagacious virtue known in legal circles as "judicial restraint." In the case *sub judice* it appears that the trial judge in isolated instances during the prolonged trial failed to exercise sufficient judicial restraint.

The judgment is reversed and we order a

New trial.

Chief Judge MORRIS and Judge ARNOLD concur.

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S. B. FRINK AND DAVIS C. HERRING v. NORTH CAROLINA BOARD OF  
TRANSPORTATION

No. 7813SC650

(Filed 19 June 1979)

**Eminent Domain § 13; State § 2.1— Intracoastal Waterway right-of-way—fee simple in State**

In an earlier action to condemn the lands of plaintiff's predecessor in title for the building of a portion of the Intracoastal Waterway, the State acquired fee simple title to the land in question, though the interest to be acquired by the State was always referred to as a right-of-way, since that term described the use to which the land was to be put and did not limit the State's interest to an easement; plaintiff's predecessors in title were divested of all their "right, title, interest and estate in and to the lands, premises, and waters"; and the subsequent deed of easement from the State to the United States asserted that the State was "the owner of and in the possession of" the land in question. Therefore, plaintiffs did not have a compensable interest in land located within the Intracoastal Waterway right-of-way utilized by the State in the construction of a new bridge and roadway, as the State had already acquired the land in fee from plaintiffs' predecessors in title.

APPEAL by defendants from *Herring, Judge*. Judgment entered 1 June 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 3 April 1979.

Plaintiffs instituted this inverse condemnation action seeking compensation for the alleged taking of certain real property which they claim. The property is located within the Intracoastal Waterway right-of-way where the new Oak Island Bridge has been constructed. Plaintiffs contend they own this land subject to an easement for the canal right-of-way. Defendant contends that the State acquired the land in fee.

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The source of this controversy is a consent judgment in a condemnation action in 1934 instituted pursuant to Chapter Two, Section Two, of the Session Laws of 1931. This act provided for the acquisition of a right-of-way for the United States to build the Intracoastal Waterway between the Cape Fear River and the North Carolina-South Carolina Line. It was enacted in accordance with the River and Harbor Act of 3 July 1930 authorizing the construction of this waterway pursuant to H.R. 41, 71st Congress, 1st Session (1929) which required that local interests provide the right-of-way without cost to the United States. Section Two of Chapter Two of the Session Laws of 1931 provides, in pertinent part:

“If the title to any part of the lands required by the United States Government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation . . . or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Transportation Advisory Commission . . . in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand to seventeen hundred fifty feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of chapter thirty-three of the Consolidated Statutes of one thousand nine hundred nineteen, entitled ‘Eminent Domain,’ shall be used by it as near as the same is suitable for the purposes of this act, and in all instances, the general and special benefits to the owner thereof

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shall be assessed as offsets against the damages to such property or lands.

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Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State of such lands or property to the extent of the interest to be acquired and the order of the Clerk of the Superior Court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Transportation Advisory Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: *Provided*, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this act provided.

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All sums which may be agreed upon between the said Transportation Advisory Commission and the owner of any property needed by the United States Government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property."

Pursuant to this provision the State petitioned to condemn "any right, title or interest" of the prior owners of the land in question. The final decree in that action, rendered in 1934, stated that the prior owners received a certain sum in full settlement of

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"all their rights, title, interest and estate in and to said premises . . . to the extent, for the purpose, and in the manner as provided and set forth in Chapter 2 Public Laws of North Carolina, Session 1931." The decree then ordered that the owners

"be, and they are hereby divested of all right, title, interest and estate in and to the lands, premises, and waters herein-after described, to the extent, in the manner and for the purpose as provided and set forth in Chapter 2 Public Laws of North Carolina, Session 1931, and that such title and use as provided, authorized and contemplated by said Statutes is hereby vested in the said State of North Carolina . . . ."

The State subsequently deeded to the United States a perpetual right-of-way for the waterway and a perpetual right and easement to enter the land not excavated for the waterway to deposit dredged material. The deed stated that the State was "the owner of and in the possession of" the land in dispute.

Plaintiffs' title to the land in dispute was derived from the defendants in the condemnation action. It was stipulated at trial that plaintiffs' title to this land was subject to the interest acquired by the State for the Intracoastal Waterway and the only issue to be decided was the extent of that interest. The trial court held that the State acquired only an easement and, therefore, plaintiffs had a compensable interest in the property taken to build the new Oak Island Bridge. From this judgment, the defendant appealed.

*Attorney General Edmisten, by Special Deputy Attorney General Eugene A. Smith, for the State.*

*Frink, Foy and Gainey, by Henry G. Foy, for plaintiff appellees.*

VAUGHN, Judge.

The ultimate issue presented for resolution is whether these plaintiffs have a compensable interest in the land utilized by the State of North Carolina in the construction of the new bridge and roadway. We hold that they do not. In reaching this conclusion, however, it is not absolutely necessary to decide that the State did indeed acquire title in fee simple absolute. It suffices to say

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that when the State acquired its interest in the property for the canal right-of-way, it also clearly acquired the inherent right to construct bridges and roadways across the property.

We do elect to discuss, however, the question of whether the State acquired title in fee simple or whether it merely acquired an easement in all of the lands within the canal right-of-way. In Chapter Two of the Session Laws of 1931, neither the term "fee simple" nor the term "easement" is used. The act repeatedly uses "right-of-way" to describe the interest to be acquired by the State. In *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330 (1958), the Court stated that the term "right-of-way" has a twofold meaning. "[I]t may be used to designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put." *McCotter v. Barnes, supra*, at 485. In *McCotter*, the land in controversy had been used by the railroad until abandoned. The deed designated the land conveyed as a right-of-way. The Court held that a fee simple was conveyed, noting that it is common knowledge that the land over which railroad tracks are laid is often called the right-of-way to describe the use of the land and not the quality of the estate. Furthermore, the granting clause described the property conveyed as a "tract hereby conveyed", with "right-of-way" used only in the description. Thus the description must yield to the granting clause conveying the fee. See also *Pearson v. Chambers*, 18 N.C. App. 403, 197 S.E. 2d 42 (1973); 77 C.J.S. *Right* 392 (1952).

In the statute in question, it appears that the term "right-of-way" is used to describe the use of the land and not to limit the State's interest to an easement. Although H.R. 41, 71st Congress, 1st Session (1929) requires that the United States be given only an easement with the fee remaining in possession of local interests, this does not restrict the interest to be acquired by the State. We note that Section Two of the act provides that, in case of condemnation, all sums assessed in favor of the owners of property taken shall be a valid claim against the State "but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property." This provision seems to reflect an intention that the State was to acquire a fee. That opinion finds further support in the 1934 decree itself. In that judgment, the plaintiffs' predecessors in title were divested

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of all of their "right, title, interest and estate in and to the lands, premises, and waters." The conveyance of "all the right, title, and interest in the land is certainly sufficient to pass the land itself." *Coble v. Barringer*, 171 N.C. 445, 448, 88 S.E. 518 (1916). Finally, the deed of the easement from the State to the United States asserted that the State was "the owner of and in the possession of" the land in question.

Plaintiffs have no compensable interest in the land utilized by defendant in the construction of the bridge and roadway within the canal right-of-way. The judgment of the trial court is, therefore, reversed.

Reversed.

Judges ERWIN and MARTIN (Harry C.) concur.

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CHARLOTTE W. E. WINBORNE v. STANLEY WINBORNE III

No. 789DC848

(Filed 19 June 1979)

**1. Husband and Wife § 12.1— action to set aside separation agreement—husband's concealment of adultery—wife represented by attorney—no confidential relationship**

Plaintiff wife's complaint failed to state a claim to set aside a separation agreement based on defendant husband's alleged fraudulent concealment of an adulterous relationship with another woman where plaintiff alleged she was represented by counsel during the negotiations concerning the separation agreement, since the confidential relationship between husband and wife no longer existed when the wife employed an attorney, and the husband was then under no duty to disclose the alleged adulterous relationship to the wife.

**2. Divorce and Alimony §§ 24.2, 25.2— support and custody of minors—effect of separation agreement**

The existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent the wife from instituting an action for a judicial determination of those same matters.

APPEAL by plaintiff from *Allen (Claude W.)*, Judge. Judgment entered 30 May 1978 in District Court, GRANVILLE County. Heard in the Court of Appeals on 21 May 1979.



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This is a civil action instituted on 18 November 1977 wherein plaintiff seeks in the first count of her complaint to have set aside a separation agreement entered into between her and the defendant on 19 November 1976. Plaintiff's complaint contains the following allegations pertinent to this appeal:

6. That during the fall of 1976, the defendant, without just cause or provocation of any sort on the part of the plaintiff, announced to the plaintiff that their marriage was over; that the defendant further informed the plaintiff of his intention to live separate and apart from her and the children; that the defendant urged and encouraged the plaintiff to enter into a separation agreement, but offered no explanation of his feelings . . . that the plaintiff, being mindful of the best interests and welfare of the minor children, and in an attempt to stabilize her emotional upset, obtained counsel and had a separation agreement and property settlement prepared when the agreement tendered by the defendant appeared unsatisfactory.

7. That the plaintiff and the defendant entered into a separation agreement and property settlement on November 19, 1976 . . .

8. That the plaintiff is informed, and said information she verily believes to be true, that during the spring, summer and fall of 1976, the defendant was carrying on an illicit, open and notorious affair with another woman. . . .

9. That the plaintiff's agreement to enter into the separation and property settlement agreement aforementioned was obtained through the fraudulent concealment by the defendant of his adulterous relationship; that the defendant, with the intent to conceal this relationship, did deceive the plaintiff and prevent the plaintiff from establishing any claim for alimony; that he represented to the plaintiff that their separation was the sole result of his incompatibility and no other cause; and that the plaintiff did rely upon and was thereby deceived by these statements.

By the second count of her complaint plaintiff alleges that she "has exclusive custody and control of the minor children born of the marital union and is a fit and proper person to continue to

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have exclusive custody and control of the minor children." Plaintiff further alleged that "since the separation, defendant has been paying to the plaintiff the sum of \$300.00 per month for the support and maintenance of the minor children born of the union, and that said sums are totally inadequate to provide a decent standard of living." Plaintiff prays for alimony *pendente lite*, permanent alimony, sole and exclusive custody of the minor children, sole and exclusive possession of the marital residence, support for the minor children, and counsel fees.

From the record it further appears that the defendant instituted a separate action in Wake County on 21 November 1977 for an absolute divorce from the plaintiff based on one year's separation. On 27 December 1977, plaintiff filed a motion for a change of venue and consolidation seeking to have the action instituted in Wake County moved and tried with her action in Granville County. On 12 January 1978, defendant filed an answer and a motion to dismiss the Granville County action for failure to state a claim upon which relief may be granted pursuant to G.S. § 1A-1, Rule 12(b)(6). On 30 May 1978, the trial judge entered an Order concluding that "the Plaintiff's causes of action fail to state claims upon which relief can be granted and should be dismissed, and upon this ruling, the Motions of the Plaintiff as to venue and consolidation are moot." Plaintiff appealed.

*Blackwell M. Brogden and Blackwell M. Brogden, Jr., for plaintiff appellant.*

*Vaughan S. Winborne for defendant appellee.*

HEDRICK, Judge.

The one question presented by this appeal is whether the trial court erred in allowing defendant's motion to dismiss plaintiff's action for failure to state a claim upon which relief could be granted.

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 sup-

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port 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); *Federal Deposit Insurance Corp. v. Loft Apartments Ltd. Part.*, 39 N.C. App. 473, 250 S.E. 2d 693 (1979); *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975).

[4] Plaintiff contends that she has sufficiently stated various claims for relief. In support of her contention, plaintiff argues that defendant had a duty to disclose the existence of his adulterous relationship because of the confidential relationship that exists between a husband and wife, *see Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965), that his failure to disclose such fact amounted to a misrepresentation, and therefore, the separation agreement is invalid under the rule in *Eubanks v. Eubanks*, 273 N.C. 189, 196, 159 S.E. 2d 562, 567 (1968), because she was induced to enter into it without "full knowledge of all the circumstances, conditions, and rights of the contracting parties."

Plaintiff's claim to set aside the separation agreement for fraud must fail for the following reason: A crucial element of plaintiff's claim is a duty on the part of the defendant to disclose the existence of his alleged adulterous relationship. Plaintiff has negated this element by alleging in her complaint that she was represented by counsel during the negotiations concerning the separation agreement. When the wife employs an attorney, and, through counsel, deals with her husband as an adversary, the confidential relationship between husband and wife no longer exists. *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965). *See also Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E. 2d 597 (1977), *rev'd on other grounds*, 295 N.C. 390, 245 S.E. 2d 693 (1978). Thus the facts alleged in plaintiff's complaint affirmatively show that the defendant was under no duty to disclose to the plaintiff the existence of the purported adulterous relationship. Plaintiff has pleaded an insurmountable bar to her claim to have the separation agreement set aside, and the first count of her complaint was properly dismissed.

Plaintiff concedes in her brief that her claims for alimony *pendente lite* and permanent alimony are dependent upon her

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claim to have the separation agreement set aside. See *Eubanks v. Eubanks, supra*. We agree. Since the plaintiff has pleaded an insurmountable bar to her claim for vacation of the separation agreement, her claims for alimony *pendente lite*, permanent alimony, and counsel fees under G.S. § 50-16.4 must also fail. Thus, the portions of her second cause of action alleging those claims were also properly dismissed.

[2] Finally, we consider plaintiff's remaining claims for custody and support of the parties' minor children. Under the separation agreement the plaintiff was awarded the custody and control of the minor children and defendant agreed to pay \$300.00 per month for the support of the children. Plaintiff alleged in her complaint that "since the separation, defendant has been paying to the plaintiff the sum of \$300.00 per month for the support and maintenance of the minor children."

The right to institute an action for custody of minor children is granted by G.S. § 50-13.1, and the right to institute an action for support for them is granted by G.S. § 50-13.4. When a case is properly before it, the court has the "duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court." *Spence v. Durham*, 283 N.C. 671, 684-85, 198 S.E. 2d 537, 546 (1973). Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. However, a valid separation agreement "cannot be ignored or set aside by the court without the consent of the parties," *Hinkle v. Hinkle*, 266 N.C. 189, 195, 146 S.E. 2d 73, 77 (1966), and "there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). See also *Soper v. Soper*, 29 N.C. App. 95, 223 S.E. 2d 560 (1976); *Childers v. Childers*, 19 N.C. App. 220, 198 S.E. 2d 485 (1973).

In the present case, we cannot say that the plaintiff has pleaded an insurmountable bar to the custody and child support claims alleged in the complaint, or that she will be unable to prove at trial facts in support of those claims. We hold, therefore,

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that the trial court erred in dismissing the claim for custody and support for the children and counsel fees for plaintiff's attorney in prosecuting this claim.

In the Order dismissing plaintiff's action, the trial judge stated that the plaintiff's motion for change of venue and consolidation was "moot." Since the plaintiff's action with regard to custody and support should not have been dismissed, on remand there must be a ruling by the trial judge on this motion.

The result is: That the portion of the judgment dismissing plaintiff's action to have the separation agreement set aside, for alimony *pendente lite* and permanent alimony, and for counsel fees for those claims is affirmed; that portion of the judgment dismissing plaintiff's claims for custody of and support for the minor children, and for counsel fees as authorized under G.S. § 50-13.6 is reversed; and the cause is remanded to the District Court of Granville County for further proceedings, including a ruling on plaintiff's motion for change of venue and consolidation.

Affirmed in part; reversed in part; and remanded.

Chief Judge MORRIS and Judge WEBB concur.

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**Trust Co. v. Sevier**

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WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE v. SUSAN BAKER SEVIER, SUSAN SEVIER MACKIN; ROBERT BAKER SEVIER; JOHN SEVIER; RICHARD SLADE SEVIER; THOMAS KEARNEY SEVIER; WILLIAM RHEA SEVIER; JAMES GRISWOLD SEVIER; MARY ANN SEVIER; CHARLES HENRY SEVIER; SUSAN GRISWOLD MACKIN, A MINOR; MARY FRANCIS MACKIN, A MINOR; DENNIS STEVEN MACKIN, JR., A MINOR; WILLIAM ANTHONY MACKIN, A MINOR; CATHERINE SHERRILL SEVIER, A MINOR; JANE RHEA SEVIER, A MINOR; ELLEN KEARNEY SEVIER, A MINOR; JOSEPHINE GLADIEUX SEVIER, A MINOR; CATHERINE SHERRILL SEVIER, A MINOR; CHRISTINA ANN SEVIER, A MINOR; SUSAN ELIZABETH SEVIER, A MINOR; SUZANNE ELIZABETH SEVIER, A MINOR; MARY SHERROD SEVIER, A MINOR; RICHARD SLADE SEVIER, JR., A MINOR; PENELOPE BAKER SEVIER, A MINOR; CLARE DROKE SEVIER, A MINOR; MALINDA SHAI SEVIER, A MINOR; WILLIAM KEARNEY SEVIER, A MINOR; THE UNBORN LINEAL DESCENDANTS OF SUSAN BAKER SEVIER AND OTHER UNKNOWN PERSONS

No. 7821SC859

(Filed 19 June 1979)

**Trusts § 9— income of trust to settlor—corpus to issue—settlor not sole beneficiary—irrevocable trust**

Where the terms of a trust provided that income should be paid to the settlor for life, that the trust corpus, upon the settlor's death, should be distributed to her issue *per stirpes*, that settlor retained a general power of appointment by will over the trust corpus, and that the trust was irrevocable, the trial court erred in determining that settlor was the sole beneficiary of the trust and that she could revoke the trust. G.S. 39-6.

APPEAL by guardian ad litem from *McConnell, Judge*. Judgment entered 7 June 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 May 1979.

The plaintiff trust company instituted this declaratory judgment action seeking an order of the court authorizing and approving the termination of a trust as requested by the settlor, Susan Baker Sevier. Plaintiff trustee stated in its complaint that it had no objection to the termination of the trust. The trust was established on 30 September 1943 when defendant Susan Baker Sevier assigned and conveyed to plaintiff as trustee certain funds and properties in trust. Under the provisions of the trust agreement, the settlor (designated in the trust instrument as the "Grantor") retained the right to demand any part or all of the income from the trust estate for her lifetime. The settlor retained no right to withdraw principal from the trust estate and did not

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grant to the trustee power to make distributions of principal. The settlor retained a general power of appointment by will over the trust corpus. In default of settlor's exercise of the general power of appointment, the trust instrument directed that the trust estate be distributed to the settlor's issue *per stirpes*, or, in the event settlor left no issue surviving her, then to the settlor's father's issue *per stirpes*.

Section 5 of the trust instrument provided:

Irrevocable.—The Grantor hereby declares that the Grantor has been advised by counsel as to the legal effect of the execution and acceptance of this agreement, that the Grantor is fully aware of the character and amount of the property hereby transferred and conveyed, and that the Grantor has given consideration to the question whether this agreement and the trust hereby created shall be revocable or irrevocable. The Grantor hereby declares that this agreement and the trust hereby created shall be irrevocable and that the Grantor shall hereafter stand without power at any time to revoke, change or annul any of the provisions herein contained, but that the Grantor or any other person desiring so to do may bring other properties within the operation of this agreement.

Susan Baker Sevier and her children, all of whom are of age, filed answers praying that the court authorize and approve termination of the trust. The guardian ad litem appointed for the minor grandchildren and any unborn lineal descendants of Susan Baker Sevier filed answer opposing revocation of the trust on the grounds that (1) the minor grandchildren and unborn lineal descendants of Susan Baker Sevier have a contingent future interest in the trust corpus and cannot give their consent to the revocation of the trust, and (2) G.S. 39-6 does not permit revocation of the trust because the trust instrument expressly makes it irrevocable.

The action came on for a hearing on 22 May 1978. Defendant settlor filed an affidavit stating:

2. The affiant has requested that the trust which is the subject matter of the above styled suit be terminated since it has come to her attention that the inflexibility of this trust

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means that she will have to pay excessive state taxes at her death which the affiant currently estimates would result in needless taxes of over one million dollars being paid. If proper use were made of gift tax exclusion and gift-splitting with her husband in excess of one million additional dollars could be transmitted to her children and grandchildren instead of being paid as Federal Estate tax.

The trial court entered judgment making findings of fact and concluding that Susan Baker Sevier was the sole beneficiary of the trust and "[a]s sole beneficiary and Grantor, the provisions of G.S. 39-6 do not apply and she is entitled to revoke the trust." The court further concluded that because continuance of the trust would necessarily result in severe adverse tax consequences to Susan Baker Sevier and her estate, thereby significantly reducing the amount of her estate which would be transmitted to her children and grandchildren, it was in the best interest of all parties that the trust be terminated. The court ordered that the trust assets be distributed "as Mrs. Sevier shall direct" and that, upon the distribution of the trust assets, plaintiff be "released from any and all further obligations of the trust estate."

From this order, the guardian ad litem appeals.

*Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and Elizabeth L. Quick for the plaintiff appellee.*

*C. Edwin Allman and Michael D. West for the defendant appellee Susan Baker Sevier.*

*Gordon W. Jenkins, guardian ad litem, appellant.*

PARKER, Judge.

The judgment in this case must be reversed. The trial court erred in concluding that Susan Baker Sevier is the sole beneficiary of the trust.

Where by the terms of the trust it is provided that the income shall be paid to the settlor for life and on his death the income or principal shall be paid to a designated third person, the settlor of course is not the sole beneficiary of the trust. So also where it is provided that on his death the principal shall be paid to his children or to his issue, he is not the



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sole beneficiary of the trust. *This is true even though the settlor reserves a general power of appointment by deed or by will by the exercise of which he could exclude his children or issue.* (Emphasis added.)

II Scott on Trusts (3d ed.) § 127.1, p. 986-87.

The living issue of Susan Baker Sevier possess an interest in the trust principal which is made contingent rather than negated by settlor's retention of a general power of appointment by will over the trust property. *McRae v. Trust Co.*, 199 N.C. 714, 155 S.E. 614 (1930).

A trust may be terminated only upon the unanimous effective consent of all parties possessing an interest in it. *Trust Co. v. Laws*, 217 N.C. 171, 7 S.E. 2d 470 (1940). The unanimous effective consent required for termination of a trust cannot be obtained in this case.

Effective consent may be given by a beneficiary in being, competent, and possessing an indefeasibly vested interest in the trust estate. *Smyth v. McKissick*, 222 N.C. 644, 24 S.E. 2d 621 (1943); *Starling v. Taylor*, 1 N.C. App. 287, 161 S.E. 2d 204 (1968). In this case, effective consent to the termination of the trust may not be given at this time by the settlor's children and grandchildren because none possess an indefeasibly vested interest in the trust estate. In addition, the settlor's minor grandchildren are legally incapable of giving consent, and issue not yet in being may acquire a vested interest upon the settlor's death.

G.S. 39-6 is not applicable to this case. G.S. 39-6 provides

The grantor, maker, or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself . . . with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect . . . *provided, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest*

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*when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest. (Emphasis added.)*

The statute was amended by the addition of the *proviso* quoted above at 1943 Session Laws, ch. 437 effective 4 March 1943. The trust instrument in this case was executed 30 September 1943. Therefore, the statute's applicability to this trust is governed by the *proviso*.

It is difficult to imagine how the settlor could have stated more clearly that the trust was irrevocable than she did in Section 5 of the trust instrument. We hold that by Section 5 the settlor made the trust irrevocable and that the *proviso* of G.S. 39-6 quoted above makes G.S. 39-6 inapplicable to this case.

The judgment appealed from is

Reversed.

Judges VAUGHN and MARTIN (Harry C.), concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 JUNE 1979

BOYD v. SMITHERS No. 7818DC912	Guilford (77CVD298)	New Trial
CALDWELL v. DIXON No. 7830SC878	Haywood (77CVS161)	Reversed and Remanded
DODGE, INC. v. CHURCH No. 7818DC899	Guilford (77CVD2753)	Affirmed
ECKARD v. ECKARD No. 7925DC88	Catawba (77CVD157)	Vacated and Remanded
IN RE BYRD No. 789DC867	Granville (78SP95)	Dismissed as Moot
IN RE TYSON No. 7826SC805	Mecklenburg (78CVS2799)	Reversed
OGLESBY v. McCOY No. 783SC835	Carteret (76CVS103)	Affirmed
PARISH v. PETERS No. 783SC894	Carteret (78CVS10)	Affirmed
POSEY v. POSEY No. 7818DC827	Guilford (78CVD1507)	Affirmed
STATE v. BROWN No. 792SC181	Beaufort (78CRS7829)	No Error
STATE v. BROWN No. 7921SC209	Forsyth (78CRS23270) (78CRS23271)	No Error
STATE v. CROWE No. 7926SC193	Mecklenburg (78CRS113244)	No Error
STATE v. EDWARDS No. 797SC231	Edgecombe (78CRS9749)	No Error
STATE v. ELLISON No. 7926SC5	Mecklenburg (78CRS8272)	No Error
STATE v. HILLMAN No. 7926SC251	Mecklenburg (77CR52547) (77CR9464)	No Error
STATE v. HOLT No. 7910SC95	Wake (77CRS54313)	New Trial
STATE v. KNOTTS No. 7919SC175	Cabarrus (75CRS13188)	No Error

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STATE v. LOWRY No. 799SC223	Vance (78CRS5659)	No Error
STATE v. MORRIS No. 7926SC183	Mecklenburg (78CRS6280) (78CRS6281) (78CRS69346)	No Error
STATE v. PARDUE No. 7923SC16	Yadkin (78CR1136)	No Error
STATE v. PEOPLES No. 7921SC271	Forsyth (78CR3039)	No Error
STATE v. SLOLEY No. 7919SC258	Randolph (78CRS7207)	No Error
STATE v. TAYLOR No. 7923SC213	Yadkin (78CRS2188)	No Error
STATE v. WARD No. 7924SC216	Avery (78CRS297) (78CRS284)	No Error
STATE v. WOODARD No. 797SC207	Wilson (78CRS5552)	Dismissed
STATE v. WRIGHT No. 7927SC252	Gaston (78CRS18856)	No Error

# **ANALYTICAL INDEX**

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# **WORD AND PHRASE INDEX**



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## ACTIONS

### § 2. Right of Nonresidents to Maintain Actions in this State

Plaintiff foreign corporation, a national franchisor of employment agencies, was transacting business in interstate commerce and was not required to obtain a certificate of authority from the Secretary of State as a prerequisite to bringing suit in this State. *Snelling & Snelling v. Watson*, 193.

## ADOPTION

### § 1. Operation of Statutes in General

The district court in a child custody proceeding did not err in failing to grant defendant county department of social services a "protective order based upon confidentiality of records as set out in G.S. 48-25." *Francis v. Dept. of Social Services*, 444.

#### § 2.1. Consent to Adoption

No provision of law gives the right to decide who may and may not be considered as adoptive parents to a natural parent who has given the director of social services a general consent order for the adoption of his child. *Francis v. Dept. of Social Services*, 444.

#### § 2.2. Abandonment of Child

In a proceeding for declaration of abandonment, trial court did not err in permitting the child's mother to testify concerning his health, nor did it err in excluding evidence of funds sent by respondent to the child's mother after the filing of the petition for a declaration of abandonment. *In re Cardo*, 503.

Evidence was sufficient to be submitted to the jury in a proceeding for declaration of abandonment. *Ibid.*

## APPEAL AND ERROR

### § 6.2. Finality as Bearing on Appealability; Premature Appeals

There is no immediate appeal from an order granting a partial new trial on the issue of damages. *Insurance Co. v. Dickens*, 184.

### § 6.9. Appealability of Preliminary Matters

Trial court's order that plaintiff not be required to answer certain interrogatories was not immediately appealable. *Starmount Co. v. City of Greensboro*, 591.

### § 9. Moot Question

Appeal from a county board of adjustment was dismissed where the questions presented were rendered moot by amendments to the county zoning ordinance. *Davis v. Zoning Board of Adjustment*, 579.

## ARBITRATION

### § 7. Conclusiveness of Award

Statutory provision allowing courts to modify or correct an arbitration award for "evident miscalculation of figures" or when an award is "imperfect in a matter of form" does not permit the court to substitute its interpretation of the evidence for that of the arbitrators. *Fashion Exhibitors v. Gunter*, 407.



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**ARCHITECTS****§ 3. Liability for Defective Conditions**

An architect may be sued by a general contractor for economic loss foreseeably resulting from breach of the architect's common law duty of care in performance of his contract with the owner. *Davidson and Jones, Inc. v. County of New Hanover*, 661.

**ASSAULT AND BATTERY****§ 14.5. Felonious Assault Where Weapon Is Knife**

Evidence of assault with a deadly weapon with intent to kill was sufficient for the jury where it tended to show defendant instigated an affray and cut the victim after he tried to withdraw. *S. v. Ransom*, 583.

**§ 14.6. Assault on Law Enforcement Officer**

Evidence was sufficient for the jury in a prosecution for assault on the chief jailer of a county jail while he was discharging a duty of his office. *S. v. Jones*, 189.

**§ 15.6. Instructions on Self-Defense**

Trial court's instruction properly charged the jury with respect to the law of self-defense under circumstances where they might find that defendant had no intent to kill or did not use a deadly weapon. *S. v. Ransom*, 583.

**ATTORNEYS AT LAW****§ 4. Testimony by Attorney**

Trial court erred in excluding relevant testimony by plaintiff's former attorney concerning an agreement with defendants' attorney on the ground that defendants' attorney was participating in the trial and could not testify without withdrawing as counsel. *Wolfe v. Herves*, 88.

**§ 7.4. Fees Based on Provisions of Instruments**

Trial court erred in awarding defendant attorney's fees expressly provided for in the parties' lease agreement. *Enterprises, Inc. v. Equipment Co.*, 204.

**AUTOMOBILES****§ 2.4. Proceedings Related to Drunk Driving**

Petitioner willfully refused to submit to a breathalyzer test where he failed to give a sufficient breath sample to get an accurate reading and refused to give another sample until after the operator disassembled the machine. *Bell v. Powell, Comr. of Motor Vehicles*, 131.

**§ 54. Negligence in Passing Vehicle Traveling in Same Direction**

Trial court in a personal injury action properly denied defendants' motions for directed verdict where the evidence tended to show that defendant was negligent in operating his truck by attempting to pass at an intersection. *Rector v. James*, 267.

**§ 62. Negligence in Striking Pedestrians**

Evidence was insufficient to show that defendant was negligent in striking deceased who was asleep on the highway. *Sink v. Sumrell*, 242.

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**AUTOMOBILES—Continued****§ 70. Negligence in Creating Dangerous Condition on Highway**

Trial court erred in directing verdict for defendants where the evidence presented a jury question as to whether defendants used due care under the circumstances to give adequate warning to plaintiff and other persons that their logging truck was completely blocking the roadway. *Smith v. Staton*, 395.

**§ 75.2. Contributory Negligence in Striking Disabled Vehicle**

Trial court erred in directing verdict for defendants where the evidence presented a jury question as to whether in the exercise of due care plaintiff could or should have seen defendants' logging truck which blocked the highway. *Smith v. Staton*, 395.

**§ 83. Contributory Negligence of Pedestrians**

Evidence established contributory negligence as a matter of law where it tended to show that deceased was asleep on the highway. *Sink v. Sumrell*, 242.

**§ 89.4. Insufficient Evidence of Last Clear Chance with Respect to Persons on or about Highway**

Evidence was insufficient to require the judge to instruct on last clear chance where it tended to show that defendant did not have an opportunity to avoid striking deceased who was asleep on the highway. *Sink v. Sumrell*, 242.

**§ 91.3 Issues as to Willful and Wanton Conduct**

Evidence that defendant ran out of gas on an interstate highway and failed to warn other motorists was insufficient to require the jury to submit an issue of willful and wanton conduct on the part of defendant. *Dixon v. Weaver*, 524.

**§ 91.5. Issues Relating to Damages**

Trial judge did not abuse his discretion in refusing to set aside a jury verdict of \$3350 on the ground that the jury arbitrarily omitted an amount for pain and suffering when plaintiff's evidence showed medical expenses, lost wages and lost benefits of over \$3800. *Smith v. Beasley*, 741.

**§ 126.3. Breathalyzer Tests; Qualification of Expert**

A breathalyzer operator's testimony was sufficient to provide the basis for a reasonable inference that he possessed a valid permit at the time he administered the test to defendant although it was not established when the permit was issued. *S. v. Doggett*, 304.

**BAILMENT****§ 3.3. Sufficiency of Evidence and Nonsuit**

In an action to recover damages for failure of defendant to return two rings which plaintiff had delivered to defendant for alteration and repairs where defendant alleged the rings were stolen during a break-in, plaintiff failed to show that defendant failed to exercise due care in safeguarding her property. *McKissick v. Jewelers, Inc.*, 152.

**§ 6. Liability of Bailor to Bailee**

In an action by plaintiff to recover damages allegedly sustained when defendant failed to repair a piece of equipment leased by plaintiff, trial court properly entered summary judgment for defendant on plaintiff's claim of negligence where plaintiff offered no evidence that the alleged defect existed at the time of leasing. *Enterprises, Inc. v. Equipment Co.*, 204.

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**BANKS AND BANKING****§ 4. Joint Accounts**

In an action to recover funds withdrawn by defendant from a joint savings account set up in both parties' names by defendant during the time the parties were cohabiting, evidence was sufficient to support the trial court's conclusion that plaintiff set up the account solely for his own convenience and that defendant wrongfully withdrew funds from the account. *McAulliffe v. Wilson*, 117.

**BASTARDS****§ 2. Warrant and Indictment**

A summons was sufficient to charge defendant with wilful failure to support his illegitimate child. *S. v. Walton*, 281.

**§ 6. Sufficiency of Evidence**

Evidence was sufficient for the jury in a prosecution for wilful failure to provide support for defendant's illegitimate child. *S. v. Walton*, 281.

**§ 9. Judgment**

Trial court erred in ordering defendant to pay \$200 per month to support his illegitimate child without considering evidence as to defendant's income, the needs of the child, or any other circumstance relating thereto. *S. v. Walton*, 281.

**BILLS OF DISCOVERY****§ 6. Discovery in Criminal Cases**

Court did not err in admitting testimony of a prosecution witness which had not been disclosed to defendant. *S. v. Locklear*, 292.

**BROKERS AND FACTORS****§ 6.1. Procuring Cause of Purchase**

In an action in quantum meruit to recover the reasonable value of plaintiff real estate broker's services in procuring a buyer for defendants' property, plaintiff's evidence was insufficient to show that it was the procuring cause of the sale of defendants' property. *Realty, Inc. v. Whisnant*, 702.

**§ 8. Licensing**

Notice to a real estate broker that he was charged with making substantial and willful misrepresentations and with improper, fraudulent or dishonest dealings because of his failure to collect an earnest money deposit as required by a contract of sale was insufficient to support suspension of his broker's license for being "unworthy or incompetent to act as a real estate broker or salesman." *Parrish v. Real Estate Licensing Board*, 102.

Finding that a real estate broker on a single occasion failed to obtain an earnest money deposit was insufficient to support a conclusion that he was "unworthy or incompetent" in violation of G.S. 93A-6(a)(8). *Ibid*.

**BURGLARY AND UNLAWFUL BREAKINGS****§ 4. Competency of Evidence**

Admission of evidence as to the "usual practice" of the victim of a breaking and entering with regard to locking his home at night, even if not relevant, was not

**BURGLARY AND UNLAWFUL BREAKINGS — Continued**

prejudicial to defendant in a felonious breaking and entering case. *S. v. Barnett*, 171.

**CEMETERIES****§ 2. Disinterment and Removal of Bodies**

Evidence was sufficient to support the court's order requiring removal of the remains of respondent's wife from petitioners' cemetery plot; however the trial court erred in requiring respondent, as next of kin, to remove her remains where respondent was not responsible for the improper burial. *Strickland v. Tant*, 534.

**CONSTITUTIONAL LAW****§ 23.7. Due Process in Probate and Succession Matters**

G.S. 29-19 and other statutes referred to therein, insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father, are constitutional. *Outlaw v. Trust Co.*, 571.

**§ 25.1. Impairment of Obligations of Contracts**

A third renewal of a lease of oyster bottoms was within the discretion of the State, and the requested increase in the rental fee was constitutionally permissible. *Oglesby v. McCoy*, 735.

**§ 26.6. Full Faith and Credit to Foreign Divorce and Alimony Judgments**

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations of a separation agreement incorporated into a Missouri divorce decree and to attach defendant's N. C. property, the courts of this State did not obtain jurisdiction over the person of the nonresident defendant under the Full Faith and Credit Clause of the U. S. Constitution by the enforcement of a valid in personam judgment of one state in the courts of another state. *Holt v. Holt*, 344.

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations due under a Missouri divorce decree and to attach realty owned by defendant in N. C., defendant's N. C. realty had sufficient "minimum contacts" with the case to give the courts of this State quasi in rem jurisdiction where defendant purchased the N. C. realty and executed deeds of trust thereon shortly after the Missouri decree was entered and began failing to make the ordered payments the next month. *Ibid.*

**§ 30. Discovery; Access to Evidence**

Court did not err in admitting testimony of a prosecution witness which had not been disclosed to defendant. *S. v. Locklear*, 292.

**§ 43. Right to Counsel; What Is Critical Stage of Proceedings**

Defendant was not entitled to counsel during a line-up where he had not been arrested or charged in this case at the time of the line-up. *S. v. Simms*, 451.

**§ 44. Time to Prepare Defense**

Where defendant's attorney requested permission to withdraw for ethical reasons on the morning of the trial, trial court did not err in refusing the request and in refusing to continue the case since defendant was adequately represented by

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**CONSTITUTIONAL LAW — Continued**

another lawyer appointed by the court to be his principal counsel 90 minutes before trial began. *S. v. Simms*, 451.

**§ 51. Speedy Trial; Delay Between Arrest and Trial**

Though a 23 month delay between defendant's arrest and trial was unduly long and though defendant did not waive his right to a speedy trial, defendant nevertheless failed to show that the delay in bringing him to trial prejudiced him in his ability to present his defense. *S. v. Branch*, 80.

**§ 53. Speedy Trial; Delay Caused by Defendant**

Defendant was not denied his constitutional right to a speedy trial by the delay between a mistrial in September 1975 and his retrial in April 1978 where the delay was primarily for the convenience of defense counsel. *S. v. Johnson*, 423.

**CONTEMPT OF COURT****§ 4. Summary Proceedings**

Trial court erred in holding defendant attorney in contempt for returning to court 18 minutes late from a lunch recess where the court gave no notice to contemnor, made no findings of fact, and did not apply the standard of proof beyond a reasonable doubt. *S. v. Verbal*, 306.

**CONTRACTS****§ 2.1. What Constitutes Acceptance**

Defendant was not obligated by contract to compensate plaintiff employment agency for its services in referring to defendant an applicant for the position of "systems analyst" who was not hired for that position but was hired by defendant some months later for the position of "material requirements planning engineer." *MacEachern v. Rockwell International Corp.*, 73.

**§ 18.1. Modification of Contract**

In a subcontractor's action against a contractor to recover extra costs incurred in the performance of the subcontract, the evidence supported the court's findings that plaintiff was entitled to recover extra costs for the storage of building materials in a dry warehouse off the project site and for additional work caused by a change in the plans and specifications and that plaintiff was not entitled to recover extra costs incurred to realign support steel for a curtain wall installed by plaintiff. *General Specialties Co. v. Teer Co.*, 273.

**§ 27.1. Sufficiency of Evidence of Existence of Contract**

In an action to recover for construction work on defendant's home renovation project, trial court properly entered summary judgment for defendants who alleged an express contract between defendants and a third person who employed plaintiff as a subcontractor. *Baumann v. Smith*, 223.

**§ 27.3. Sufficiency of Evidence of Damages**

Court erred in refusing to submit to the jury defendant's claim for plaintiff's breach of a construction contract because defendant failed to produce evidence of damages since defendant was entitled to nominal damages at least. *Cole v. Sorie*, 485.

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## CORPORATIONS

### § 2. Registration of Foreign Corporations with Secretary of State

Plaintiff foreign corporation, a national franchisor of employment agencies, was transacting business in interstate commerce and was not required to obtain a certificate of authority from the Secretary of State as a prerequisite to bringing suit in this State. *Snelling & Snelling v. Watson*, 193.

## COURTS

### § 2.2. Territorial Limitations on Jurisdiction

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations due under a separation agreement incorporated into a Missouri divorce decree and to attach realty owned by defendant in N. C., defendant's N. C. realty had sufficient "minimum contacts" with the case to give the courts of this State quasi in rem jurisdiction where defendant purchased the N. C. realty and executed deeds of trust thereon shortly after the Missouri decree was entered and began failing to make the ordered payments the next month. *Holt v. Holt*, 344.

### § 10. Terms of Superior Court

A motion to set aside a judgment in a criminal case may not be determined at a session of court designated for the trial of civil cases only. *Whedbee v. Powell*, 250.

## CRIMINAL LAW

### § 18.4. Trial De Novo in Superior Court

By appealing to superior court for trial de novo, defendant secured and exercised his right to introduce evidence and could not complain he was deprived of that right in district court. *S. v. Williams*, 287.

### § 23.1. Acceptance of Guilty Plea

G.S. 15A-1022(c) does not place a mandatory burden on trial courts to hear evidence and rule on its sufficiency to prove defendant guilty before accepting a guilty plea. *S. v. Dickens*, 388.

The sources of information enumerated in G.S. 15A-1022(c) for determining whether there is a factual basis for a plea of guilty are not exclusive. *Ibid.*

### § 23.4. Withdrawal of Guilty Plea

Trial court did not abuse its discretion in refusing to permit defendant to withdraw his guilty plea after sentence had been imposed. *S. v. Dickens*, 388.

### § 33. Facts Relevant to Issues

Testimony of a victim of assault with intent to commit rape about her orphan status, epileptic history, scholarship assistance and summer employment was competent to establish an introduction of her as a witness. *S. v. Sports*, 687.

### § 33.3. Evidence as to Collateral Matters

Exclusion of testimony by defendant that three weeks after the sale of cocaine to an undercover agent he told his sister that he had "been trapped" was not prejudicial to defendant. *S. v. Moore*, 148.

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**CRIMINAL LAW—Continued****§ 34.6. Admissibility of Defendant's Guilt of Other Offenses to Show Knowledge or Intent**

In a prosecution for feloniously receiving stolen goods, testimony by one of the thieves that he had been to defendant's store at least 50 times to sell him merchandise was admissible to show guilty knowledge. *S. v. May*, 370.

**§ 42.6. Chain of Custody of Articles Connected With Crime**

A showing that a package was put into the U.S. mail and that it was received by a chemist at the SBI laboratory in Raleigh was sufficient to establish the chain of custody. *S. v. Sealey*, 175.

**§ 55. Blood Alcohol Tests**

Admission of a pathologist's testimony of the blood alcohol content of deceased when the State failed to establish chain of custody of the blood sample was harmless error. *S. v. Ledford*, 213.

**§ 66.5. Right to Counsel at Line-up**

Defendant was not entitled to counsel during a line-up where he had not been arrested or charged in this case at the time of the line-up. *S. v. Simms*, 451.

**§ 66.15. Independent Origin of In-Court Identification**

Evidence was sufficient to support the trial court's findings that witnesses' in-court identifications of defendant were based upon their personal observation at the time of the crime and were not tainted by any impermissible pretrial procedure. *S. v. Simms*, 451.

**§ 71. Shorthand Statements of Fact**

Sheriff's testimony that the blood he observed on the ground was fresh "within one to three hours" was admissible as a shorthand statement of fact. *S. v. Ledford*, 213.

An officer's observations that certain bloodstains appeared to have been wiped up and that a towel appeared to have been saturated with blood were admissible as shorthand statements of fact. *S. v. Locklear*, 292.

**§ 73.1. Admission of Hearsay Statement as Prejudicial Error**

Trial judge committed prejudicial error in admission of a deputy sheriff's hearsay testimony concerning criminal activity by defendants in another county. *S. v. Cox*, 746.

Trial court in a homicide case erred in admitting into evidence extrajudicial statements of the victim concerning her intent to tell defendant that she wanted a separation and to leave the marital home since such statements were inadmissible hearsay. *S. v. Parks*, 514.

**§ 73.2. Statements Not Within Hearsay Rule**

Testimony by the victim of a breaking and entering that he knew defendant by the nickname, Spook, was not inadmissible because it was hearsay. *S. v. Barnett*, 171.

**§ 76. Determination of Admissibility of Confession; Presumptions and Burden of Proof**

Defendant's statement to officers that he could take them to where more of the stolen property was located amounted to a confession and was inadmissible because defendant had not been given the Miranda warnings, and the court erred in admit-

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**CRIMINAL LAW—Continued**

ting a subsequent written confession made by defendant after he had been given the Miranda warnings without finding that the second confession was not the product of the prior invalid confession. *S. v. Forrest*, 160.

**§ 77.1. Admissions and Declarations of Defendant**

A witness's uncertainty as to whether statements made to him by defendant occurred prior to or subsequent to the shooting of deceased went to the credibility of the testimony and not to its admissibility. *S. v. Ledford*, 213.

**§ 79. Acts and Declarations of Coconspirator**

Trial court did not err in allowing various statements of defendant's coconspirators into evidence against him after two persons had given testimony concerning the existence of the conspiracy. *S. v. Branch*, 80.

**§ 85. Character Evidence Relating to Defendant**

Testimony by a breaking and entering victim that he knew defendant by the nickname, Spook, was not inadmissible because it tended to impeach defendant's character when his character was not at issue. *S. v. Barnett*, 171.

**§ 85.2. State's Examination of Character Witness**

Court's error in permitting the prosecutor to ask defendant's character witness whether he knew defendant had been convicted of armed robbery was harmless. *S. v. Sports*, 687.

**§ 88. Cross-Examination Generally**

Defendant's right to effective cross-examination of an SBI chemist concerning the chain of custody of a controlled substance did not include a right to a practice run examination on voir dire. *S. v. Sealey*, 175.

**§ 91.4. Continuance to Obtain New Counsel**

Where defendant's attorney requested permission to withdraw for ethical reasons on the morning of the trial, trial court did not err in refusing the request and in refusing to continue the case since defendant was adequately represented by another lawyer appointed by the court to be his principal counsel 90 minutes before trial began. *S. v. Simms*, 451.

**§ 92. Consolidation of Counts Generally**

Defendant's motion to require the State to join other cases pending against him should have been made at defendant's arraignment. *S. v. Moore*, 148.

**§ 92.1. Consolidation of Counts Against Multiple Defendants**

Charges against two defendants were properly joined for trial where each defendant was charged with thefts which apparently occurred in the same general area and during the same time span. *S. v. Jefferies* and *S. v. Person*, 95.

**§ 92.4. Consolidation of Charges Against Same Defendant**

Trial court did not abuse its discretion in allowing the State's motion to join felony and misdemeanor charges against defendant for trial where the motion for joinder was not made until after defendant's arraignment. *S. v. Williams*, 287.

**§ 99.10. Improper Examination of Witnesses by Court**

Trial judge committed prejudicial error in his prosecutorial interrogation of defendants about matters which were the subject of hearsay testimony. *S. v. Cox*, 746.



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**CRIMINAL LAW—Continued****§ 102. Argument of Counsel and District Attorney**

There was no merit to defendant's contention that he was deprived of due process by the prosecutor's remark to trial court that defendant's voluntary manslaughter case was back for retrial after having started out as a first degree murder case. *S. v. McLaurin*, 552.

**§ 102.5. District Attorney's Improper Questions to Witnesses**

The possible prejudicial effect in a murder trial of the prosecutor's improper questions to defendant's character witness as to whether he knew defendant had been convicted in Halifax County 21 times could not be cured by the trial court's instruction that they be disregarded. *S. v. Johnson*, 423.

**§ 102.7. District Attorney's Comment on Character of Witnesses**

District attorney's references to the victim as "a twenty-one year old epileptic, half-blind college student" and "epileptic, virgin orphan" were consistent with facts in evidence and not improper. *S. v. Sports*, 687.

**§ 102.10 District Attorney's Comment on Character of Defendant**

The district attorney's characterization of defendant in his jury argument as an "admitted armed robber" was supported by the record and was not improper. *S. v. Sports*, 687.

**§ 113.7. Charge on Aiding and Abetting**

Court erred in giving jury instructions which would permit the jury to find defendant guilty of armed robbery as an aider and abettor if it found that defendant's only participation was the furnishing of an automobile to the actual robber prior to the robbery. *S. v. Sutton*, 603.

**§ 114. Court's Expression of Opinion in the Charge**

Trial court did not express an opinion as to the credibility of a witness when he instructed the jury that evidence tended to show that a prior statement of the witness was inconsistent. *S. v. McLaurin*, 552.

**§ 121. Instructions on Entrapment**

Trial court did not err in failing to instruct the jury to examine the activities of an undercover agent who bought cocaine from defendant "to see whether or not her activities created a substantial risk that the offense of sale of cocaine and possession with intent to sell cocaine would be committed by someone other than an individual who was prepared to commit it." *S. v. Moore*, 148.

**§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict**

Trial judge did not coerce a verdict when he encouraged the jury to reconcile its differences while admonishing the jurors not to surrender their conscientious convictions. *S. v. May*, 370.

**§ 128.2. Particular Grounds for Mistrial**

Court did not err in failing to declare a mistrial because the jury was out of the courtroom on the second day of the trial until 11:00 a.m. *S. v. Moore*, 148.

Trial court did not abuse its discretion in making inquiry of the jury as to whether further deliberation would be fruitful or in declaring a mistrial because of a hung jury. *S. v. Johnson*, 423.

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**CRIMINAL LAW—Continued****§ 138. Severity of Sentence**

That a judgment not recommending defendant for work release was entered after defendant gave notice of his intent to appeal was not sufficient, standing alone, to show that it was entered to punish defendant for exercising that right. *S. v. McLaurin*, 552.

**§ 138.1. More Lenient Sentence to Codefendant**

Trial court did not penalize defendant for pleading not guilty when it imposed on defendant a more severe sentence than that imposed on an accomplice who entered into a plea bargaining agreement and testified for the State in defendant's trial. *S. v. Ransom*, 586.

**§ 138.6. Evidence Considered in Determining Sentence**

Defendant was not entitled to a continuance of his sentencing hearing for the purpose of preparing a record of his background and standing since commission of the crime three and one-half years earlier. *S. v. McLaurin*, 552.

In imposing a sentence for possession and sale of cocaine, trial court properly considered defendant's testimony that he had made two other sales of cocaine to an undercover agent. *S. v. Moore*, 148.

Trial court did not violate G.S. 15A-1334 by calling a detective on its own motion to testify at defendant's sentencing hearing. *S. v. Smith*, 600.

**§ 142.1. Continuance of Prayer for Judgment**

Where prayer for judgment was continued in a drunken driving case without conditions until the 21 April 1975 session of superior court, the case was continued for defendant at the 21 April 1975 session, and defendant was called and failed to appear at the 26 June 1975 session, the court had authority to enter judgment against defendant at the 4 September 1975 session of court. *Whedbee v. Powell*, 250.

**§ 155.1. Docketing Record in Court of Appeals**

For failure of defendant to file record on appeal within 10 days after certification by the clerk of superior court, defendant's appeal is dismissed. *S. v. Crouch*, 612.

**§ 157. Necessary Parts of Record Proper**

Notice of Appeal is required to be a part of the record in order to give the Court of Appeals jurisdiction to hear and decide a case. *S. v. Morris*, 164.

**§ 162.5. Instructions to Jury After Motion to Strike Allowed**

Defendant was not prejudiced where the court sustained his objections to testimony without giving limiting instructions. *S. v. Locklear*, 292.

**§ 181. Post-Conviction Hearing**

Order of the trial court denying defendant's petition for post-conviction relief is vacated and an evidentiary hearing is ordered where defendant raised substantial questions of violation of constitutional rights. *S. v. Roberts*, 187.

**§ 181.3. Review of Judgment Entered at Post-Conviction Hearing**

The proper method for defendant to seek appellate review of the trial court's order denying his petition for post-conviction relief was by writ of certiorari. *S. v. Roberts*, 187.

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**DAMAGES****§ 13.5. Testimony by Physicians**

In an action to recover for injuries sustained by plaintiff in an automobile accident, trial court erred in permitting a doctor to state an opinion with regard to possible pain and suffering which plaintiff might suffer in the future. *Garland v. Shull*, 143.

**DEEDS****§ 24. Covenants Against Encumbrances**

An existing violation of the minimum side lot requirement of a city ordinance constitutes an encumbrance within the meaning of the covenant against encumbrances in a warranty deed. *Wilcox v. Pioneer Homes*, 140.

**§ 25. Proceedings to Register Land Under Torrens Act**

A notice published in a newspaper of a petition for a new certificate of title to land under the Torrens Law was insufficient where it described the land only as "Registered Estate No. 9, Book 1, Page 33, of Gates County Public Registry." *Cedar Works v. Mfg. Co.*, 233.

In a contested proceeding for registration of a land title under the Torrens Law, the evidence was sufficient to establish appellees' superior title under the common source doctrine. *Ibid.*

**DESCENT AND DISTRIBUTION****§ 8. Bastards**

G.S. 29-19 and other statutes referred to therein, insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father, are constitutional. *Outlaw v. Trust Co.*, 571.

**DIVORCE AND ALIMONY****§ 13.3. Effect of Prior Proceedings**

A judgment which denied defendant wife alimony and which awarded her possession of the residence for the benefit of the minor children legalized the separation of the parties even though the court found that plaintiff had wrongfully abandoned defendant, and plaintiff could thereafter maintain a divorce action based on separation for one year. *Cook v. Cook*, 156.

**§ 16.5. Competency of Evidence in Alimony Action**

Plaintiff was not prejudiced by the court's refusal to admit evidence of the financial status of the parties since, even if plaintiff was a dependent spouse, she would not have been entitled to alimony because the jury found that defendant had not abandoned plaintiff or committed indignities against her. *Fogleman v. Fogleman*, 597.

In an action for alimony without divorce, evidence of defendant's actions six and eight months after the parties separated was not competent on the issues of abandonment and indignities submitted by the court. *Ibid.*

**§ 16.6. Sufficiency of Evidence in Alimony Action**

Trial court did not err in finding that defendant wife was a dependent spouse and in awarding her possession of the home of the parties, although plaintiff husband is 65 years old and cannot work because of heart problems. *Love v. Love*, 308.

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**DIVORCE AND ALIMONY—Continued****§ 16.7. Instructions in Alimony Action**

The jury could not have been misled by the court's one reference to "wilful failure to provide support" as an example of constructive abandonment when there was no evidence of such wilful failure. *Fogleman v. Fogleman*, 597.

**§ 28. Foreign Decrees**

A Florida judgment of final divorce was effective on the date it was orally granted by the Florida court. *Armstrong v. Armstrong*, 168.

**ELECTRICITY****§ 1. Control and Regulation Generally**

Testimony by two servicemen and the manager of operations of a utility company was relevant to show defendant's lack of authority to tamper with a meter. *S. v. Hill*, 722.

Evidence was sufficient for the jury in a prosecution for unlawfully and willfully tampering with an electric meter. *Ibid*.

**EMINENT DOMAIN****§ 7.1. Proceedings to Condemn Land Generally**

A permit from the U. S. Army Corps of Engineers which is now required but was not required at the time an action was instituted could not have been a prerequisite to the filing of the action. *Power & Light Co. v. Merritt*, 438.

**§ 12. Abandonment of Condemnation Proceedings**

A final judgment entered in an earlier condemnation proceeding against respondent was not res judicata in the present proceeding since the final judgment of the earlier action was in fact a voluntary dismissal. *Power & Light Co. v. Merritt*, 438.

**§ 13. Actions by Owner for Compensation or Damages**

A contractor employed by a city to abate a nuisance on private property was not liable to the property owner for the destruction of vegetation on the property where the contractor did not deviate from the contract through negligence or otherwise. *Horne v. City of Charlotte*, 491.

Plaintiff did not have a compensable interest in land located within the Intracoastal Waterway right-of-way utilized by the State in the construction of a new bridge since the State had already acquired the land in fee from plaintiff's predecessors in title. *Frink v. Board of Transportation*, 751.

**§ 15. Time of Passage of Title**

Trial court in an eminent domain proceeding did not err in refusing to stay petitioner's entry upon the land pending appeal since petitioner had deposited with the clerk the full amount of compensation awarded by the commissioners. *Power & Light Co. v. Merritt*, 438.

**ESTOPPEL****§ 8. Sufficiency of Evidence of Estoppel**

Equitable estoppel did not apply to preclude plaintiff from recovering under a title insurance policy. *Mortgage Corp. v. Insurance Co.*, 613.

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**EVIDENCE****§ 3.4. Judicial Notice as to Health and Medical Matters**

Permanent scarring is sufficient evidence to permit judicial notice of mortuary tables. *Rector v. James*, 267.

**§ 11. Transactions on Communications with Decedent**

In an action to recover rents and profits for the two years after the death of the landowner, an affidavit by defendant which incorporated by reference averments contained in defendant's unverified answer was inadmissible under the Dead Man's Statute. *Etheridge v. Etheridge*, 44.

In an action by the executor of testatrix to recover the reasonable rental value of farmland for the year prior to testatrix' death, an affidavit by defendant who had rented and cultivated the land concerning the amount of land involved and the agreed rental price was inadmissible because of the Dead Man's Statute; however, trial court erred in excluding an affidavit by defendant's son concerning the rental contract. *Etheridge v. Etheridge*, 39.

**§ 14. Communications Between Physician and Patient**

The physician-patient privilege is not applicable in involuntary commitment proceedings. *In re Farrow*, 680.

**§ 32.2. Application of Parol Evidence Rule**

Where a written contract gave plaintiff broker exclusive right to sell certain real estate for defendants, the parol evidence rule rendered inadmissible evidence offered by defendants that the parties had agreed that another broker also had the right to sell the property. *Realty, Inc. v. Coffey*, 112.

**§ 36.1. Admissions by Agent; Scope of Agent's Authority**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets left in a sidewalk after removal of a phone booth, statements made by an agent of defendant telephone company at the scene of the accident shortly after it occurred were properly admitted into evidence. *Pearce v. Telegraph Co.*, 62.

**§ 44. Nonexpert Opinion Evidence as to Physical Condition**

A nonexpert witness may testify as to pain suffered by another, based upon his personal observation. *Rector v. James*, 267.

**EXECUTORS AND ADMINISTRATORS****§ 8. Collection of Assets**

In an action by plaintiff executor to recover the reasonable rental value of testatrix' farmland which was rented and cultivated by defendant, trial court erred in granting partial summary judgment for plaintiff where there were genuine issues of fact as to whether there was an express contract for the rental of the farm at \$30 per acre and as to whether the estate of testatrix' husband was liable to plaintiff for any rent money received by the husband from defendant. *Etheridge v. Etheridge*, 39.

**FALSE PRETENSE****§ 3.1. Nonsuit**

Evidence was sufficient for the jury in a prosecution for obtaining a loan from a bank through false pretense. *S. v. Cronin*, 415.

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**FALSE PRETENSE—Continued****§ 3.2. Instructions**

In a prosecution for obtaining property through false pretense, defendant was entitled to a new trial where the court failed to instruct the jury that the false pretense must, among other things, be made for the purpose of obtaining anything of value. *S. v. Cronin*, 415.

**FIRES****§ 3. Sufficiency of Evidence**

Evidence was sufficient to establish that a fire originated inside a leased building in an area controlled by the lessee and that plaintiff lessor's loss occurred by reason of or incidental to lessee's occupancy of the building. *Railway Co. v. Fibres, Inc.*, 694.

**FRAUD****§ 5. Reliance on Misrepresentation**

In an action to reinstate a health and disability insurance policy which plaintiff cancelled because of a misrepresentation by defendant insurer's agent that his back condition was not covered by the policy, evidence on motion for summary judgment presented a jury question as to whether plaintiff reasonably relied on the agent's misrepresentation when he could have discovered his condition was covered by reading the policy. *Johnson v. Lockman*, 54.

**§ 9. Pleadings**

An action against defendant bank for fraud was properly dismissed for failure of plaintiffs to state with particularity the circumstances constituting the alleged fraud. *Coley v. Bank*, 121.

**§ 12. Sufficiency of Evidence**

Trial court erred in entering summary judgment for defendants in plaintiff's action to recover damages caused by defendants' allegedly fraudulent scheme to secure money since the evidence presented an issue of fact with respect to credibility. *Bank v. Belk*, 328.

**GUARANTY****§ 1. Generally**

Where defendant bank held stock certificates as security for defendant lessee's performance of a lease, including the lessee's agreement to pay ad valorem taxes on the leased premises, the bank was not a guarantor or surety of the lessee's performance but was an agent of plaintiff lessor and was liable to plaintiff for damages caused by its release of the stock to its owners when ad valorem taxes had not been paid by the lessee. *SNML Corp. v. Bank*, 28.

**§ 2. Actions to Enforce Guaranty**

Trial court did not err in entering summary judgment for defendant against the third-party defendant guarantor since third-party defendant specifically agreed to be liable for all debts arising under plaintiff's lease obligations. *Enterprises, Inc. v. Equipment Co.*, 204.

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**HOMICIDE****§ 15. Relevancy and Competency of Evidence in General**

Trial court in a homicide case erred in admitting into evidence extrajudicial statements of the victim concerning her *intent* to tell defendant that she wanted a separation and to leave the marital home since such statements were inadmissible hearsay. *S. v. Parks*, 514.

**§ 15.2. Relevancy and Competency of Evidence of Malice**

A medical expert's opinion that deceased's life might have been saved if she had received immediate medical attention after she was stabbed was relevant on the issue of malice. *S. v. Locklear*, 292.

**§ 15.5. Opinion as to Cause of Death**

Court's erroneous admission of an officer's testimony that there was a "stab wound" in deceased's chest was not prejudicial. *S. v. Locklear*, 292.

**§ 27.1. Instructions on Heat of Passion**

Defendant was not entitled to a mitigating instruction on heat of passion where the evidence tended to show that defendant initially fired warning shots in an attempt to get the victim to leave the premises and that he then shot deceased to protect his brother. *S. v. Jones*, 465.

**§ 28. Instructions on Self-Defense Generally**

Evidence was insufficient to require an instruction on self-defense where it tended to show that the victim was in the process of fending off an attack from defendant's brother at the time he was shot in the back and side. *S. v. Jones*, 465.

**§ 28.4. Instructions on Duty to Retreat**

Evidence was insufficient to require an instruction on defense of home where it tended to show that defendant did not fire the fatal shot until deceased had ceased beating on the front door of defendant's home. *S. v. Jones*, 465.

**HUSBAND AND WIFE****§ 12.1. Revocation of Separation Agreement; Fraud**

Plaintiff wife's complaint failed to state a claim to set aside a separation agreement based on defendant husband's alleged fraudulent concealment of an adulterous relationship with another woman where plaintiff alleged she was represented by counsel in negotiating the separation agreement. *Winborne v. Winborne*, 756.

**INDICTMENT AND WARRANT****§ 17.3. Variance as to Persons**

There was a fatal variance where the indictment alleged sale of a controlled substance to a named person and the evidence showed only a sale to a different person. *S. v. Sealey*, 175.

**INFANTS****§ 5. Jurisdiction to Award Custody of Minor**

The fact that a mother had surrendered her child to the department of social services and had signed a general consent for his adoption did not vest subject mat-

### INFANTS – Continued

ter jurisdiction over all matters pertaining to the child's custody exclusively in the clerk of superior court or in the superior court itself. *Francis v. Dept. of Social Services*, 444.

#### § 6. Hearing for Award of Custody

The district court in a child custody proceeding did not err in failing to grant defendant county department of social services a "protective order based upon confidentiality of records as set out in G.S. 48-25." *Francis v. Dept. of Social Services*, 444.

### INJUNCTIONS

#### § 3. Mandatory Injunctions

Plaintiffs could properly request a mandatory injunction as an ancillary remedy to their action for continuing trespass. *English v. Realty Corp.*, 1.

### INSANE PERSONS

#### § 1.2. Findings Required by Involuntary Commitment Statutes

The physician-patient privilege is not applicable in involuntary commitment proceedings. *In re Farrow*, 680.

A patient voluntarily admitted to a mental health care facility may not be ordered held involuntarily absent evidence that it is reasonably necessary for the effective treatment and safety of the patient or for the safety of others. *Ibid.*

### INSURANCE

#### § 27.1. Credit Life Insurance

A credit life insurance policy which expired on 2 December 1976 and contained no provisions for extension or renewal was not in effect on and after its expiration date notwithstanding the grace period provision of G.S. 58-211. *Comer v. Insurance Co.*, 610.

#### § 29.1. Change of Beneficiary

The insured contracted away his right to designate the beneficiary of a life insurance policy issued to himself when he signed a separation agreement with his first wife which included a provision that he would transfer all incidents of ownership on the policy to the first wife. *Barden v. Insurance Co.*, 135.

#### § 44. Actions to Recover Benefits; Disability Insurance

In an action to reinstate a health and disability insurance policy which plaintiff cancelled because of a misrepresentation by defendant insurer's agent that his back condition was not covered by the policy, evidence on motion for summary judgment presented a jury question as to whether plaintiff reasonably relied on the agent's misrepresentation when he could have discovered his condition was covered by reading the policy. *Johnson v. Lockman*, 54.

#### § 69.2. Automobile Insurance; Meaning of "Uninsured Vehicle"

Plaintiff was not entitled to recover under the uninsured motorist provision of his automobile liability insurance policy since the automobile which was involved in the collision with plaintiff carried the minimum required liability insurance. *Tucker v. Insurance Co.*, 302.



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**INSURANCE—Continued****§ 79.2. Automobile Liability Insurance Rates; Evidence Considered by Commissioner of Insurance**

A determination by the Comr. of Insurance that unaudited data was not reliable as a basis for justifying a change in automobile insurance rates was supported by the evidence. *Comr. of Insurance v. Rate Bureau*, 310.

The Comr. of Insurance could properly consider investment income in determining an underwriting profit margin for automobile insurance, but the Comr. erred in requiring that investment income be considered at a risk-free rate of return. *Ibid.*

**§ 79.3. Automobile Liability Insurance Rates; Findings of Fact; Sufficiency of Evidence**

Conclusion of the Comr. of Insurance that a 10% increase in automobile insurance rates for insureds ceded to the Reinsurance Facility above the rates for voluntary business would be unfairly discriminatory was supported by findings and evidence. *Comr. of Insurance v. Rate Bureau*, 310.

Findings by Comr. of Insurance that projection of territorial rate differences for automobile insurance did not consider the new classification plan required by G.S. 58-30 were unsupported by the evidence. *Ibid.*

Determination by the Comr. of Insurance that the rate proposed for \$25 deductible automobile collision insurance was excessive in relation to the coverage provided was not supported by the evidence. *Ibid.*

**§ 85. Automobile Liability Insurance; "Non-owned Automobile" Clause**

A motorcycle was not a "non-owned automobile" within the meaning of an automobile liability policy. *Hunter v. Liability Co.*, 496.

**§ 148. Title Insurance Generally**

Trial court erred in denying recovery under a title insurance policy where the defect in the title under consideration occurred because of innocent conduct by insured in authorizing an improper disbursement of loan proceeds. *Mortgage Corp. v. Insurance Co.*, 613.

An insured is not required to accept a defense by insurer rendered under a "reservation of rights," and the insurer's conditional tender of defense does not absolve it of its contractual duty to defend an action for loss within the coverage of the policy. *Ibid.*

**JUDGMENTS****§ 34. Setting Aside Judgment; Trial and Determination**

Trial court did not have the power to vacate an order so as to affect the rights of the parties without giving the parties notice and an opportunity to be heard. *Insurance Co. v. Johnson*, 299.

**§ 36.2. Conclusiveness of Judgments; Persons Regarded as Privies Generally**

There was no merit to defendants' contention that adjudication of a cause of action for fraud was precluded by the dismissal of a related action in the U. S. District Court. *Bank v. Belk*, 328.

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**LANDLORD AND TENANT****§ 5. Lease of Personal Property**

Provision in a lease of business equipment absolving the lessor of responsibility for damages resulting from defects in the equipment was valid. *Enterprises, Inc. v. Equipment Co.*, 204.

**§ 10. Liability for Injury to Property**

Evidence was sufficient to establish that a fire originated inside a leased building in an area controlled by the lessee and that plaintiff lessor's loss occurred by reason of or incidental to lessee's occupancy of the building. *Railway Co. v. Fibres, Inc.*, 694.

**§ 18. Forfeiture for Nonpayment of Rent**

Where plaintiff leased a bus station from defendant but refused to pay rent during the four months defendant suspended operations because of a labor dispute with its employees, trial court properly granted summary judgment for defendant on plaintiff's claim for damages due to defendant's alleged breach of the lease agreement and properly granted summary judgment for defendant on its counterclaim for rental payments allegedly due. *Knowles v. Coach Co.*, 709.

**LARCENY****§ 7.8. Felonious Larceny; Sufficiency of Evidence**

Evidence was sufficient for the jury in a prosecution for felonious larceny. *S. v. Jefferies and S. v. Person*, 95.

**§ 9. Verdict**

Where all the evidence tended to show that merchandise stolen by defendants was valued at over \$200, the jury was not required by statute to state in their verdict the value of the stolen property. *S. v. Jefferies and S. v. Person*, 95.

**LIBEL AND SLANDER****§ 16. Sufficiency of Evidence**

In an action to recover damages from defendant newspaper editor for libel, trial court did not err in directing verdict for defendant where plaintiff's evidence failed to show that any false statements were made by defendant. *Brown v. Boney*, 636.

**LIS PENDENS****§ 2. Property Within Doctrine**

Trial court properly cancelled plaintiffs' notice of lis pendens where they did not state a cause of action affecting title to real property. *Wolfe v. Hewes*, 88.

**MALICIOUS PROSECUTION****§ 10. Proof of Malice; Competency and Relevancy of Evidence**

Trial court in an action for malicious prosecution properly considered one defendant's affidavit offered in support of his summary judgment motion which set out material which defendant thought or felt. *Middleton v. Myers*, 543.

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**MASTER AND SERVANT****§ 55.3. Workmen's Compensation; Particular Injuries as Constituting Accident**

A finding by the Industrial Commission that the cart plaintiff was pulling was struck by another cart and hit him in the back and, therefore, that an accident occurred was supported by plaintiff's testimony at the hearing although such testimony contradicted prior statements made by plaintiff. *Click v. Freight Carriers*, 458.

Evidence was sufficient to support findings by the Industrial Commission that plaintiff upholsterer slipped as she turned to pick up a chair and hurt her back and that her injury therefore resulted from an accident. *Fowler v. Chaircraft, Inc.*, 608.

**§ 56. Workmen's Compensation; Causal Relation Between Employment and Injury**

Plaintiff's evidence was sufficient to support a finding that an accident at work caused his herniated disc, notwithstanding there was no medical evidence that the accident could have caused the disc injury. *Click v. Freight Carriers*, 458.

**§ 85.3. Workmen's Compensation; Jurisdiction of Industrial Commission to Review and Amend Award**

It is within the discretion of the Industrial Commission to review a workmen's compensation award and, if proper, to amend the award. *Lynch v. Construction Co.*, 127.

**§ 93.2. Workmen's Compensation; Admissibility of Evidence in Proceedings Before Industrial Commission**

In a proceeding before the Industrial Commission to determine if plaintiff was entitled to receive lifetime compensation payments for the death of her husband because she was disabled at the time of his death, no prejudicial error occurred by reason of the introduction of plaintiff's social security file containing medical reports. *Hedrick v. Southland Corp.*, 431.

**§ 94. Workmen's Compensation; Necessity for Specific Findings of Fact**

G.S. 97-38, the statute providing compensation for life or until remarriage for a disabled spouse of an employee who dies under compensable circumstances, does not on its face require a finding of permanent disability. *Hedrick v. Southland Corp.*, 431.

**§ 94.1. Workmen's Compensation; Sufficiency of Findings of Fact**

Evidence that plaintiff was a chronic alcoholic and that she suffered other medical problems was sufficient to support the Industrial Commission's conclusion that plaintiff was unable to support herself by reason of physical and mental disability as of the date of her husband's death. *Hedrick v. Southland Corp.*, 431.

**MORTGAGES AND DEEDS OF TRUST****§ 4. Description of Land Conveyed as Security**

A deed of trust did not contain an insufficient description of the land offered as security because the plat to which the deed of trust referred for a specific description was not recorded until after the deed of trust was executed. *In re Foreclosure of Norton*, 529.

A deed of trust was not invalid because it referred to a plat and deed as being recorded in the Clerk's office rather than in the office of the Register of Deeds. *Ibid.*

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**MORTGAGES AND DEEDS OF TRUST—Continued****§ 5. Execution and Validity**

A deed of trust was not rendered void by the fact that an attorney, before recording it, inserted in it the book and page numbers where the plat referred to therein was to be recorded. *In re Foreclosure of Norton*, 529.

**§ 6. Construction Generally**

Where a note and deed of trust cross-refer to each other and incorporate each other by reference, and only one of them clearly indicates the purchase money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction. *Bank v. Belk*, 356.

**§ 24. Foreclosure by Action**

Deeds of trust were subject to foreclosure for default of payments and for failure to pay ad valorem taxes on the property. *In re Foreclosure of Deed of Trust*, 563.

**§ 26.1. Personal Notice**

Respondent was not prejudiced by petitioner's failure to give notice of a foreclosure hearing to other record owners. *In re Foreclosure of Norton*, 529.

Respondent waived notice of a foreclosure hearing by his presence at and participation in the hearing. *Ibid*.

**§ 32.1. Restriction of Deficiency Judgments**

G.S. 45-21.38 does not prohibit an in personam action based on an underlying obligation secured by a mortgage on a leasehold interest. *Real Estate Trust v. Debnam*, 256.

The protection of the anti-deficiency judgment statute, G.S. 45-21.38, cannot be waived. *Bank v. Belk*, 356.

**MUNICIPAL CORPORATIONS****§ 4.4. Public Utilities and Services**

The "decapping" procedure employed by a city to compute the charges for water and sewer service for apartment complexes in which more than one apartment is served by a single meter unreasonably discriminates against the owner of such apartment complex. *Wall v. City of Durham*, 649.

**§ 30.6. Zoning; Special Permits**

Petitioners failed to carry their burden of establishing prima facie entitlement to a conditional use permit for a planned unit development where they failed to offer any evidence as to the availability or adequacy of fire fighting facilities. *Woodhouse v. Board of Commissioners*, 473.

Evidence supported the trial court's determination that petitioner had met all requirements of a town ordinance to obtain a conditional use permit for a ready-mix concrete plant. *Concrete Co. v. Board of Commissioners*, 557.

**§ 43. Claims Against Municipality for Trespass and Damage to Lands**

A contractor employed by a city to abate a nuisance on private property was not liable to the property owner for the destruction of vegetation on the property where the contractor did not deviate from the contract through negligence or otherwise. *Horne v. City of Charlotte*, 491.

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**NARCOTICS****§ 1.3. Elements of Statutory Offenses Relating to Narcotics**

In a prosecution under G.S. 90-87(15) for manufacturing a controlled substance in which the production, propagation, conversion or processing of the controlled substance is involved, the intent of defendant either to distribute the controlled substance or consume it personally is irrelevant and does not form an element of the offense. *S. v. Childers*, 729.

**§ 3. Presumptions**

The State is entitled to assume marijuana seeds are capable of germination until it is shown otherwise. *S. v. Childers*, 729.

**§ 3.1. Competency and Relevancy of Evidence**

Defendant's right to effective cross-examination of an SBI chemist concerning chain of custody of a controlled substance did not include a right to a practice-run examination on voir dire. *S. v. Sealey*, 175.

**§ 4.1. Cases Where Evidence Was Insufficient**

There was a fatal variance where the indictment alleged sale of a controlled substance to a named person and the evidence showed only a sale to a different person. *S. v. Sealey*, 175.

**NEGLIGENCE****§ 2. Negligence Arising from Performance of a Contract**

A general contractor and subcontractors who submitted bids and conducted work on a construction project in reliance on a soil investigative report could sue the engineers who prepared the report for damages caused by negligence in preparation of the report. *Davidson and Jones, Inc. v. County of New Hanover*, 661.

An architect may be sued by a general contractor for economic loss foreseeably resulting from breach of the architect's common law duty of care in performance of his contract with the owner. *Ibid.*

**§ 15. Comparative Negligence**

In an action to recover for injuries sustained in an automobile accident, plaintiff was not prejudiced where the trial court promptly sustained plaintiff's objection and corrected the statement by defendant's counsel concerning comparative negligence. *Dixon v. Weaver*, 524.

**§ 29.3. Sufficiency of Evidence of Proximate Cause**

Trial court erred in granting defendant automobile driver's motion for summary judgment on the ground that her negligence was not, as a matter of law, a proximate cause of plaintiff's injuries but was insulated by the negligence of defendant dump truck driver who struck plaintiff's vehicle from the rear. *Hester v. Miller*, 509.

**§ 49. Condition of Sidewalk**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets embedded in cement adjacent to a sidewalk, trial court erred in directing a verdict for the individual defendant who left the brackets in the cement when he removed a telephone booth. *Pearce v. Telegraph Co.*, 62.

### NEGLIGENCE — Continued

#### § 56. Competency and Relevancy of Evidence in Actions by Invitees

In an action to recover for injuries sustained by plaintiff when she fell in front of defendant's store, an admission by defendant of subsequent repairs and a statement by a bag boy concerning a loose metal strip could not properly be considered on a summary judgment hearing. *Emerson v. Tea Co.*, 715.

#### § 57.6. Sufficiency of Evidence in Action by Invitee; Slippery Floor

Trial court erred in granting summary judgment in favor of defendant in an action to recover for injuries received by plaintiff in a fall in a theater allegedly caused by defendant's negligent failure to adequately clean the theater. *Jenkins v. Theatres, Inc.*, 262.

#### § 57.10. Sufficiency of Evidence in Actions by Invitees

Summary judgment for defendant was improper in plaintiff's action to recover for injuries sustained when she fell on a metal strip at a store entrance. *Emerson v. Tea Co.*, 715.

### PARENT AND CHILD

#### § 7. Parental Duty to Support Child

A finding that defendant has an income of \$1700 per month is sufficient to support the court's conclusion that he has sufficient earning capacity to enable him to support his minor child in the amount of \$200 per month although the court also found defendant has expenses of \$1710 per month. *County of Stanislaus v. Ross*, 518.

#### § 10. Uniform Reciprocal Enforcement of Support Act

A complaint under the Uniform Reciprocal Enforcement of Support Act was not deficient because it failed to state the name of defendant's employer or the amount of his earnings, or because it failed to allege a substantial change in circumstances. *County of Stanislaus v. Ross*, 518.

### PARTNERSHIP

#### § 3. Rights, Duties and Liabilities of Partners Among Themselves

Partners could not perfect their lien as to partnership property allegedly wrongfully applied until dissolution of the partnership. *Wolfe v. Hewes*, 88.

Plaintiffs' evidence was sufficient for the jury in an action based on defendants' alleged fraudulent use of partnership funds. *Ibid.*

### PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

#### § 6. Revocation of Licenses Generally; Grounds

The Board of Podiatry Examiners properly suspended petitioner's certificate to practice podiatry for misconduct in collecting and attempting to collect fees from Blue Cross through misrepresentation. *Boehm v. Board of Podiatry Examiners*, 568.

#### § 7. Appeal and Review of Orders of Licensing Boards

The "whole record" test applies to judicial review of an order of the N. C. Board of Podiatry Examiners. *Boehm v. Board of Podiatry Examiners*, 568.

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**PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS – Continued****§ 11.1. Standards as Determined by Particular Circumstances; Locality of Practice; Specialists**

The standard of care required of a podiatrist could not be established through testimony of an orthopedic surgeon who was not familiar with the practice of podiatry. *Whitehurst v. Boehm*, 670.

**§ 20.2. Instructions in Malpractice Actions**

Trial court erred in giving conflicting instructions that the standard of care of a podiatrist must be established by other podiatrists and that it must be established by an orthopedic surgeon. *Whitehurst v. Boehm*, 670.

**PLEADINGS****§ 37.1. Necessity for Proof**

It is not necessary that any portion of the pleadings be introduced in evidence in order that allegations of new matter in defendant's answer favorable to plaintiff may be considered in passing on defendants' motion for a directed verdict. *Smith v. Staton*, 395.

**PRINCIPAL AND AGENT****§ 10. Rights and Duties of Agent as Respects Principal**

Where defendant bank held stock certificates as security for defendant lessee's performance of a lease, including the lessee's agreement to pay ad valorem taxes on the leased premises, the bank was not a guarantor or surety of the lessee's performance but was an agent of plaintiff lessor and was liable to plaintiff for damages caused by its release of the stock to its owners when ad valorem taxes had not been paid by the lessee. *SNML Corp. v. Bank*, 28.

**PROCESS****§ 9. Personal Service on Nonresident Individual in Another State**

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations of a separation agreement incorporated into a Missouri divorce decree and to attach defendant's N. C. property, the courts of this State did not obtain jurisdiction over the person of the nonresident defendant under the Full Faith and Credit Clause of the U. S. Constitution by the enforcement of a valid in personam judgment of one state in the courts of another state. *Holt v. Holt*, 344.

**§ 9.1. Minimum Contacts Test**

In an action by a nonresident plaintiff against a nonresident defendant to recover alimony, child support and other obligations due under a separation agreement incorporated into a Missouri divorce decree and to attach realty owned by defendant in N. C., defendant's N. C. realty had sufficient "minimum contacts" with the case to give the courts of this State quasi in rem jurisdiction where defendant purchased the N. C. realty and executed deeds of trust thereon shortly after the Missouri decree was entered and began failing to make the ordered payments the next month. *Holt v. Holt*, 344.

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## PROFESSIONS AND OCCUPATIONS

### § 1. Generally

A general contractor and subcontractors who submitted bids and conducted work on a construction project in reliance on a soil investigative report could sue the engineers who prepared the report for damages caused by negligence in preparation of the report. *Davidson and Jones, Inc. v. County of New Hanover*, 661.

## QUASI CONTRACTS AND RESTITUTION

### § 1. Implied Contracts; Elements and Requisites of Right of Action

In an action to recover for construction work on defendants' home renovation project where plaintiff sought to recover on the basis of quantum meruit, summary judgment was properly entered for defendants. *Baumann v. Smith*, 223.

#### § 1.2. Unjust Enrichment

Evidence was insufficient to establish plaintiff's claim against defendant wife for unjust enrichment where it tended to show a contract between defendant husband and his employer for the building of a house on land owned by defendants as tenants by the entirety. *Bryson v. Hutton*, 575.

#### § 2.1. Sufficiency of Evidence

Plaintiff employment agency was not entitled to recover a fee under the theory of quantum meruit for its services in referring to defendant an applicant for the position of "systems analyst" who was not hired for that position but was hired some months later for the different position of "material requirements planning engineer." *MacEachern v. Rockwell International Corp.*, 73.

Trial court properly denied defendant's motions to dismiss where plaintiff established the existence of an implied contract for defendants to pay plaintiff for services rendered in the construction of a building. *Harrell v. Construction Co.*, 593.

#### § 2.2. Measure of Recovery

Trial court's award of damages was improper in plaintiff's action based on quantum meruit because it was not supported by competent evidence of reasonable value of plaintiff's services. *Harrell v. Construction Co.*, 593.

## RAPE

### § 18.2. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for assault with intent to commit rape although there was no evidence of an attempted penetration. *S. v. Sports*, 687.

## RECEIVING STOLEN GOODS

### § 1. Elements of the Offense

Proof of ownership of stolen property is not an essential element of the crime of receiving stolen goods. *S. v. May*, 370.

#### § 5.1. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for feloniously receiving stolen goods. *S. v. May*, 370.



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**RECEIVING STOLEN GOODS — Continued****§ 6. Instructions**

In a prosecution for feloniously receiving stolen goods, including a quantity of meat, trial court's mandate to the jury was sufficient without requiring the jury to find that defendant knew the thief had left the meat on his premises. *S. v. May*, 370.

**RULES OF CIVIL PROCEDURE****§ 9. Pleading Special Matters**

An action against defendant bank for fraud was properly dismissed for failure of plaintiffs to state with particularity the circumstances constituting the alleged fraud. *Coley v. Bank*, 121.

**§ 12. Defenses**

Defendant's Rule 12(b)(6) motion to dismiss was not converted into one for summary judgment by the trial court's consideration of the contract which was the subject of the action. *Coley v. Bank*, 121.

**§ 23. Class Actions**

Trial court erred in allowing plaintiffs' motion that the action be maintained as a class action since the trial court failed to provide members of the class with adequate notice. *English v. Realty Corp.*, 1.

**§ 41.1. Voluntary Dismissal; Dismissal Without Prejudice**

Though two dismissals of plaintiff's actions based on the same claim were obtained at plaintiff's instance, neither was effected by plaintiff's filing a notice of dismissal, and both were therefore without prejudice. *Parrish v. Uzzell*, 479.

Plaintiff's action instituted on 9 December 1977 to recover for personal injuries sustained on 8 August 1968 was not barred by the three year statute of limitations where plaintiff brought her first action within three years of her injuries and her second and third actions within one year of dismissal of her first and second actions. *Ibid.*

**§ 56. Summary Judgment**

Where a complaint attempts to allege alternative theories to support a cause of action and summary judgment is proper with respect to one or more of the attempted theories, it will also be proper with respect to the remaining theories which may fail to comply with the minimum pleading requirements. *Baumann v. Smith*, 223.

**§ 56.1. Timeliness of Summary Judgment**

There was no merit to defendants' contention that entry of summary judgment was premature in that the 20-day period in which defendants were allowed to answer following denial of their G.S. 1A-1, Rule 12(b) motion had not yet expired. *Real Estate Trust v. Debnam*, 256.

**§ 59. New Trials**

Trial court did not abuse its discretion in denying plaintiff's motion for a new trial made on the ground that the jury's award of \$1250 for damages was grossly inadequate. *Railway Co. v. Fibres, Inc.*, 694.

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**RULES OF CIVIL PROCEDURE—Continued****§ 60.1. Notice of Relief from Judgment or Order**

Trial court did not have the power to vacate an order so as to affect the rights of the parties without giving the parties notice and an opportunity to be heard. *Insurance Co. v. Johnson*, 299.

**§ 60.2. Grounds for Relief from Judgment or Order**

Rule 60(a) does not authorize the trial court to set aside a previous ruling for legal error. *Insurance Co. v. Johnson*, 299.

**SALES****§ 22. Actions for Personal Injuries Based upon Negligence**

Summary judgment was properly entered for defendant in an action for negligent design and manufacture of a steel punch. *Neihage v. Auto Parts, Inc.*, 538.

**SEARCHES AND SEIZURES****§ 2. Searches by Particular Persons**

An agent of a carrier who opened and inspected a package consigned to his employer's care acted as a private citizen, and a subsequent warrantless search by officers was not improper since it did not constitute a new or different search. *S. v. Morris*, 164.

**§ 11. Search and Seizure of Vehicles Without Warrant**

Officers had probable cause to believe a search of defendant's vehicle would reveal a pistol which had been taken during a break-in, and a warrantless search of the vehicle was not unreasonable. *S. v. Lail*, 178.

Officers had probable cause to believe that one defendant's car contained marijuana and a warrantless search of the car was proper. *S. v. Chambers*, 380.

A warrantless search of one defendant's vehicle was constitutional where defendant, as the registered owner and person in control of the vehicle, consented to the search. *S. v. Jefferies and S. v. Person*, 95.

**§ 23. Sufficiency of Affidavit to Show Probable Cause**

An affidavit stating facts connecting a marijuana patch with defendants' residence was sufficient to show probable cause for issuance of a search warrant. *S. v. Eutsler*, 182.

An officer's affidavit was sufficient to establish probable cause for the issuance of a warrant to search defendant's grocery store for stolen items. *S. v. May*, 370.

**§ 40. Items Which May Be Seized Under a Warrant**

Trial court did not err in determining a box containing drug paraphernalia and methamphetamine which was in plain view in defendant's apartment was properly seized, though the officer's warrant was for marijuana. *S. v. Smith*, 600.

**STATE****§ 2.1. Lands Beneath Navigable Waters; Tidelands and Marshlands**

A third renewal of a lease of oyster bottoms was within the discretion of the State, and the requested increase in the rental fee was constitutionally permissible. *Oglesby v. McCoy*, 735.

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**STATE—Continued**

Plaintiff did not have a compensable interest in land located within the Intracoastal Waterway right-of-way utilized by the State in the construction of a new bridge since the State had already acquired the land in fee from plaintiff's predecessors in title. *Frink v. Board of Transportation*, 751.

**§ 7.1. Affidavit in Action Under Tort Claims Act**

In an action under the Tort Claims Act, plaintiff's affidavit naming only a dump truck driver as the negligent employee was sufficient to support its claim without also naming a concurrently negligent foreman. *Distributors, Inc. v. Dept. of Transportation*, 548.

**§ 12. State Employees**

The State Personnel Commission did not have authority to reinstate an employee of the Dept. of Corrections to the position from which he was demoted where the Commission made no finding that the employee's refusal to cooperate in a departmental investigation was justified. *Reed v. Byrd*, 625.

**TAXATION****§ 32. Intangibles Tax**

A cemetery corporation could not deduct reserves for pre-need markers, contributions to perpetual care funds and commissions payable to salesmen in determining the value of its notes receivable for intangibles tax purposes. *In re Memorial Park*, 278.

**TELECOMMUNICATIONS****§ 4. Liability for Negligence Generally**

In an action to recover for injuries sustained when plaintiff tripped and fell over brackets left in a sidewalk after removal of a telephone booth, trial court did not err in denying defendant telephone company's motion for summary judgment where a genuine issue of fact existed as to whether the individual defendant who actually removed the booth was an independent contractor or an agent. *Pearce v. Telegraph Co.*, 62.

**TENANTS IN COMMON****§ 3. Mutual Rights and Liabilities**

In an action to recover rents and profits for the two years after the death of the landowner, an affidavit by defendant which incorporated by reference averments contained in defendant's unverified answer was inadmissible under the Dead Man's Statute. *Etheridge v. Etheridge*, 44.

In an action to recover rents and profits for the two years after the death of the landowner, who was the mother of plaintiffs and defendant, trial court did not abuse its discretion in denying defendant permission to amend his counterclaim to allege ouster from the homeplace. *Ibid.*

Proof of ouster of a tenant in common is not a requisite to recovery of rents and profits from a cotenant. *Ibid.*

A tenant in common in possession of property by court order who makes repairs to the property may not charge a proportional part of the costs of the repairs to the co-tenant. *Craver v. Craver*, 606.

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**TRESPASS****§ 7. Sufficiency of Evidence**

In an action by lot owners in a subdivision to have defendant enjoined from constructing a road across their property, trial court erred in granting partial summary judgment for plaintiffs where a genuine issue of material fact was raised as to whether the roadway in question encroached on any lots other than those owned by defendant. *English v. Realty Corp.*, 1.

**TRIAL****§ 16. Withdrawal of Evidence**

Defendant was not prejudiced by the court's failure to instruct the jury that stricken testimony should not be considered in the jury's deliberations. *Cole v. Sorie*, 485.

**§ 52. Setting Aside Verdict for Inadequate Award**

Trial court did not abuse its discretion in denying plaintiff's motion for a new trial made on the ground that the jury's award of \$1250 for damages was grossly inadequate. *Railway Co. v. Fibres, Inc.*, 694.

**§ 52.1. Setting Aside Verdict for Inadequate Award; Particular Cases**

Trial judge did not abuse his discretion in refusing to set aside a jury verdict of \$3350 on the ground that the jury arbitrarily omitted an amount for pain and suffering when plaintiff's evidence showed medical expenses, lost wages and lost benefits of over \$3800. *Smith v. Beasley*, 741.

**TRUSTS****§ 9. Revocation**

Trial court erred in determining that settlor was the sole beneficiary of a trust and that she could revoke the trust. *Trust Co. v. Sevier*, 762.

**§ 16. Pleadings in Actions to Establish Resulting and Constructive Trusts**

Where plaintiff and others executed and delivered a warranty deed conveying lots in fee simple to defendant, plaintiff could not impose a parol trust on the land for her benefit in the absence of fraud or other ground for equitable relief. *Best v. Perry*, 107.

**UNIFORM COMMERCIAL CODE****§ 42. Perfection of Security Interest; Filing**

A lien by levy pursuant to judgment does not relate back to the filing date of a financing statement when the security interest has become unperfected by the lapse of time under G.S. 25-9-403(2). *Hassell v. Bank*, 296.

**WILLS****§ 58.1. Gifts of Stock, Bonds, Other Securities**

Where testatrix bequeathed all of her stock in a certain oil company to her sister, shares of stock in the oil company purchased by testatrix's trustees after she became mentally incompetent did not pass to her sister under terms of the will. *Tighe v. Michal*, 15.

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**WILLS – Continued****§ 61.6. Dissent by Husband**

The fact that the husband of testatrix had no right to dissent at the time testatrix's will was written or at the time she became mentally incompetent did not bar his right to dissent given him by G.S. 30-1. *Tighe v. Michal*, 15.

The valid exercise of a right to dissent by testatrix's husband did not terminate upon his death but passed to his estate. *Ibid.*

**§ 67. Ademption**

The principle of ademption is a rule of law which operates without regard to the testator's intent, but the principle does not apply when the testator intends that the beneficiary of a specific gift shall have other property if the gift is no longer available and says so according to established rules of law. *Tighe v. Michal*, 15.

The principle of ademption did not apply when the testatrix became incompetent and remained incompetent until her death and the subject matter of specific testamentary gifts was sold by her trustees during her incompetency. *Ibid.*

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